THE HINDU CODE

20959
340/86

THE HINDU CODE

BEING

A CODIFIED STATEMENT OF HINDU LAW

WITH A COMMENTARY THEREON

AND

RELEVANT ACTS ANNOTATED

Bharti Bhawan Library
Allahabad.

BY

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PREFACE.

In preparing the present edition of this work I have taken care to see that every obsolete case and principle is omitted and to enable me to do so without giving the edition the appearance of patch work I had practically to re-write the entire work, condense it in parts, annotate all its sections, add to them wherever necessary, and generally to see that the work was up to date in every detail.

This work was never intended to be a jumble of cases but a synthesis of the current law for which I had to read, digest and analyse several thousands of cases, both reported and unreported, reconcile them where possible, reject them if they appeared to have overlooked some settled principle or were otherwise inconsequential. In doing so I have had to practically re-write the entire work, but I shall not grudge the stupendous labour spent upon it, if I have succeeded in elucidating the law where it was contradictory or obscure and in filling up some of its lacunæ by reason and logical deduction which both Brihaspati and Gautam enjoin as the true mirror of equity.

1st June, 1938.

H.S.G.

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LIST OF ABBREVIATIONS

A.	...	Allahabad (Indian Law Reports).
A. C. J.	...	Appellate Civil Jurisdiction.
A. & E.	...	Adolphus & Elli's Reports (1834-1841). (N. S.) (1841-1852).
Agra.	...	Agra High Court Reports.
A. L. J.	...	Allahabad Law Journal (1904—).
A. I. R.	...	All India Reporter (Nagpur 1922—).
Arub.	...	Arubler's Reports (1737-1784).
App. Cas.	...	Law Reports Appeal Cases.
Atk.	...	Atkin's Reports (1736-1754).
A. W. N.	...	Allahabad Weekly Notes.
B.	...	Bombay (Indian Law Reports).
B. & Ad.	...	Barnewall and Adolphus' Reports (1830-1834).
B. & Ald.	...	Barnewall and Alderson's Reports (1817-1822).
B. & C.	...	Barnewall and Cresswell's Reports (1822-1830).
B. & S.	...	Best and Smith's Reports (1861-1866).
Bac. Ab.	...	Bacon's Abridgment.
Beav.	...	Beavan's Reports (1838-1866).
B. H. C. R.	...	Bombay High Court Reports (1862-1875).
Beng. S. R.	...	Bengal Select Reports.
Bing.	...	Bingham's Reports (1822-1834).
Bing. N. C.	...	Bingham's New Cases (1834-1840).
B. L. R.	...	Bengal Law Reports (1868-1876).
B. S. D. A.	...	Bengal Sadar Diwani Adalat Reports.
Bl. Comm.	...	Blackstone's Commentaries.
Bom. L. R.	...	Bombay Law Reporter (1899—).
B. P. J.	...	Bombay Printed Judgments (1869-1898).
Br. C. C.	...	Brown's Chancery Cases (1778-1794).
Brow. & Lush.	...	Browing and Lushington's Reports.
Bur. L. R.	...	Burmah Law Reports.
Bur. L. T.	...	Burmah Law Times.
C.	...	Calcutta (Indian Law Reports).
Camp.	...	Campbell's Reports (1807-1816).
C. B.	...	Common Bench Reports (1845-1856).
C. B. (N. S.)	...	Common Bench (New Series) (1856-1865).
C. & J.	...	Crompton and Jervis' Reports (1830-1832).
Ch.	...	Chapter.
C. L. J.	...	Calcutta Law Journal (1905—).
C. L. R.	...	Calcutta Law Reports (1877-1883).
C. & M.	...	Crompton and Meson's Reports (1832-1834).
C. M. & R.	...	Crompton, Meason and Roscoe's Reports (1834-1835).
C. & P.	...	Crompton and Payne's Reports.
Ch. C. C.	...	Cases in Chancery (1660-1668).
Ch. R.	...	Reports in Chancery (1616-1712).
Co. Litt.	...	Coke upon Littleton.
Coll.	...	Colles (House of Lords) (1697-1714).
C. & P.	...	Carrington and Payne's Reports (1823-1841).
C. L. J.	...	Calcutta Law Journal.
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GLOSSARY.

Word.	Sanskrit.	Meaning.	Remarks.
Adhyagnik ..	अध्यग्निक ..	Presents given to the bride before the nuptial fire (*Adhi*-before, *Agni*-fire).	A species of stridhan. *See* S. 364 (8) (*i*) (*a*), *post*.
Adhyavahanik.	अध्यवाहनिक ..	Presents given to the bride at the time of the bridal procession (*Adhi* near or during, *Avahnik* procession).	Ditto. *See* S. 364 (8) (*i*) (*b*).
Angiras ..	आङ्गिरस ..	Writer of a Dharmashastra ..	He flourished before Yadnavalkya and is mentioned by him in his Smriti in Acharadhaya, Sloke 4. For a recent redaction of the work, *see* § 121.
Anvadheyak.	अन्वाधेयक ..	Gifts by stranger (*Anva* other outsider, *dhayak* what is given, gift by another).	A species of Stridhan. *See* S. 364 (10), *post*.
Aparaditya Dev.	अपरादित्यदेव ..	Name of a king of the Silahara dynasty one branch of which reigned in Jhana the other in Panola near Kolhapur in Konkan in the Bombay Presidency.	He flourished either at the time of Vijnaneshwar or subsequent to him. *See* Sarvadhikari, pp. 381-387.
Aparark ..	अपरार्क ..	Writer of a Dharmashastra ..	Mayne in para. 26 says that his work is of paramount authority in Kashmir, which, however, appears doubtful.
Apastamb ..	आपस्तम्ब ..	Do. ..	Translated in 2 S.B.E. *See* §§ 73-76.
Apavidha ..	अपविद्ध ..	Son deserted or disowned by the parents.	One of Manu's twelve sons, No. 11, § 55. Now obsolete.
Asahaya ..	असहाय ..	Writer of a Dharmashastra ..	..
Asahaya Vijnaneshwar.	असहाय विज्ञानेश्वर	..	..
Ashvalayan..	आश्वलायन ..	Name of a Smriti writer ..	..
Atharv Veda.	अथर्ववेद ..	The fourth Veda ..	*See* § 35.
Atri ..	अत्रि ..	Writer of a Dharmashastra ..	He is mentioned by Yadnavalkya in Acharadhya.

Word.	Sanskrit.	Meaning.	Remarks.
Auras ..	औरस ..	Son by married wife of the same caste, Legitimate son.	One of Manu's 12 kinds of sons. *See* § 55.
Ayautak ..	अयौतुक ..	*See* Yautak ..	*See* § 1141.
Baudhayan ..	बौधायन ..	Writer of a Dharmashastra ..	His work is translated in 14 S.B.E. series, p. 62. *See* §§ 73-86.
Bharuchi ..	भारुचि ..	Do. ..	..
Bhashya ..	भाष्य ..	Commentary ..	..
Bhrigu ..	भृगु ..	Name of a sage who revealed to the people the doctrines of Manu.	*See* Manu, Chapter 1, Sloke 59. Probably a compiler of Manu.
Bhrigusanhita.	भृगुसंहिता ..	Bhrigu's recension of Manu ..	..
Brihaspati ..	बृहस्पति ..	Writer of a Dharmashastra ..	His work is translated in 33 S.B.E. series. *See* §§ 109-111.
Brihat ..	बृहत ..	Great wise { Often used to distinguish the various writers of Dharmashastras described as *Vridh*-old; *Brihat*-senior; — *Laghu*-junior.	..
Budh ..	बुध ..		
Chandeshwar Thakur.	चण्डेश्वरठाकुर ..	..	Author of Vivad Ratnakar; and authoritative work of the Mithila School.
Daksh ..	दक्ष ..	Writer of a Dharmashastra ..	..
Dattak ..	दत्तक ..	Son by adoption ..	One of Manu's twelve sons (No. 10), § 55. *See* Ch. V.
Dattak Chandrika.	दत्तकचन्द्रिका ..	A work on adoption *Dattak*-adoption, *Chandrika*-moonlight.	A work on adoption. *See* §§ 145, 235, *post*.
Dattak Mimamsa.	दत्तकमीमांसा ..	A work on adoption (author-Nand Pandit). (Lit. *Dattak*-adoption, *Mimamsa*-inquiry).	A work on adoption. *See* §§ 145, 235, *post*.
Dayabhag Daya Vibhag.	दायभाग दाय विभाग	Partition of heritage (*daya*-what is given hence inheritance; and *bhag or vibhag*-partition).	A treatise on the Law of Inheritance by Jimutvahan. *See* §§ 137-139, *post*.
Deval ..	देवल ..	A writer of a Dharmashastra ..	He flourished probably prior to Brahaspati.
Dharanidhar.	धरणीधर ..	A commentator on Manu ..	..

Word.	Sanskrit.	Meaning.	Remarks.
Dhareshwar.	धारेश्वर ..	King of Dhar ..	He is mentioned by Yadnavalkya in Acharadhaya, Sloke 5.
Gautam ..	गौतम ..	A writer of an old Dharmashastra.	Translated in 2 S.B.E. *See* §§ 64-72, *post*.
Govindraj ..	गोविन्दराज ..	A commentator on Manu ..	..
Gudhaj ..	गूढज ..	Son by adultery ..	One of Manu's twelve sons (No. 9), § 55.
Harit ..	हारित ..	Writer on Dharmashastra (*Brihat Harit*-Harit, the senior).	He is mentioned by Yadnavalkya in Acharadhaya, Sloke 4. *See* § 63 *post*.
Hiranya Keshin.	हिरण्यकेशिन ..	Lit. " Golden haired" ..	A School forming a subdivision or Apastamb. *See* Apastamb 2 S. B. E. Introduction.
Jeemut Vahan.	जीमुत वाहन ..	Author of Dayabhag ..	He probably flourished in the fifteenth century. *See* §§ 138-139 *post*.
Kalpataru ..	कल्पतरु ..	Dharmashastra. (*Kalp*-desire, *Taru*-a tree—a Wishing tree).	A work written by Lakshmidhar sometime between the 12th and 14th century.
Kamalakar ..	कमलाकर ..	Dharmashastra (*Kamal*-lotus, *Akar*-cluster, mine, treasure.)	Name of the Author of Nirnayasindhu and Kinad Tandava : flourished in the 13th century.
Kanin ..	कानिन ..	Son of unmarried daughter ..	One of Manu's twelve sons (No. 4), § 55. Now obsolete.
Karavir ..	करवीर ..	A Minister of Har Sinha Deva King of Mithila.	..
Kashyap ..	काश्यप ..	A writer ..	His date is not fixed : but flourished after Brihaspathi.
Katyayan ..	कात्यायन ..	A writer	Do.
Krita ..	क्रीत ...	Son purchased ..	One of Manu's twelve sons (No. 5), § 55. Now obsolete.
Kritrim ..	कृत्रिम ..	Son made ..	One of Manu's twelve sons, § 55, now in vogue in Mithila. *See* Ss. 67-69.
Kshetraja ..	क्षेत्रज ..	Son begotten on one man's wife by another man who was appointed by the husband or other kinsman for that purpose.	One of Manu's twelve sons (No. 8). *See* § 55. Now obsolete.

Word.	Sanskrit.	Meaning.	Remarks.
Kulluk Bhatt.	कुल्लुक भट्ट ..	Best known commentator on Manu.	..
Kulluk Dharma-sar.	कुल्लुक धर्मसार	Epitome of Kulluk's Commentary on Manu.	..
Lakshmi-dhar.	लक्ष्मी धर ..	Author of Kalpataru (*q.v.*) ..	..
Likhit ..	लिखित ..	Shankh and Likhit were joint authors. (*Likhit*-what is written —a pen-name).	They are mentioned by Yadnavalkya in Achara-dhaya, Sloke 5.
Manu ..	मनु ..	He is the first lawgiver said to be a Magadh or Mithila Brahmin.	*See* §§ 50-62.
Mayukh ..	मयूख ..	Lit. a ray or beam (of the Sun) Vyavhar Mayukh is the chapon *Vyavhar* or duty.	*See* §§ 140-141, *post*.
Medhatithi ..	मेधातिथि ..	A commentator on Manu ..	Flourished before Vidnya-neshwar.
Mitakshara ..	मिताक्षरा ..	A commentary on Yadnavalkya Smriti by Vidyaneshwar. (*Mit*-few, measured, *Akshar*-letters, *i.e.*, concise treatise).	*See* §§ 129-136, *post*.
Mitra Misra.	मित्र मिश्र ..	Author of Virmitrodaya. A work of the Benares School. Written in the 16th century.	..
Nand Pandit.	नन्द पण्डित ..	Author of " Dattak Mimamsa" ..	*See* § 147, *post*.
Narad ..	नारद ..	A writer on Dharmashastra ..	Translated in 33 S. B. E., §§ 104, 108, *post*.
Nilkanth ..	नीलकण्ठ ..	Author of Vyavhar Mayukh ..	*See* § 140, *post*.
Parashar ..	पराशर ..	Paramount authority in the Kalinga. His work on law is lost, though extracts from it are cited in the commentaries. His date is not settled.	..
Paunarbhava.	पौनर्भव ..	Son of a twice married woman ..	One of Manu's twelve sons (No. 12), § 55.
Prajapati ..	प्रजापति ..	Lit, *Praja*-subjects ; and *pati*-lord, master ; "Lord of the People"; A king.	..
Pratap Rudra Deo.	प्रतापरुद्रदेव ..	King of the Kakataya Dynasty of Warangal. Said to be the author or Saraswati Vilas, a work of authority in the Madras Presidency. He flourished in the 4th century.	..

Word.	Sanskrit.	Meaning.	Remarks.
Putrika-putra.	पुत्रिका पुत्र ..	Son of appointed daughter ..	One of Manu's twelve kinds of sons (No. 7), § 55.
Rigveda ..	ऋग्वेद ..	The first Veda (*Rikh*-Hymn and *Veda*-knowledge—Hymnbook).	*See* § 35, *post*.
Sahodhaj ..	सहोढज ..	Son of a wife who had conceived and delivered of a son before her marriage.	One of Manu's twelve sons (No. 5), § 55.
Samvart ..	संवर्त ..	Name of a writer on Dharmashastra.	He is mentioned by Yadnavalkya in Acharadhaya, Sloke 4.
Sam Veda ..	सामवेद ..	Third Veda (*Sam*-song, *Veda*-knowledge).	*See* § 35, *post*.
Saudayik ..	सौदायिक ..	Lit. *Sau*-love, *dayik*-offering—Love-offering.	A species of stridhan. *See* §§ 2631-2648, *post*.
Shankh ..	शंख ..	Name of a writer (*Sankh*-conch)..	..
Saraswati-vilas.	सरस्वती विलास ..	A work (*Saraswati*-goddess of learning, *vilas*-sport or amusement—"Sport of the Goddess of learning").	..
Shatatap ..	शातातप ..	A writer on Dharmashastra mentioned by Yadnavalkya in Acharadhaya, Sloke 5.	..
Shaunak ..	शौनक ..	An author more known to lawyers for having prescribed particular ceremonies on adoption.	..
Smriti-chandrika.	स्मृतिचन्द्रिका..	Lit. *Smriti*-tradition, *Chandrika*-moonlight. Name of a work on Dharmashastra by Devanand Bhatt also called Deva or Devanna Bhatt.	
Srikar ..	श्रीकार ..	Name of an author ..	..
Subodhini ..	सुबोधिनी ..	Lit. *Su*-good, *bodh*-knowledge. A commentary.	..
Sulk ..	शुल्क ..	Bride-price ..	A species of stridhan. *See* § 2642, *post*.
Svayamdatta.	स्वयंदत्त ..	Son self-given ..	..
Upanishad ..	उपनिषद् ..	Metaphysical chapter of the Vedas.	..
Ushanas ..	उशनस् ..	Name of an author on Dharmashastra.	He is mentioned by Yadnavalkya in Acharadhaya, Sloke 4.
Ushan ..	उषन् ..	A writer ..	Ditto.

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Word.	Sanskrit.	Meaning.	Remarks.
Ushanas Sutras.	उशनस्सूत्राणि ..	Sutras of Ushanas .. Author of Vivad Chintamoni.	..
Vachaspati Misra.	वाचस्पतिमिश्र ..	An authoritative work of the Mithila School. He flourished in the beginning of the fifteenth century.	..
Vaidyanatha Dikshitiyam.	वैद्यनाथ दीक्षितीयम् ..	Name of work ..	..
Vaishnav ..	वैष्णव ..	Worshippers of the God Vishnu—A sect founded by a Ramanuj.	*See* §§ 323-327, *post*.
Vasishth ..	वसिष्ठ ..	Name of an author on Dharmashastra.	Translated in the 14 S.B.E., Pt. 2. *See* §§ 90-97.
Veda Vyas ..	वेदव्यास ..	Lit. " the diameter of the Vedas." Said to be the name of the compiler of the Vedas ; the author of Mahabharat and a number of Puranas.	..
Vidnyaneshwar (also written Vijnyaneswar).	विज्ञानेश्वर ..	Lit. *Vidya*-learning, *Iswar*-master (of). Author of the Mitakshara.	*See* § 130.
Viramitrodai.	वीरमित्रोदय ..	Lit. *Vir*-brave, *mitra*-the Sun, also the name of a King *udai*-rise "Rise of the brave Mitra." Name of a work.	*See* § 142.
Vishnu ..	विष्णु ..	Name of a law book called after the God Vishnu.	Translated in 7 S. B. E.
Vishvarup ..	विश्वरूप ..	Lit. *Vishva*-universe ; *rupa*-appearance (having the appearance of the universe). Author of a commentary on Yadnavalkya Smriti.	..
Vivad Chandra.	विवाद चन्द्र ..	"The moon on discussion" from *Vivada*-discussion and *Chandra*-the moon. Name of a work of the Mithila School.	A work supposed to be prepared by Laxmi Devi, though it bears the name of her nephew Misaru Misra as the writer—*See* 1 Colebrooke's Digest Preface P. XX. *See* § 144, *post*.
Vivad Chandrika.	विवादचंद्रिका ..	"Moon-light on discussion."(*Vivad*-discussion. *Chandrika*-moonlight) name of a work.	..
Vivad Chintamani.	विवाद चिन्तामणि	"Antidote against anxiety regarding discussion." (*Vivad*-discussion, *Chinta*-anxiety, *Mani*-antidote.)	*See* § 144.

Word.	Sanskrit.	Meaning.	Remarks.
Vivad Ratnakar.	विवाद रत्नाकर . .	"Ocean of discussion ;" from *Vivad* discussion and *Ratnakar*-ocean.	A work of the Mithila School composed by Chandeshwar. *See* § 144, *post*.
Vriddha Shatatap.	वृद्ध शातातप	*Vridha*-old, senior ; *Shatatap*-the senior.	Author of Prataparudriya.
Vyas ..	व्यास ..	'Diameter' A writer on Dharmashastras.	..
Vyavahar Chintamani.	व्यवहार चिन्तामणि	"Antidote against anxiety regarding legal matters."	Another work of Vachaspati Misra.
Vyavahar Mayukh.	व्यवहार मयूख	*See* Nilkanth. "A ray of light" (on matter of law).	..
Vyavahar Nirnai.	व्यवहार निर्णय	Decisions on legal topics ..	..
Yadnavalkya or Yajnavalkya.	याज्ञवल्क्य ..	Name of a smritikar ..	*See* §§ 112-120, *post*.
Yajur Veda.	यजुर्वेद ..	*Yajus* a sacrifice; *Veda*-knowledge "A book containing the sacrificial formulas or rituals."	*See* § 12, *post*.
Yama ..	यम ..	Name of a writer, author of a Dharmashastra mentioned by Yadnavalkya in Acharadhaya, Sloke 4 and quoted by Vashisth.	..
Yautak ..	यौतुक ..	*Yu*. to join. Nuptial presents made at the time of marriage, as distinguished from *Ayautak*, that is those made before or after the marriage. A species of stridhan.	*See* § 2639, *post*.

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GENERAL INTRODUCTION.

I

Genesis of Aryan Institutions.

1. The true prototype of the institutions peculiar to Hindu Law is to be found in the primeval tribal customs which are the common stock of all sections of the Indo-European race. The law of joint Hindu family, of adoption, marriage and succession is not the peculiar feature of archaic Hindu Law. It was part of the customs of the ancient Greeks, Romans and other nations who claim their descent from the common parent race. The system of Hindu Law is, indeed, not a peculiar feature of the Aryan races. It is to be found up to the present day in countries such as China and Japan, though somewhat modified by the force of modern circumstances. The joint family is but the natural outcome of the gregarious instinct of man. Indeed, in one sense there are joint families even among certain classes of lower animals. They play a necessary part in the growth of civilization and the development of society. But the joint families, as now known to the Hindus, are not the joint families as known to their primeval progenitors. To them a family meant a body of men united for purposes both offensive and defensive, to which were necessarily attached a number of women as dependant serfs. It was both natural and necessary that this band of men should have a leader, and what can be more natural than that, in such a society, respect should be paid for age, for with age went experience and, with experience, wisdom. The oldest male would naturally become the leader of such a flock. This is then the genesis of the patriarchal society which, in its primitive and rude simplicity, may still be observed in several remote parts of India, such as, *e.g.*, amongst the Santals[1] the Oraons, the Bhils and other aboriginal hill tribes. Writing about the Oraons Sir H. Risley, in his Ethnography, describes their custom of promiscuous intercourse between the sexes outside the totem as quite common, with the result that pregnancies often occur before marriage which is then performed and the wife is then expected to lead a virtuous life.[2] Such was the order of the Cyclops described by Homer in his Odyssey.[3]

State of Nature.

2. In this primitive state of Nature, idealized by the modern man as the golden dawn of history, there was little to choose between the grim battle for life, which the human hunter fought, and his animal prey upon which he subsisted. For, as Hobbes has pointed out, the primitive state of human society was not that of universal peace but one of indiscriminate war, and even when men were not actually engaged in war, their condition was at all times one of armed neutrality.[4] This state of insecurity from without necessarily dictated the assurance of the society within. The tribal units were too loosely

(1) Ethnography, p. 248.
(2) 2 Tribes and Castes, p. 141.
(3) Odyssey, IX, 12.
(4) *See* Leviathan, Ch. XIII.

formed and unwieldy for a strict discipline in detail, which necessitated their splitting up into smaller groups held together by the combined forces of personal and sexual affinity, and dictated by the natural instincts of self-preservation. Strangers would be freely admitted into this social group. The modern social order is thus the result of modified promiscuity.[1]

Primitive State of Society.

3. The formation of hordes and the formation of familial groups are the two facts which mark the dawn of history. But which of them preceded the other is a question upon which the ethnologists are still at variance.[2] But it is not only possible for the two units to come into existence in response to local conditions, but it is equally possible for both of them to co-exist at the same time and in the same place. This will be evident if regard is had to the fact that a tribe in its original form is distinguished from a caste by the fact that its basis is political rather than economic or social and that the impelling demand of social necessity may equally be combined with political exigency. To these causes might be added other adventitious causes leading to the formation of tribes and families side by side.

Female Infanticide.

4. One thing is certain. The ancient nomadic groups all practised female infanticide. Daughters were an incumbrance to the people who had every moment to turn their strength to account in defence of their property and person, while grown-up women afforded an attraction for hostile attacks, enhancing the worries of an insecure existence. Each primitive group depended for its necessary supply of women upon women-stealing, for which marauding excursions were frequent and are immortalized by the legend of the founder of Rome. That such wife-hunting expeditions were common long after the Hindus had established a settled social order is evident from the forms of marriages described in the law books to which particular reference will be presently made. This practice had a far-reaching effect upon the history of the Aryan people. They appear to have early discovered the evils of consanguinous inter-breeding which, in many cases, afforded ample ocular demonstration of transmitted maladies and deformities. Exogamy was, therefore, not only the acknowledged necessity but became the prevailing rule. But in this way, some of the groups became sufficiently large to dispense with exogamy: Endogamy then took its place and thus arose the notion of a *gens* and *gentiles*, self-centred and self-contained, who all claimed descent through males from a common ancestor. It was a further bond for cementing the ties of association.

The mimetic faculty of man traceable to his simian ancestry would play a conspicuous part in shaping all groups after settled model, once it was well formed and its utility sufficiently demonstrated. There would also be the equally natural egoism, that pride of self, or something like self, which accounts for the continuance of clans, castes and races. But here again one must not lapse into the danger of a too wide generalization. For while it is true that the Aryan *gens*, such as that of the Hindu, the Greek and the Roman type, trace their ancestry in a continuous agnatic line, there are instances on record of groups, such as the so-called aborigines of Australia or the American islands, among

(1) Maine's Early Law and Custom, Ch. VII, p. 200.

(2) *See* Maine's Ancient Law, Ch. V; Early Law and Custom, Ch. VII, p. 214; Ch. VIII, p. 216; Darwin, 2 Descent of Man, p. 362.

whom kinship is traceable exclusively through the female parent. These grouped; they marked their bodies with a common mark or "totem" to preserve their clannish identity and members of the same group never intermarried. This "totem" became a symbol of great cohesive value. People of the same "totem" will often travel long distances to assist their fellow-totems. But kinship so created is naturally apt to become confused in course of time, and even where it is not so, it naturally yields the palm to the agnatic group, which represents the flower of its masculine strength and mind, whose exploits and achievements would naturally out-distance the cognatic clans.

Ancestor Worship.

5. This fact accounts for the ancestor worship, as to which Sir John Lubbock wrote: "Although descent among the lowest savages is traced in the female line, I do not know of any instance in which female ancestors were worshipped." The worship of female ancestors marks yet another stage in the evolution of society. Here again, the genesis of the custom is laid in the dawn of history. The savage races believed in the continued existence of their dear departed dead who had assisted them in life, and who, they fondly believed, could not do otherwise after their death. The primitive conception of a great warrior, leading the same life and following the same occupation before and after death led to the funeral offerings of food, clothing and weapon. These rites and beliefs of a by-gone age still linger in several parts of Europe and have survived the combined attacks of science and the testimony of reason.[1] Those who were most endeared in life offered their utmost homage to the vanished spirit, and the test applied by the Dayabhag for determining the heirs thus becomes at once intelligible. Those were the nearest of kin who offered the largest obsequial feasts. That these should be confined to the priestly class of Brahmins, is only due to their sacerdotal influences. They were the scribes of old and naturally placed their class interest before the public weal. But it marks a later epoch in the development of society. As adoption was necessary to strengthen the patriarchy, so ancestor worship was persisted in to preserve its identity. The two institutions, now peculiarly Hindu, have thus persisted in the march of ages.

The law of inheritance is only a necessary corollary of the ancestor worship. Those who performed the obsequial rites were naturally the offspring of the deceased. By a confusion of cause and effect, ancestor worship and inheritance became a part of the established usage of classic antiquity. Those who conferred the utmost benefit upon the deceased were admitted to preferential claim for participation in his worldly effects. The mediæval Christian Church made the one a condition precedent to the other, and upon it, it founded the jurisdiction of the Ecclesiastical Court in which all movable and personal property of the deceased vested in the first instance, before it could be distributed; and this jurisdiction, extended over executors in the case of wills and administrators in the case of intestacies, has descended to the modern Court of Probate.

Law and Religion.

6. One special feature of the archaic society was the blending of law with religion without there being a clear line of demarcation between the two. All passed under the garb of religion and the executive being weak this was very

(1) Tylor, Primitive Culture, Chs. I. III, IV, XI, XII; Mankind, Ch. VI. Early History of

advantageous, as it tended to ensure implicit obedience by hushing all doubts and silencing all dissent and opposition. "The first great step in the progress of law is when the distinction between acts that are harmful to human society and acts that may not be so, but are hateful to supernatural beings, is thoroughly grasped . . . for this distinction lies at the root of all legal development."[1] On these points, early societies had everything to learn and necessarily, the lesson was acquired slowly and imperfectly. Even now, the classification of wrongs and offences or sins and crimes is not satisfactory. Judged by this test, Hindu Law, never emerged out of its pristine infancy, and its social development, as portrayed in its law, remains far behind that of the earliest Roman Institutions as seen in the Twelve Tables, promulgated about 500 B.C. The fact is that Hindu Law took the turn suitable to the genius of the people, as the Grecian and Roman Laws overtook the fast developing republican genius of the people. Consequently, while their early laws furnish close analogies, which are to be expected by reason of common ancestry, their later developments furnish matters only for contrast rather than for comparison.

The Laws of Solon.

7. The early development of Hellenic culture on account of the emancipation of the people from the thraldom of priestcraft gives to the laws of Solon, promulgated in 594 B.C., a comparative modernity which is not found in the laws of Apastamb and Baudhayan, who promulgated their *Sutras* about the same time. The laws of Solon, inscribed on wooden tablets arranged in pyramidal blocks turning on an axis, announced to the people the distinction between civil law and religious duty. They show the struggle that was still raging between religious fears and civic liberty. To allay the fears of the superstitious, Solon is said to have invited Crete, reputed to possess the power of magic. He performed certain rites, which appeased the superstitious Athenians, offering, it is said, even a human sacrifice to allay their fears. He curtailed the extravagant funeral expenses, released the pledged lands from their incumbrances and repealed the law which enabled the creditor to enslave his debtor, that had led debtors to sell even their own children. He substituted property for birth as a qualification for citizenship and divided citizens into four classes. All the highest offices were reserved for the first class, the second and third performed military duties. The people were given a democratic constitution. The Archons retained their judicial powers, but appeals were allowed to the Senate and the Areopagus, which were popularly elected bodies.

Early Roman Law.

8. Under the Republic established in 509 B.C., the people became divided into two classes—the patricians and the plebians, and though both possessed theoretical equality, the patricians in fact enjoyed all the powers and emoluments of office. But the plebians were not long in asserting themselves. The first thing they forced the patricians to do was to define the constitution which led to the codification of the customary law which was published to the people on twelve bronze tables, known as the Laws of the Twelve Tables which are the foundation of the whole fabric of Roman Law. Of these, the first two tables prescribe the procedure for the trial of cases. They provide for the hearing of both sides, and for an *ex parte* decree against the absent party. The third table prescribes a mode of execution. The debtor was to be made over to his creditor in bondage. The latter might bind him with

(1) Hunter's Roman Law, 1063.

thongs or with fetters which were not to weigh more than 15 pounds. The creditor must provide a pound of bread a day for the maintenance of his debtor, who could, moreover, live on his own means. The maximum period of his bondage was sixty days, during which he was brought in three times before the prætor who publicly proclaimed his debt. After the third market day, he could be put to death or sold beyond the Tiber, and if there were several creditors, they might cut and divide amongst themselves the several portions of his body. The fourth Table permitted parents to put to death their deformed children. They had the power of life or death over their legitimate children. The fifth table codifies the law of guardianship and inheritance. All women except the vestal virgins were always to remain under the guardianship of their agnates. The *pater familias* could will away his property, in the absence of which, the property devolved upon his *suii heres,* failing which the agnate and the gentile succeeded. By the Prætorian edicts these terms were explained to mean as follows:—(1) *Suii heres*—Children and grandchildren by son. (2) *Agnates*—Statutory heirs. (3) *Gentiles*—Cognates and husband and wife. It will be noted that women were not excluded since brothers and sisters equally participated in their patrimony.

9. The history of Roman Law commences with a family which, from a legal point of view, consisted of a head ruler or patriarch, called the *pater familias* and the junior members, who were absolutely subject to his despotic sway. His own sons had no rights in the family and could possess no property of their own. All they acquired became his. He possessed the supreme power of life and death over them. Accordingly, he usually destroyed all the elder female children excepting only the eldest. This power was revoked by an edict of Constantine (218 A.D.) which also curtailed the power of sale permitting only the poor to dispose of their new-born babies, reserving to them, however, the right of redemption.

Adoption in Roman Law.

10. In this state of society, the adoption or affiliation of children was a matter of course. In early times, adoption was known as *arrogatio* and required the sanction of the pontiff and the people in their *comitia curiata,* in accordance with the following formulæ addressed to the person about to be arrogated, and to the people:—

To the person to be arrogated. "Do you formally agree that Lucuis Titius shall have power over you, as over a son, the power of life and death?"

To the people. "Is it your will, your order, *Quirites;* that Lucuis Titius be, by right and statute a son, as if by birth, the child of Titius and his *mater familias,* and that Titius should have over him the power of life and death?"

Law prohibited the adoption of an only son, while the arrogator could not adopt unless he was married, childless and of sixty years of age, or if, on account of illness or other reason, there was a probability of his dying childless. In early law, women could not be arrogated; but later on, their adoption was sanctioned. A person of any age could be adopted. The arrogator might adopt one as his son, grandson, great-grandson, granddaughter or great-grand-daughter. The old juridical character of adoption was to bring the adoptee within the *potestas* of the *pater familias.* Justinian permitted adoption but allowed the natural father to retain the *potestas.* He also simplified the procedure by allowing adoption to be completed by a declaration in writing, made before a magistrate.[1] At first, women could not adopt as they had no *potestas,* but Diocletian and Maximian relaxed this

(1) Gaius, I-99; Just. I-II-1.

restriction in A.D. 29. Adoption could not be repeated. The adopted son succeeded to his father in case of intestacy.

Greek Adoption.

11. The Greeks also practised adoption. But while the primary object of their adoption was to ensure that some one should make the proper sacrifices and offer the funeral cake, the underlying principle of a Roman adoption appears to have been to strengthen the family and to avoid its extinction by securing an heir.[1]

Roman and Hindu Systems Compared.

12. It would be thus seen that while both the Hellenic as well as the Roman Laws, in their inception furnish many interesting and close analogies to Hindu Law, their early secularization and rapid development makes the relationship look like that of a child to a grown-up man. In regard to the law of inheritance, however, the Roman and the Hindu systems retained close association for a longer period. But the point of divergence between them was also equally striking. Under Hindu Law, the institution of the joint family has a peculiar significance. But the Roman joint family resembled more a Dayabhag family than the one contemplated by the Mitakshara. The *patria potesta* excluded the law of coparcenership. At the same time, in both the systems, inheritance is inextricably connected with the performance of obsequial rites. Both the Romans and the Greeks inherited the tradition of their forefathers that life in some form persists after death, and that the dead needed the same nourishment and comforts as the living. The performance of the obsequies was a concern of the State, as much as that of the individual. For the disconsolate spirit not only inflicted the family but also the State as an abettor of the family, if it suffered it to do wrong.

13. But the early secularization of Roman Law led to restrictions upon lavish expenditure on funerals and the tenth Table is directed towards the curtailment of all such expenditure. It restricted mourners to three, and flute-players to not more than ten in number. "Women shall not tear their cheeks nor indulge in wailing." "No person shall have more than one funeral, or more than one bier." "Gold shall not be burned or buried with the dead, except such gold as the teeth have been fastened with." Both the Greeks and the Romans generally cremated their dead, as do the Aryan Hindus, but while burial has supplanted cremation in the Western countries till its modern revival, the twice-born Hindus still cremate their dead, though like the Romans, the Vedic Hindu both buried and cremated their dead, and it appears that of the two, burial was more common.[2] But this mode of disposal is now exclusively confined to the Shudras.

Secularization of Law.

14. The one outstanding difference between the two branches of the Aryan family, migrated in opposite directions, is in their mental outlook on life. The one migrating to the East were meekly submissive to the usages which they continued to regard as records of divine wisdom, while the others threw the divine influence into the background, and secularized their laws, which they modified with the growing earnestness of the age. Ethnologists have not adverted to this radical distinction which has produced such far reaching results.

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(1) Vicero, *Pro Domo*, 13, 15; Dig. 1; 7, 15, 20.

(2) *Cf.* the funeral hymn in Rig. Veda, X-18.

Status of Women.

15. The primitive man had to wage war with his fellow-men whose savage instincts for spoil and strife rendered existence precarious and in the case of women and children, impossible. Alliances and family groups were naturally formed, in which the wives, sons and slaves came under the sway of the adult men of whom the eldest, usually the father, became soon recognised as the headman and leader. The idea of property was then in its embryo, and his dependents and belongings were alike his property without any distinction. The virile ruled the weak, and as women and sons were weak and defenceless, he afforded them protection in return for their services. It was so even in the advanced state of Hellenic culture, where the growing freedom of women was curbed by Solon, who prohibited them from going abroad with more than three changes of apparel, and a limited quantity of provisions, and passing through the streets at night otherwise than in a carriage with a light carried before them. This heralded the curtailment of further liberties, resulting, in later years, in the introduction of a semblance of *purdah* amongst them.

16. This condition continued for long ages and when the Hindu *Smritis* were written it was the prevailing practice. Wives, sons and slaves fell into the general category of this property, and could own no property of their own. Accordingly, Manu says: "A wife, a son, and a slave are devoid of property: whatever they acquire become his whose they are."[1] "Even when some order was established, their position of positive dependence continued undisturbed, and the courts were disinclined to interfere with the parental control which had led to the establishment of peace. So in a Smriti, cited in the Mitakshara, it is said: "Even when there is a cause of dispute between preceptor and pupil, between husband and wife, between father and son, between master and slave, no action is maintainable." The infusion of religious ideas into the fabric of society merely gave to it a new reason and an added solemnity. The wife became even more dependent upon her husband who continued to be her *Swami* or master. The father was free to sell his children, and as such, he sold his daughters in bondage or marriage. The *Asur* form of marriage was thus the precursor of the *Brahma* form, in which the daughter was to be gifted to the bridegroom. But in either case, it was transfer, whether by sale or by gift, and little distinguishable from the transfer of a chattel such as a goat or a cow. The *patria potestas* was transferred by marriage to the husband. She still continued to be a chattel, and as the husband was himself a dependent in the family of his father, his acquisition of her was an acquisition of and for the family who could use her for her primary purpose of procreation. This enabled them to use her independently of her own volition, which did not count, for she was foredoomed to lifelong dependence upon her husband and his relations. "The younger brother of the husband, a sapinda, or a sagotra, being anointed with clarified butter, and with permission of the *guru*, may go to a sonless widow, when in season, with the desire of raising a son."[2] If the wife is withdrawn after marriage, the delinquent is punishable for theft[3] and the punishment of a thief is that his head be cut off.[4] This was the stage of development when the earlier Smritikars, ending with Yadnyavalkya described the *status* of women.

(1) VIII-416.
(2) Yad. 1-68.
(3) Yad. III, 68, Narad, XII-80; 81; See § 15 *post.*
(4) Narad, XII, 32.

17. This property in women, sons and slaves was no peculiar feature of the Hindu system, for it is equally shared by the ancient Greeks[1] and Romans who sold or lent their wives to their friends either for pleasure or procreation.[1] So Plutarch defended this course on the ground of eugenics and Lycurgus, similarly, defended it on the ground that the children were not so much the property of the parents as of the State, which was interested in seeing that they were begotten by the best men in it. As such, Socrates is said to have lent his wife, Zantippe, to his young disciple and friend, Alcibiades, and Cato not only lent but presented his wife to Hortensius with the consent of the lady's father. That this practice was quite common and became extended to the Egyptians, Persians, Assyrians, and the Babylonians, and became the current of the Indo-Aryan thought is apparent from the records of contemporary history. Lycurgus justified it on the ground that if people took the trouble to improve the breed of dogs and cattle, why should they not take the trouble of improving their race. The presentation of wives of older men to younger people for procreation was thus defended upon national grounds.[2] The practice of Niyog in India was the remote echo of the system of the social usage here described.

18. The Athenian law permitted divorce on condition that the wife appeared in person and presented her bill before the Archon, when the husband was free to seize her person and carry her off if he liked.[3] This marks the second stage in the improvement of women's status, though it is still that of a chattel in her husband's household—her sole purpose being still regarded as that of procreation to strengthen his household.

19. The law of marriage has passed through two stages; in its inception, it was regarded as a sacrament, and was, as such, controlled by the Church, who enforced their domination over the laity by controlling the rites incident to births, marriages and deaths. The revolt of the people against this priestly privilege, in Europe, belongs to the History of the Renaissance; in India, the bulk of the people are still under its yoke, though it has been, in some measure, relieved by the Legislature.

20. In England, marriage was a sacrament subject to ecclesiastical control which was materially relaxed by the passing of the Parliamentary Act (known as Lord Hardwicke's Act, 1753),[4] repealed and superseded by the Marriage Act, 1823,[5] and amended by several later Acts,[6] the effect of which is to transform marriage into civil contract, which might be solemnized before a lay official, appointed as the Registrar of marriages. It is now so viewed in most of the countries of Europe, America and Japan; and as all ships flying their national flags carry the laws of their own country with them up to within 3 miles of its coast it follows that a civil marriage might be contracted by an Indian, not only in Europe, America and Japan, but also on board the ships of those countries within three miles of the harbour. And since civil marriage takes no account of the religion or caste of the contracting parties, a Hindu may equally contract a civil marriage. Such marriage is monogamous

(1) Plato's Republic, Bk. IV, C. 3; Bk. V, C. 7 (2 Bohn's Ed.), pp. 107, 141; but see *contra* Aristotle, Politics, II, C. 2; Hist. Animals, IX-i.

(2) Plutarch's Lives—Lycurgus (Ward Lock), p. 36, Cato the Younger, pp. 538, 539. *Ib.*, Lycurgus, p. 36; *see*, to the same effect, Plato's Republic, Bk. IV, C. 3; Bk. V, C. 72 (Bohn's Ed.); pp. 107, 141; *contra* Aristotle, Politics, II, Ch. 2; Hist. Animals, IX-i.

(3) *Ib.*, Alcibiades, p. 144.

(4) 26 Geo. II, C. 33.

(5) 4 Geo. IV, C. 76.

(6) *e.g.*, Marriage and Registration Act, 1856 (19 and 20 Vict., C. 119).

and is free from all communal restrictions. Being monogamous it is valid everywhere. It was so held in a case in which an Englishman had married a Japanese lady in Japan according to the law of Japan. The Probate Court declared the marriage to be good in England and everywhere else.[1]

21. Marriage is, sometimes, defined as the act, ceremony, or process by which the relationship of the husband and wife is constituted. Under English Law, marriage is a contract between a man and a woman by which they naturally promise to marry one another, the promise of each being the consideration for the promise of the other.[2] In other words, the English notion of marriage implies a mutual contract, which naturally implies that the contracting parties are *sui juris*. Consequently, a minor cannot be sued on such contract, even if ratified after coming of age,[3] though he or she may sue thereupon the other party, if major.[4] That marriage is not a contract for consideration in the normal sense of the term will be apparent if it is remembered that the parties to a contract are entitled to determine their rights and duties, whereas in marriage every resulting right and duty is fixed by the law.

22. In both these respects Hindu Law differs, since the marriage of Hindus needs and implies no mutual promise, and no theory of consideration underlies it to make it a binding contract. It is in the nature of a gift by the father of his daughter to the husband. The daughter has no choice, she need not consent, and may not even be conscious of the nature of the act and its effect upon her life, and she cannot refuse to live with her husband howmuchsoever she might detest him.

23. Under the English Law, both lunacy[5] and impotency[6] at the time of marriage render the marriage void; but under Hindu Law, neither would seem to be a bar to marriage unless the lunacy of the husband had prevented him from accepting the bride at the time of the marriage ceremony or understanding its nature.[7]

24. The meaning of marriage differs in different countries. In Christendom, it means a monogamous marriage, being a voluntary union for life of one man and one woman to the exclusion of all others.[8] In India, a marriage has a different meaning, in that in case of the Hindus, it need not be voluntary and it may be polygamous, and if custom permits polyandrous, while in the case of Mahomedans, there is a marriage called the *mutah*, which need not be for life at all. But inter-national law respects the personal law of all nations, and if a marriage was contracted in any form, recognized by the personal laws of the parties, the Court will give effect to it.[9] A polygamous marriage is a good marriage, though it may not be recognized by the law of Christian countries. English Law recognizes divorce; Hindu Law now treats it as impossible. Polyandry would be treated as unthinkably immoral in Europe. It is customary in Malabar and was not unknown, though it was not customary in ancient India.

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(1) *Brinkley* v. *Attorney-General*, 15 P.D. 76.
(2) *Venell* v. *Veness*, 4 F. & F. 344.
(3) *Ditcham* v. *Worral*, 5 C.P. 410.
(4) *Purushotam Das* v. *Purushotam Das*, 21 B. 23.
(5) Marriage of Lunatics Act, 1811, (51 Geo. 3, C. 37) *Turner* v. *Meyars*, I Hag. Con. 414.
(6) *Turner* v. *Thompson*, 13 P.D. 37.
(7) *Maunjilal* v. *Chandrabati*, 38 C. 700 (706) P.C.
(8) *Warrender* v. *Warrender*, 2 C.L. & F. 488 (530); *Brinkley* v. *A.G.*, 15 P.D. 76.
(9) *Bethel* v. *Hilyard*, 38 Ch.D. 220.

Polygamy.

25. As the marriage under Hindu Law is a sacrament so it was in ancient Rome, where it could be put an end to by the husband, though not by the wife, barrenness being a sufficient cause for divorce. But public opinion soon rallied to the support of the wife who could divorce her husband with equal ease. In Rome, marriage commenced as a sacrament and ended as a loose and voluntary contract which could be determined at the will of either party. As in ancient and modern India, so in ancient Greece and Rome, early marriage was customary. In Greece, which lived for the worship of beauty, marriage never attained the same dignity as it did in Rome.

Early Marriages.

26. Polygamy was, from the earliest times, prohibited both in Greece and Rome,[1] but concubinage was common and customary and upto the tenth century, it was regarded as a secondary marriage. The children of such unions were classed as natural offsprings of concubinage, as distinguished from the spurious breed of adultery, prostitution and incest. Polygamy was also permitted and practiced by the ancient Egyptians.[2]

Polyandry.

27. Polyandry, though probably unpopular, was not wholly unknown in ancient India. The Mahabharat furnishes one well-known instance of Draupadi, wife of the five Pandavas, whose marriage is there described as "divinely arranged,"[3] and the fixing of whose hours to live with the five brothers was directed by Narad.[4] The custom is still alive, though decadent in several localities, and amongst scattered communities in the Punjab, and the Himalayan and its submontane tracts. It, probably, owed its origin to the scarcity of woman and was kept alive by the craving for male offspring, to which must be traced the practice of the levirate or *Niyog*, which the Shastras uphold till the widow is the mother of one or two sons.[5] Polyandry is still customary amongst certain castes in Cochin[6] and on the Malabar Coast, though with social development it is being slowly abandoned. The Nairs practised polyandry of the maternal type until quite recently, and it has left an indelible trace on their law of succession in that the Nairs still trace their descent through the female.[7]

Prohibited Marriages.

28. Ancient law contains no prohibition against incestuous marriages. Abraham had espoused his half sister[8] while in Egypt, the marriage of uterine brothers and sisters was admitted as a customary, and even a favoured alliance. As such Cleopatra had to marry her younger brother, though it led to endless misery. Greek custom allowed marriage between half-brothers and half-sisters when not descended from the same mother. The Spartan might espouse the daughter of his father, and the Athenian that of his mother, and the nuptials of an uncle with his niece were applauded at Athens as a happy union of the dearest relations. But the Roman lawyers prohibited these incestuous alliances and laid down the rules of prohibited degrees for marriage. And later jurisprudence has more or less copied those restrictions. Under Hindu Law, the prohibited degree has been extended much further beyond the Roman Law.

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(1) 2 Gulab, XLIV.
(2) 1 Kings XI-3.
(3) *Mahabharat, Adi Parvas*, v. 118 (*Dutt's Tr.*), Vol. I, p. 13.
(4) *Ib.*, v. 120 (*Dutt's Tr.*), Vol. I, p. 13.
(5) Gautam XVIII-8; 2 S.B.E. 268, but *see* Manu LX-52.
(6) 1 Cochin Tribes and Castes, 161, 173, 182, 209, 301, 346.
(7) Gait's Census of India (1911), Vol. I, Pt. I, S. 294.
(8) Genesis XII-19.

29. The relation of guardian and ward, or to quote the Roman words, of tutor and pupil, occupies an important place in the Institutes and the Pandects. Roman Law condemned females to the perpetual tutelage of their parents, husbands or guardians; a sex, created to please and obey, was never supposed to have attained the age of reason and experience. This is her place in Hindu Law, for says Manu, "Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age; a woman is never fit for independence."[1] As regards males, Roman Law placed all youths upto their fourteenth year in charge of their tutors and afterwards upto the twenty-fifth year in charge of a curator. The tutor held a public office. Without his consent no act of the pupil could bind him to his own prejudice, though it might oblige others for his personal benefit.

Guardian and Ward.

30. Unnatural vice infected all ancient society, and it grew with the increase of wealth. Marriages became unpopular, so much so that in 131 B.C. the censor Metellus urged marriages as a patriotic necessity. The position of a married woman among the Romans compared favourably with her position in Greece. In both countries, she was no doubt subordinate to her husband, but while, in Greece, the wife looked after and performed other menial offices, in Rome, the wife was the mistress (*domina*) of her household. In Greece, women lived in seclusion and appeared only veiled in public. In Rome, the wife appeared at religious services, at meals, in the theatres and even in the courts.

Women's Position Compared.

31. In both countries, while polygamy was prohibited, concubinage took its place, and the offspring of such an alliance were not treated as illegitimate. As compared to this, the Hindu wife occupies by no means an unfavourable position. With her, marriage is a lottery as it was with the ancient Greeks. But the position of a Hindu wife in the household is more that of the *domina* than of a dependent. She is entitled to own and hold separate property. She succeeds to the separate estate of her husband, in the absence of male issue, though her right is restricted to the enjoyuent of the estate without impairing it, except in the case of legal necessity. But with all this, although the position of her Western sister has immeasurably improved in recent years the status and lot of the Hindu wife have remained unaltered for over 3,000 years.

II

32. The History of Hindu Law falls into three epochs (*i*) from the earliest time down to the writing of Mitakshara (1300 B.C.-1150 A.D.), (*ii*) from the Mitakshara to the establishment of British rule (1150 A.D.-1772 A.D.), and (*iii*) the third from that date onwards which marks its modern development by the British Courts.

33. As the four Vedas are regarded by the Hindus as the main repository of all their laws, sacred and secular, a brief reference to them is necessary in order to assign them their proper place in the legal literature which is ever growing and changing with the progress and altered condition of society.

34. **Vedic Epoch.**—All Hindu sacred literature is divided into the main groups—the *Shruti* and the *Smriti*, the former being synonymous with the Vedas; while

The Shruti and the Smriti.

(1) Manu IX-3, V-148, IX-2.

the latter comprises most of the early post-vedic literature which has, by its antiquity acquired the halo of sacredness. The words *Shruti* (which means *heard*) and *Smriti* (which means *remembered*), though now used as conveying a secondary meaning, really point to a time when writing was unknown, and the sacred lore had to be memorized to be preserved for posterity. The Sruti matter was embodied in set forms of language, mostly in metre, so that the words could be recited and sung. The Vedas have become so known because of their antiquity when literature was scanty and the Aryan could devote more time to memorize the very words, instead of only the substance and purport, which he commenced to do as soon as his memory became loaded with the fast accumulating traditions of custom and conduct, which knit together the ancient Aryas in spite of their scattered settlements and lengthening distances. These were the *Smritis* which represented the substance though not the text of the compiler.

The Vedas.

35. All laws of the Hindus are nominally traceable to the Vedas which are the only records of direct revelation.[1] Originally, there was only one Veda—the Rig Veda; but, later on, it put forth other *shakhas* or offshoots, due to differences in ceremonial observances and readings of the original unwritten Veda after the introduction of writing, and the three main branches became known as (1) the Rig Veda Samhita, containing now 1017 verses, (2) Yajur Veda Samhita, (3) Sama Veda Samhita, to which was subsequently added (4) the Atharva Veda. These main branches put forth other offshoots which were designated either *shakhas* or *charanas*, each in turn giving rise to a collection of its hymns, tradition and precepts, as understood by the schools, which have come down to us as the Dharma Shastras ascribed either to some god, or sage, or a princely patron, or to the school of which it was the approved manual. The Vedas contain a collection of hymns in two parts, one touching the sacrifice, the other touching the Supreme being or Brahma. The latter portion is called the Upanishad, and appears to have been added after the ceremonial section later on. As there are three branches of the ceremonial, the Veda is, for the better performance of its sacrifices, divided into three books; the Rig Veda, Yajur Veda and Sama Veda which were really the records of ceremonies as performed by three priestly families, namely, Hotri, Adhvaryu and the Udgatri. The Atharva Veda is not used for solemn sacrifices and is very different from the others, as it teaches only expiatory, preservative, or imprecatory rites.

36. From their very nature the Vedas cannot be expected to contain any legal precept, nor in fact do they contain any. They may, therefore, be dismissed from consideration. But the following ethnological facts, deducible from them are interesting to the lawyers, presenting as they do a vivid portrait of ancient manners, which constituted the then laws, regulated the lives of the people and which are the parent of all laws of the present day.

Vedic Society.

37. An examination of the four Vedas brings to light the following facts. The oldest of them all, the Rig Veda, was composed when the Aryan immigrants had settled down in the Punjab and had reached as far South as Ambala. They

(1) Consequently they alone constitute the *Shruti* or what was directly heard (*i.e.*, revelation), as distinguished from the Smriti or what was remembered (*i.e.*, tradition). Even the Vedic Sutras belong to the latter class—Max Muller's A.S. Lit.—49.

were struggling for mastery of the Gangetic plain, which they obtained by the time the Atharv Veda was composed. It mentions the Provinces of Magadh (Behar) and the Angas (Bengal). The Rig Veda mentions "the five tribes" which, though in political alliance with one another, did not always preserve their amity. The tribe was the political unit, scattered over a number of settlements comprising an aggregate of villages and ruled by a king, who was ordinarily hereditary, though occasionally elected by the districts of the tribe. There were no taxes, the king being maintained by voluntary offerings by his people. The basis of Vedic society was the patriarchal family. The Indian patriarch (*Grihapati*) wielded the same power over his family as did the patriarch in Rome. His power was strictly limited by the will of the people, expressed in the tribal assembly (*Samiti*). As such, he possessed no greater power than the pre-republican Roman King.

38. The social life, reflected in the Vedas, is closely analogous to the contemporary life of the Western settlers. The patriarchal family was well established. The father possessed the right to sell or kill his sons. The price of a son was a hundred cows. Adoption was legal. So Viswamitra had adopted Ajigarta who had left his home owing to parental cruelty. He adopted other sons as well. Polygamy was practised then as now. Viswamitra had a hundred sons. Education was confined to the *Aryas*, who afterwards comprised the three higher castes. Women were left in ignorance. The practice of *Sati* was common and extolled as the highway to heaven.[1] Education was purely religious. The Aryans were harassed by the *Dasyus* who stole their cattle and plundered their grain. They even stole their women. Life was otherwise simple and uneventful. The Arya was religious first and religious last. His government was a theocracy. Consequently, his leisure and spare wealth were spent in elaborate sacrifices, some of them lasting a whole year. Cattle were killed in sacrifice and their flesh eaten. There are traces of the practice of *Niyog* which was common to all ancient Aryan races.

39. The earlier Vedas contain no reference to any caste. They only refer to the *Aryas* and the *Dasyus*, the former being the Aryan immigrants and the latter the aboriginal natives of the country. The latter are also at times described as *Shudras*. The Vedas were composed when the Brahmanical ascendency over the people had not only become established in India,[2] but when his lust for pelf and political power had also been gratified. He had already obtained precedence over the *Kshatriya* kings: "The king before whom there walks a priest, lives well-established in his own house; to him the earth yields for ever, and before him the people bow of their own accord."[3] There is a whole class of hymns in praise of gifts (called *Danastuti*) received from princely patrons.

Vedic Religion.

40. The gods of the Vedic pantheon were the *Varun* (Rain),[4] *Agni* (fire),[5] *Indra* (the thunderbolt) who "is greater than all,"[6] *Soma* the king of the world,[7] *Mitra*,[8] (the sun) *Aryaman*[9] and the other forces of nature; but above them all stood the Supreme God whom the Vedic sage invokes as "my father." "That One breathed breathless by itself; other than it nothing

(1) Rig Veda, cited in 1. Cole, Mis. Essays, p. 116.
(2) Max Muller's A.S. Lit. 242.
(3) Rig Veda, IV, 50-7.
(4) *Ib.* II, 2710.
(5) *Ib.* II, 1-9.
(6) *Ib.* X-86.
(7) *Ib.* IX-59.
(8) *Ib.* I-162.
(9) *Ib.*

since has been." That One breathed and lived, it enjoyed more than mere existence; yet its life was not dependent on anything else, as our life depends on the air which we breathe. It breathed breathless. "Then call Him Indra, Mitra, Varun, Agni; the He is the well-winged heavenly Garutmat; that which is One the wise call it in many ways; they call it Agni, Varun, Matarisvan."[1] As Max Muller observed: "Even in the invocation of their innumerable gods, the remembrance of a God, one and infinite, breaks through the mist of an idolatrous phraseology, like the blue sky that is hidden by passing clouds".[2] "Language blushes at such expressions, but her blush is a blush of triumph."[3]

Hindu Caste.

41. Hindu Law cannot be understood without reference to caste,[4] a division of the people into four graded classes which is determined by their birth and remains unaltered through life. Hindu Society is divided into two main castes: (1) The *Dwijas* or twice-born, and (2) the *Antyajas,* (Shudras) or the servile people. This distinction is observed throughout Hindu Law, both ancient and modern. There is often one law for the regenerates and another for the Shudras. But, on many points, the former are subject to many disabilities from which the latter are free. In the confusion of castes created by the policy of the foreign rulers, who for the first time, established a secular rule free from the control of the hierarchy, the question of caste at times presents difficulties. It is specially so in view of the general social upheaval, created by the impact of Western thought and the consequent abandonment by the regenerates of the customary rituals, and the claim of some of the Shudra castes to the position of *Dwijas.* The question of caste has thus a foremost place in the historical survey of Indian law, but it is a subject at once so stupendous and complicated that nothing but only a succinct *resume* can be attempted here.

Origin of Caste.

42. A tribe in its original form is distinguished from a caste by the fact that its basis is political rather than economic or social. The members believe that they all have a common origin, but what holds them together is the community of interest and the need of mutual defence; and aliens who are willing to throw in their lot with the tribe are usually freely admitted. The Hindu literature, both legal and religious, teems with allusions to caste from very early times. The Vedas, however, contain no reference to caste, though it is alluded to in the *Purushasukta,*[5] which is considered to be a modern interpolation, though the earliest *Sutras* of Apastamb and Baudhayan take its existence for granted. But caste in their time was in a fluid state. They mention only four castes, which, according to the Census Report of 1921, have now multiplied to nearly 2,400, though the last decennial Census Report notes a growing tendency towards their consolidation.[6] In Burma caste is so little known that the Burmese language possesses no word for it,[7] while, in the extreme West, Mr. Hughes-Buller records that when a Hindu in Baluchistan is questioned about his caste he "will often describe himself by the name of the tribal group to which he holds himself attached."[8] It may then be premised that caste, as such, is peculiar to the India dominated

(1) Rig Veda, VI-164, 46.
(2) A.S.L. 288.
(3) *Ib.,* 289.
(4) From Port. *Castus,* pure.
(5) Rig Veda, X-90.
(6) (1931) Census Report, 1 § 182 pp. 430, 431.
(7) 1 Imperial Gazetteer of India, Ch. 6, p. 330.
(8) Baluchistan Census Report, 1901, cited in 1 Imp. Gazetteer, Ch. 6, p. 330; Risley's Census Report, 1901, S. 851.

by the priestly Brahmins. Manu allegorically traces its origin to the *anima mundi* (the supreme soul) Brahma, who "produced by a thought a golden egg," "in which" he himself was born as Brahma, who for the sake of the prosperity of the worlds, caused the Brahman, the Kshatriya, the Vaishya and the Shudra to proceed from his mouth, his arms, his thighs and his feet and allotted to these their distinctive duties. The Brahman was enjoined to study, teach, sacrifice, and receive alms; the Kshatriya to protect the people and abstain from sensual pleasures; the Vaishya to tend cattle, trade, to lend money and to cultivate land, while for the Shudra was prescribed the duty of service of the three groups.

43. But this follows the favourite method of exposition of a fact by its reference to the divine law. The fact is that caste in Egypt and Persia[1] was functional, but in India, it took its root owing to the difference in colour between the Aryan invaders and the aborigines of India. Thus a Vedic Hymn thanks Indra for having killed the Dasyas and "protected the Aryan colour."[2] Caste in its inception was synonymous with colour and the term *Varna* means nothing more. But in later years, it became multiplied. As the functions multiply with the development of society, the occupations became multiplied. Other forces have since contributed to its multiplication such as (*i*) the tribal groups, (*ii*) functions or occupations, (*iii*) sects comprising a small number of castes which commenced life as religious sects, founded by philanthropic enthusiasts, proclaiming the equality of their followers, (*iv*) cross-breeding, (*v*) racial tradition, (*vi*) migration, as where two persons of the same caste migrating to different localities become members of distinct castes discontinuing all connubial connection with each other, (*vii*) changes of custom, to which might be added, (*viii*) language, (*ix*) the worship of different gods, (*x*) the eating of different food, (*xi*) other social or religious habits, (*xii*) pride or prejudice, and (*xiii*) totemism. The growth of the caste instinct must have been greatly promoted and stimulated by certain characteristic peculiarities of the Indian intellect, its lax hold on facts, its indifference to action, its absorption in dreams, its exaggerated reverence for tradition, its distinctions, its pedantic tendency to press a principle to its furthest logical conclusion, and its remarkable capacity for imitating and adopting social ideas and usages of whatever origin.

44. While the Vedas contrast the Arya with Dasa, calling the wife of the Arya, Aryapatni, and that of a Dasa, Dasapatni, in later years, the term Arya became transferred to the first three castes, the rest being relegated to the servile caste. But caste as the corner-stone of modern Hinduism had not then become prominent. Indeed, the very term, Hindu, was unknown to the Smritikars. It owed its origin to the river "Sindhu" (Sanskrit for river) *par excellence*. The river Indus was then the natural Western boundary of the Aryan settlers. It appears that the word Sindhu was corrupted by the Persians into Hindu and the term Hindusthan was coined to designate the country where those people lived.

45. The Smritis follow the tripartite division of the Vedas[3] but their three parts deal with three branches of Dharma or duty, *viz.*, (1) *Achar* (*i.e.*, ceremonies), (2) *Vyavahar* (*i.e.*, Social duty which includes legal obligations) and (3)

Shastric Social Polity.

(1) Spiegel, Eranische Alterthumakunde, III, 54-670.
(2) III, 34, 9.
(3) Divided into three parts, *viz.*, Samhita, Brahmana and Aranyak.

Prayaschit i.e., expiation). The society assumed and commended throughout including the Mitakshara is a society in which wealth counts for nothing and life of religious asceticism is all in all. All Hindu philosophy is pessimistic. Life is not a gift but an ordeal. It cannot be enjoyed but must be endured. Life is an evil and in the cycle of years the present age is the worst. The end of life is the end of all worldly torments and a step hastening to *Nirvan* or cessation of reincarnations and an absorption into the Divine Spirit which is the be all and the end all of existence.[1] It is the Supreme beatitude.[2] To quicken this state what is required is the practice of austerity.

46. The love of life prolongs life. Its prolongation lengthens the span that separates it from *Nirvan.* Life is an illusion (*Maya*). Who cherishes an illusion? The Aryan is, therefore, enjoined to divide life into four stages as a compromise between this stern doctrine and his mundane attachments. An Aryan boy is at birth no better than a Shudra. Before reaching a certain age[3] he must undergo the Upanayan[4] ceremony which makes him a twice-born. He must then study the Vedas under his Guru. His pupilage lasts till then, after which he attains the status of a householder. As such, he must strive for, and accumulate, no wealth. He must marry but the purpose of marriage is merely to raise a male offspring. For the rest he must adhere to, and perform, his appoined duties: "Sacrificing, studying, and giving alms are appointed for the Vaishyas and Kshatriyas, and to the Brahman, there are, in addition, receiving gifts, assisting others to sacrifice and teaching the Vedas. To the Kshatriya is ordained the protection of their subjects as the chief duty, for the Vaishya, lending at interest, agriculture, trade, and tending cattle are laid down. For the Shudras is laid down the service of twice-born (as the chief duty), or if he cannot thereby earn his livelihood he may become a trader, or studying the benefit of the twice-born, he may assist by various mechanical arts."[5] Even these circumscribed duties he could not perform for long: "When the father of a family perceives his muscles become flaccid and his hair gray and sees the child of his child, let him then seek refuge in a forest."[6] Manu then particularizes the life this hermit is to lead in the forest till he can get rid of life by torments and tortures, privations and self-denials, and even suicide if afflicted with any incurable ailment, when he should "advance in a straight path towards the invincible North-Eastern point feeding on water and air till his mortal frame totally decays, and his soul becomes united with the Divine Essence."[7]

47. The young Aryan becomes a householder from sheer necessity. He must leave that state as soon as he has begotten children from choice. Even as a householder he must abjure wealth. His grain store should be sufficient to last only for a year. If it exceeds that limit he must spend it on sacrifices.[8] In this scheme of life, this world, its pleasures and passions, its occupations and attachments, play a very subordinate part and legal obligations necessarily share the same fate. Even a casual glance at any Smriti will show that rituals loom large in the author's eye who adverts to

(1) Manu, VI-61; Ch. XII-1-126.
(2) Manu, VI-31, 32; XII-1-126.
(3) Manu, II-38; Yadnayavalka, 37; Brahmin before his 16th year, Kshatriya up to his 22nd year and Vaishya up to his 24th year.
(4) Lit. Going near—Skt. *Upa* near, *Nayan* to go, *i.e.,* going near his spiritual preceptor.
(5) Yadnayavalka, 118, 120.
(6) Manu, Ch. VI-2.
(7) Manu, Ch. VI-31.
(8) Yad. 124, 125.

legal matters as merely necessary for the guidance and government of the family.

48. These books refer to a state of society long passed. Aryan life has become complex with industrialism and the vast accumulation of wealth. The head of the social order then was a Kshatriya king, holding autocratic sway over his people, who believed in his Divine supremacy. The society was divided into four main castes and subdivided into numerous sub-castes and people followed professions allotted to them by their caste. The Brahmin priests were the sole repositories of all knowledge, secular and divine, and wrote the Dharma Shastras. There was no collection of precedents and no enunciation of legal principles and the only factor which broke the monotony of the traditional teaching was the slow moving custom. Though extremely slow, there was a little progress and some change which had to be explained away without shaking the authority of the Divine Law. This was done by saying that the change was necessitated with the advent of *Kaliyug*—the present age of sinfulness, falsehood and deceit.

The Smritis.

49. Hindu Law is in essence a purely religious law which has never been secularized. Theoretically, the Smritis are our sole repository of law. They afford ample material for the ethnographic survey of the people and guide the course of their social evolution with which their laws and practices are naturally interwoven. A historical survey of their leading principles is, therefore, here attempted. It would show how modern ideas, with which the Hindu lawyer has to make himself familiar, have their roots lying embedded in the social structure of the ancient people.

The Age of Manu.

50. The Code of Manu or Manu-Smriti[1] is the first and foremost repository of Hindu Law. It is not a work of any single author, but rather a compilation used as a text-book of the school of Manavas held in high reverence from all time. Even the Veda declared that "whatever Manu pronounced was a medicine for the soul." From the fact that many passages are quoted by later writers from what is called Vrihat (or great) Manu and Vridha (or old) Manu, it is surmised that the code, now extant, is only one of the many, probably successive, redactions. The laws of Manu reflect the customs and practices of the society then extant, but which have long since become obsolete, though technically the work still remains a standard authority upon the unchangeable laws of the Hindus. They show the fast grip of the sacerdotal influence upon the community. The four castes had already become well established, but they had not as yet crystallized into their latter rigour. For instance, while a Brahmin is recommended to take for his first wife a woman of his estate[2] for subsequent marriages he is permitted to marry of the next lower twice-born order;[3] but the marriage of a twice-born with a Sudra woman is strongly reprobated, but should such marriage take place, then the progeny is degraded to the status of Shudra,[4] while the marriage itself is denounced as an inexpiable sin[5] which suggests that such alliances were becoming so common as to menace the purity of the Aryan race and continued despite the sacerdotal sermons due to paucity of Aryan women

(1) Manu was a Rajanya or Kshatriya and not a Brahmin. His father Vivaswat is called "the seed of all the Kshatriyas". (Madhusudan, Bhagwat-Gita, iv-i, cited by Max Muller in "Chips from a German Workshop," pp. 341, 342). But if so, the texts now extant must have undergone material alterations, since it places the Brahmin in a class apart.

(2) Manu, Ch. III, v. 12.

(3) Manu, Ch. III, v. 12.

(4) *Ib.*, v. 15.

(5) Ch. III, v. 19.

brought about by female infanticide. The Gandharwa[1] form of marriage was usual amongst the twice-born: the Rakshasa[2] and the Paishach[3] forms took place between the twice-born and the Shudras.

Kinds of Marriage.

51. Manu describes eight kinds of marriages;[4] but of these he regards the first four as approved in the case of Brahmins.[5] The rest he reprobates.

52. In short, the first four are godly, the last four, demoniac. There was a difference of opinion whether the fifth should go into the first class, or be relegated to the second, and Manu cuts the gordion knot by holding it legal or not according to the caste of the husband. The difference between the first four lay in the price paid for the bride. The first two were marriages without consideration; the third and the rest were less meritorious, because they were marriages for a price or were otherwise non-consensual.

53. Wives in Manu's age enjoyed considerable liberty. The marriage itself was not a mere contract but a sacrament.[6] To the wife is assigned the duty of the hostess.[7] A man is recommended to consult his guide before marriage.[8] All men are enjoined to honour women: "Where females are honoured, there the deities are pleased; but where they are dishonoured, there all religious acts become fruitless."[9] The married man is to dispense hospitality with a lavish hand—an injunction which is to this day obeyed and is one of the sweetest phases of the Hindu religion.

54. Manu disapproves of widow marriages[10] likening it to a "practice fit only for cattle,"[11] but he allows the deceased husband's brother to espouse his virgin widow.[12] Child marriages appear to be common; girls below 8 are mentioned as possible brides.[13]

Manu's Twelve Sons.

55. Manu and the later text-writers do not regard marriages as an end in any sense, but only as a means to the sole end of securing the male issue to pull the begetter out of the torments of hell.[14] Consequently, as Manu treats every alliance between a man and a woman as marriage, he regards the son anyhow procreated, whether by the procreator or not, as a legitimate son. He classifies the following twelve as sons: (1) son by married wife of the same caste, (2) son by married wife of a lower caste than the husband, (3) by a wife two or more degrees lower, (4) by twice born who have not assumed the sacred thread, (5) by a wife who had conceived and delivered of a son before her marriage, (6) son purchased, (7) son of an appointed daughter, (8) son of an impotent or ailing husband born of his wife by another with his permission (a case of Levirate or *Niyog*), (9) son of a woman pregnant with or without the knowledge of the bridegroom, (10) adopted son—the latter being of the same caste as the adopter, (11) any boy deserted by his parents and received as such by the putative father, and (12) son of a remarried woman.[15]

56. Of these twelve, the Hindu had brought with him the practice of Niyog and adoption from his ancestral Aryan home. The practice of

(1) *Ib.*, v. 33.
(2) *Ib.*, v. 33.
(3) *Ib.*, v. 34.
(4) *Viz.*, (1) Brahma; (2) Daiva; (3) Arsha; (4) Prajapatya; (5) Asur; (6) Gandharva; (7) Rakshasa; and (8) Paishach.
(5) Ch. III, v. 24.
(6) Ch. III, v. 18.
(7) *Ib.*, v. 4.
(8) Manu, Ch. III, 56; *cf.* v. 55, 62.
(9) III-56.
(10) IX-65, 68.
(11) IX-66.
(12) IX-69.
(13) IX-88.
(14) IX-138.
(15) *Nagindas* v. *Bachao*, 40 B. 270, P. C.

Levirate or Niyog, and arrogation or adoption, was quite established in Greece and Rome. If it fell into disuse it was because of the early establishment of settled governments and the absence of case which soon restored the equilibrium of sexes so seriously deficient in the case of oriental settlers, in whose case the necessity of combined and corporate existence continued down to very recent times and in whose case, the interwelding of law with religion with the attendant horrors of hell presented to the sonless man, created a thirst which could only be gratified by begging, borrowing or stealing a son. The practice of early marriage was probably also traceable to the same source. And the little scrutiny exercised in obtaining a son appears to have been due to their great scarcity and the high prices claimed for obtaining them.

57. The slaughter of cattle, bulls, buffaloes, cows and horses for food or sacrifice was permissible even to Brahmins[1] while the Ashwamedh or horse-sacrifice is spoken of as specially meritorious;[2] and a human sacrifice was not unknown. But Manu is not consistent with himself. In some places he condemns flesh-eating altogether;[3] in another place, he exalts both the beef-eaters as well as the slaughtered cattle to the summit of beatitude;[4] but probably, the latter verses were penned after a delicious dish off a fattened calf. The age of Manu was the age of pastoral life. All the goods and chattels that the Aryan had consisted of cattle, goat and sheep.

58. The Code commends strict conjugal fidelity. It prohibits polyandry, a practice which appears to be of later growth. Of course, polygamy was then, as it is now, legal. References such as, "If two sons begotten by two successive husbands who are both dead"[5] are of course to widow remarriage.[6] The right of a married woman to her separate property was recognized in verses which will have to be considered in another place.[7]

59. As might be expected, the government was on a par with the rest of the ordinances of Manu. Brahmins were wholly exempt from the payment of taxes, and kings, even though dying, were bound to see that the Brahmins were neither taxed nor left hungry.[8] Not only Brahmins but their benefactors were free from having to bear the burden of the State[9] which was thrown on the rest of the community. Taxes were levied *in specie*[10] and the king's share was fixed.[11] But fines were payable in coins of which gold, silver and copper pieces were well established.[12]

60. Justice was administered by the king with the assistance of three Brahmin assessors.[13] Law could, however, be interpreted by any of the twice-born.[14] The procedure is elementary, and for the most part fair, Indeed, Manu is fair in other respects except where his judgment is warped by prejudice or prepossession. And even as regards Brahmins, while they are singled out for every privilege, they are also enjoined to practise severe austerity[15]—the only difference in practice being that while the one is real, the other is ideal.

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(1) Manu, V. 22.
(2) V. 53.
(3) V. 37, 47-56.
(4) V. 41-42.
(5) IX-191.
(6) IX-190.
(7) IX-194, 197. *See*, Chapter on *Stridhan*.
(8) VII-133.
(9) VIII-394.
(10) *See* VII-130.
(11) VII-130-132.
(12) VIII-131-138.
(13) VIII-10-11.
(14) VII-20.
(15) II-162-163.

61. Only Brahmins are to be appointed as Judges.[1] "The very birth of Brahmins is a constant incarnation of *Dharma*,[2] for the Brahmin is born to promote justice and to procure ultimate happiness."[3] He is exalted to the status of the gods but not yet above them. Later on he rose above them, and the gods in the heavens lived by his sufferance.[4] Manu's rules on the law of inheritance call for detailed examination, and refer as they do, to a subject which is still technically the current law. Their examination must be reserved for the ensuing commentary dealing with the subject.

62. All transgressions are punishable by Manu, but the difference between punishment and penance is not yet discerned. Even murder may be expiated by penance and amercement regulated according to the caste and kind of the murdered. The fine was the delivery of cattle.

63. The Smrit of Harit has not been translated in the "Sacred Books of the East." But a translation of a work of that name appears in the Twenty Samhitas. If this be the entire Smriti, it is devoid of any legal or ethnological significance. The work contains seven short chapters in which the four stages are defined. They merely show that Hindu Society had become divided into four castes according to their occupations, but there is no indication of their inter-relation, while Harit entirely omits to allude to the *Dharma* or civil duties which, in the earlier and later Codes, embody the laws of family relations and inheritance.

Harit, 850 B.C.

64. Next to Manu, Gautam is the oldest *Dharm Shastra* extant. But it was not the only work composed since the Code of Manu, for Gautam refers to other writers whose opinions he quotes without naming them.[5] The work belongs to the followers of the Sama Veda. Its age cannot be ascertained, but it appears to be older than Baudhayan by several generations, as the customs in vogue in his time appear to have died out when the Baudhayan school was founded just as the customs current in Baudhayan's time had disappeared when the Apastamb school was founded.

Gautam, 700-800 B.C.

65. The dominating note of the Aryan society in the days of Gautam was the same as in the days of Manu. Some changes were no doubt creeping into society. Caste was becoming a trifle more rigid, but it was still in a fluid condition as before. For instance, Gautam allows the student to accept alms from men of all castes,[6] and a Brahmin may eat food given by a twice-born man,[7] and in case of necessity, even that given by a Shudra.[8] He must not eat the flesh of "milch cows and draught oxen" but he was otherwise free to partake of that and other meat.[9] Society is divided into four orders—that of the student, the householder, the ascetic (*Bhikshu*) and that of the hermit in the woods (*Vaikhanas*). Only the householder can marry; the others are consigned to life long celibacy.[10] The householder must marry in the caste a woman not related to him within six degrees on the father's side,[11] or within four degrees on the mother's

(1) VIII-11.
(2) God of Justice.
(3) Manu, I-98.
(4) Vishnu, XIX-22; (7 S.B.E. 77): "It is by the favour of the Brahmins that the gods reside in heaven; a speech uttered by Brahmans (whether a curse or a benediction) never fails to come true."
(5) By use of the expression "Some declare" as in Gautam, II-9. 34, III-1, 19, VI-6, X-52, XVI-14, XVII-7.
(6) Gautam, II-35.
(7) XVII-1.
(8) XVII-5.
(9) XVII-27-38.
(10) III-3.
(11) IV 1-3.

side.[1] It recognizes the eight forms of marriages described in Manu[2] including capture[3] and the embracing of an unconscious female.[4]

66. Inter-caste marriages were customary and their offspring are declared legitimate.[5] But as was the view of all ancient laws, the wife was merely a means to an end. She was married for the sole purpose of procreating a son. If her husband dies sonless, she may procreate up to two sons[6] by his brother[7] or a sapinda, a sagotra, a samana-pravar or one belonging to the same caste.[8] The practice of Niyog is preserved in the following verse: "And the child begotten at a living husband's request on his wife belongs to the husband,"[9] but if it was begotten by a stranger, it belongs to the latter,[10] or to both the natural father and the husband of the mother.[11] Another means of raising an issue was to obtain a son by an appointed daughter.[12] Girls were married off before they attained puberty.[13] "Some declare that a girl shall be given in marriage before she wears clothes"[14]—which shows that a tendency had then become established in favour of child-marriages, though Gautam appears to have been comparatively a rationalist. Polygamy was then naturally customary.[15]

67. Gautam's law of inheritance recognizes the rule of primogeniture[16] as the rule of succession, but the rule on that point was fluctuating, and the tendency was towards the equality of shares amongst all the sons, the eldest being given two shares.[17] "A legitimate son, a son born secretly, and a son abandoned by his natural parents inherit the estate of their father."[18] "The son of an unmarried damsel, the son of a pregnant bride, the son of a twice-married woman, the son of an appointed daughter, a son self-given and a son bought"[19] receive one-fourth on failure of the other sons.[20] Idiots and eunuchs were disinherited, but the disqualification was personal and they were entitled to maintenance,[21] Cases of inheritance not covered by the express texts were to be decided by the committee (*parishud*) of ten Brahmins learned in law.

68. Hospitality is enjoined, but Brahmins are to be fed first, Kshatriyas next, and men of other castes are to be fed with one's servants for mercy's sake.[22] Reverence is due to age, and "even a Shudra of 80 years or more must be honoured by one young enough to be his son."[23] But an Arya, though he be younger, must be respected by a Shudra.[24] Prestige!

69. No Aryan should grow a beard without a sufficient reason.[25] But the Vedic Aryans grew beards as a rule, and hid his long hair in a conch-like pyramidal chignon arranged to the right. The student is now enjoined to shave off his head but merely maintain a pigtail.[26] They walked bare-headed during the day,[27] covering their heads only at night.[28] The Arya

(1) IV-5.
(2) IV-6-13.
(3) IV-12.
(4) IV-13.
(5) IV-16, 17.
(6) Gautam, XVIII-14.
(7) *Ib.*
(8) XVIII-6.
(9) XVIII-11.
(10) XVIII-12.
(11) XVIII-13.
(12) XXVIII-18.
(13) XVII-21.
(14) XXVIII-21.
(15) XXXVIII-14.
(16) XXVIII-3.
(17) XXVIII-9.
(18) XXVIII-32.
(19) XXVIII-33.
(20) XXVIII-34.
(21) XXVIII-43.
(22) VI-43.
(23) VI-40.
(24) VI-11.
(25) IX-7.
(26) I-27.
(27) IX-35.
(28) IX-36.

should not take water offered by a Shudra[1]—a notable restriction on the older law, when the Shudra was vigorously anathematized but not yet ostracized.

70. The Aryan ate meals twice a day—morning and evening,[2] but unlike that of the Romans, it savoured of the Spartan simplicity. The three duties enjoined on all Aryans are the study of the Vedas, the offerings of sacrifices and the giving of alms,[3] the additional duties of the Brahmin being to receive them and teaching people the making of sacrifices.[4] The payment of taxes follows the rules stated in Manu.[5]

71. The origin of *bhet bigar* is to be found in Gautam: "Each artizan shall monthly do one day's work for the King."[6]

72. The duties of a King are set out in much detail[7]: "The King is master of all, with the exception of Brahmins,"[8] "All excepting Brahmins shall worship him.[9] . . . . The Brahmins also shall honour him."[10] "He shall administer justice according to the laws of countries, castes and families which are not opposed to the sacred records."[11]

73. Of the rest of the productions of this age Apastamb occupies a prominent place not only because a comparatively authentic version of this *Smriti* is extant but also because it is an excellent compendium of the followers of Yajur-Veda originally compiled for the benefit of the Adhvaryu priests and their acolyte pupils.

Baudhayan, 650 B.C. Apastamb, 500 B.C.

74. The term "Apastamb" is the name of the school like Ashvalayan, Baudhayan, Bharadwaj or Gautam. It was one of the five branches of Khandikiya school which, again, was a branch of the Taittriyas, a section of the Brahmanas who studied the Black Yajur-Veda.

75. Apastamb and Baudhayan belong to the same school, but of these, Baudhayana is about 100 to 150 years older. If, therefore, Apastamb was compiled in 500 B.C. Baudhayan, which portrays customs of a ruder age, must have been composed about 650 B.C. Older than both is the work of Harit, but though a copy of this work exists, it has no practical value to the lawyer, as its Dharma Sutras are meagre and incomplete. So are those of Baudhayan as compared to those of Apastamb, though in this case, later glossators have performed the work of restoration according to their own ideas.[12]

76. Nevertheless, the following facts may be gleaned from what remains, which has been translated, with an Introduction in the Sacred Books of the East Series.[13] Both Baudhayan and Apastamb originated in the Deccan,[14] and both probably belonged to the Andhra country.[15] As to the age of Baudhayan it is manifestly older than Apastamb as it recognizes several customs reprobated in the latter work. It is computed that Apastamb flourished about 500 B.C., probably more but not less.[16] The Criminal

Baudhayan.

(1) Gautam, IX-10.
(2) IX-59.
(3) X-1.
(4) X-2.
(5) X-24-30.
(6) X-31.
(7) XI.
(8) XI-1.
(9) XI-7.
(10) XI-8.
(11) XI-20.
(12) 14 S.B.E., XXXIII.
(13) 14 S.B.E. Translated by G. Buhler.
(14) India South of the Nerbudda, *i.e.*, the Bombay and Madras Presidencies; *see* S.B.E., 20, 24: Intr., xlii.
(15) India South of the Nerbudda, *i.e.*, the Bombay and Madras Presidencies; *see* S.B.E., 20, 24; Intr., xliii.
(16) Baudhayan, XLIII.

Law is draconian in its severity against Shudras. There was one law for the Aryan—another for the Shudra.

77. The outstanding features of Baudhayan are the recognition of family relations in their widest sense, the growing cleavage between the different castes and their tendency to follow their hereditary occupations. Like the older writers Baudhayan enters into the trivialities of life and prescribes a mode of living which must have reduced men to mere automata. Women were pre-ordained for procreation. They have no other function. They are excluded from education and inheritance, and though Baudhayan combats the view that they should be married off as they emerge from their cradle, he supports their marriage before puberty. Niyog was still in vogue[1] and sonship used in the same large sense as before.[2]

78. These peculiarities of Hindu society became accentuated with time and the writings of later sages only voice the growing tendency of the time when they applied the cardinal doctrines of their race to the practical problems of sociology.

79. Bhaudhayan even justifies divorce on the part of the husband: "Let him abandon a wife who does not bear children in the tenth year, one who bears daughters only in the twelfth, one whose children all die in the fifteenth, but her who is quarrelsome without delay."[3] With the last sentiment every one from Socrates downwards will agree. Baudhayan prefaces to his Smriti a long dissertation on personal purity in which he follows Manu, Gautam and the other sages of his time.

80. His law of inheritance is contained in the following seven verses[4]:—

"Moreover, the great-grandfather, the grandfather, the father, oneself; the uterine brothers, the son by a wife of equal caste, the grandson, and the great-grandson—these they call Sapindas, but not the great-grandson's son: and amongst these a son and a son's son (together with their father) are sharers of an undivided oblation.

"The sharers of divided oblations, they call Sakulyas.

"If no other relations are living, the property of a deceased male descends to them after the Sapindas.

"On failure of them, the teacher who holds the place of a spiritual father, a pupil, or an officiating priest shall take it.

"On failure of them, the king. Let him give that property to persons well-versed in the three Vedas.

"But the king should never take for himself the property of a Brahmin."

81. In Baudhayan's time, the law of coparcenership had not yet developed. There could be no partition during the father's lifetime except with his permission.[5] The rights of the younger sons to an equal division with their eldest brother was now recognized. He still received an additional 10 per cent. or the most excellent chattel, but it all depended upon the father's volition.[6]

82. Baudhayan's catalogue of edibles is the same as Gautam's. He believes in limited polygamy, allowing four wives to a Brahmin, three to a Kshatriya, two to a Vaisya and only one to a Shudra.[7] Inter-caste unions are discussed without being condemned. Their offspring are treated as legitimate.[8] His criminal law is hard on the Shudra. The murderer of a Shudra is, however, liable to the same fine as for killing a dog, a crow, an owl, a frog or a musk-rat.[9]

(1) Baudhayan, 14 S.B.E., p. 226, v-17.
(2) *Ib.*, pp. 227, 288; v-20-33.
(3) II-6.
(4) 14 S.B.E., 178, 179.
(5) 14 S.B.E., 224.
(6) *Ib.*
(7) 14 S.B.E., 196.
(8) *Ib.*, 197, 198.
(9) *Ib.*, 202.

83. There was a growing sense of the dignity of marriage. Though he recites the eight forms of marriage, he reserves the Gandharv and the Pisach forms for Vaisyas and Shudras—a departure which was not universally acclaimed, since "some recommend the Gandhary rite for all castes because it is based on mutual affection."[1]

84. Baudhayan strikes the dominant note of the time to obtain a son by marriage if you may—by Niyog if you must—but get a son, for "through the procreation of a virtuous son he saves himself."[2] "Therefore, he should sedulously beget offspring."[3]

85. The right of women to acquire property was now recognized. Though women possess no independence and are never fit for it,[4] nevertheless, "the daughters shall obatin the ornaments of their mother, as many as are presented according to the custom of the caste, or anything else that may be given according to custom."[5]

86. The work concludes with a chapter on adoption,[6] in which occurs the text prohibiting the giving and taking of an only son in adoption,[7] which is no longer the law, and prescribing the following ceremony, the substance of which is still essential, to constitute the giving and taking in adoption:—

"9. Then he....goes to the giver of the child and should address this request to him: "Give me the son.'

"10. The other answers: 'I give him.'

"11. He receives the child with these words: 'I take thee for the fulfilment of my religious duties; I take thee to continue the line of my ancestors.'[8]

"If a legitimate son is afterwards born the adopted son gets a fourth of the legitimate son's share. Thus says Baudhayan."[9]

Another text of Baudhayan on the incapacity of women to inherit was used by the courts to overrule the succession of a sister, now set right by the Legislature.[10]

Apastamb, 500 B.C.

87. The Apastamb Sutra, the youngest of the trio, represents the doctrines of the school of that name which flourished in South India[11] and whose founder, according to tradition, was a native of the Andhra country. As compared to Gautam and Baudhayan, it records a change in the Aryan customs which is in many respects modern. In their general structure the three works agree, containing as they do, many verses in common, and setting out only some additional clauses which had forced themselves into the forefront by reason of their acceptance as the acknowledged tenets of the people. For instance, with the growing rigidity of caste, he prohibits intercourse, dining and intermarriages with those whose great-grandfather's, grandfather's and father's initiation is not remembered.[12] If a Shudra touches him then he shall leave off eating.[13] He shall not eat in a ship[14] or ready-made food purchased in the market,[15] but "the meat of milch cows and oxen may be eaten."[16] "Bull's flesh is fit for offerings."[17] But a Brahmin shall not eat in the house of people of the three other castes,[18] but on this point there was

(1) 14 S.B.E., 207.
(2) *Ib.*, 272, v. 8.
(3) *Ib.*, 272, v. 11.
(4) *Ib.*, v. 44-45.
(5) *Ib.*, v. 43.
(6) *Ib.*, 334-336.
(7) *Ib.*, 334, v. 4.
(8) *Ib.*, 335, v. 9-11.
(9) *Ib.*, 336, v. 16.
(10) *Lallubhai* v. *Cassibai*, 5 B. 110 (118) P.C.
(11) In a work called *Maharnava*, India is divided into two equal halves by the river Nerbuda and the School of Apastamb prevailed in the country to its south up to the mouth of the Godavari.
(12) 2 S.B.E. vv. 5, 6.
(13) *Ib.*, p. 61 v. 1.
(14) 2 S.B.E. v. 6.
(15) *Ib.*, v. 14.
(16) *Ib.*, p. 64 v. 30.
(17) *Ib.*, v. 31.
(18) 2 S.B.E., p. 66, v. 9.

still dissent: "According to some, food offered by people of any caste, who follow the law prescribed for them, except that of Shudras may be eaten."[1] Even the Shudra's food may be eaten in times of distress.[2] Apastamb affects puritan piety in forbidding food given by a physician,[3] or one who lives by the use of arms, excepting a Kshatriya[4] and several other injunctions, which, if strictly obeyed, must have left the Aryan very hungry. *Niyog* had by this time died out and is forbidden.[5] So is the delivery of widows for procreation to the agnatic kinsmen of her deceased husband.[6]

89. Apastamb's law of inheritance follows the beaten track except that it allows the daughter to take after the pupil—a very remote chance.[7] The wife's *Stridhan* is better defined as comprising her ornaments and the wealth received from her relations.[8] The doubtful equity in favour of the eldest son is now positively swept away. "Preference of the eldest son is forbidden by the Shastras."[9] It is allowed for a Shudra to prepare the food under the superintendence of men of the three higher castes. That Shudra cooks were employed is apparent from an allusion to that effect.[10]

Baudhayan allowed traffic in sons, Apastamb forbids it.[11]

90. After the two exponents of the Southern School, Vashishth who belongs to the Northern School, that is to say, the school founded in the country, north of the Nerbudda river and the Vindhya mountain, presents some interesting and instructive features. This Dharma-Shashtra was composed by the sage Vashishth, or, at any rate, by the pupils of his school who followed the *Rig-Veda*. There are no data to ascertain the age of this work, though internal evidence shows it to belong to a period long past the age of Baudhayan.

Vashishth, 400 B.C.

91. From its general structure it would show that it was written after the rise of Buddhism in India and when the hatred it had aroused amongst the priestly classes was keen: it refers to them as "Atheists," service with whom entails forfeiture of caste.[12] Consequently, it would not be far wrong if the age of Vashishth is placed in the fourth or fifth century before Christ. The author defines Aryavart to be a country between the Himalaya and the Vindhya ranges, limited on the East and West by the ocean.[13] The law prevailing there is authoritative.

92. It will be observed that while Apastamb has limited polygamy to four wives for a Brahmin, three for a Kshatriya, two for a Vaisya and only one for a Shudra, Gautam improves on Apastamb by reducing the Brahmin's allowance only to three, Kshatriya's to two and one each to the Vaisya and Shudra.[14] Vashishth reproduces many aphorisms of Baudhayan and Apastamb; but they are better arranged and brought up to date. Vashishth denounces the prevailing, though perhaps decadent, custom of a Brahmin marrying a Shudra.[15]

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(1) 2 S.B.E., p. 67 v. 13.
(2) *Ib.*, p. 67 v. 14.
(3) *Ib.*, p. 67 v. 21.
(4) *Ib.*, p. 67 v. 19.
(5) *Ib.*, pp. 130, 131 v. 7, Niyog is definitely prohibited; *Ib.*, p. 164, v. 2, 5.
(6) *Ib.*, p. 164 v. 5.
(7) *Ib.*, p. 133 v. 4.
(8) *Ib.*, p. 134 v. 9.
(9) *Ib.*, p. 134 vv. 10-14.
(10) *Ib.*, v. 6.
(11) *Ib.*, p. 13 v. 11. "The gift or acceptance of a child and the right to sell or buy a child are not recognized."
(12) I-23.
(13) I-8, 9.
(14) I-24.
(15) I-25, 26.

93. In regard to the marriage rites, Vashishth only recognizes six forms against the eight of his predecessors, namely: (1) Brahma (Supreme Spirit); (2) Daiva (Gods); (3) Arsha (Sages); (4) Gandharva (Love-match); (5) Kshatriya (Warrior); (6) Manush (Man). Of these, the last two are new, though they bear the old meaning, the Kshatriya marriage being seizure by main force, while the Manush marriage is purchase, pure and simple.[1] The dependence of women upon men is again insisted on.[2] He allows the widow after six months of widowhood—her appointment to raise an issue to her deceased husband[3] from whose estate she is to be maintained.[4] A woman may marry of her own accord three years after attaining puberty,[5] but with Gautam he counsels marriage before puberty[6] and permits re-marriage of virgin widows[7] and of deserted wives to one of the husband's kinsmen,[8] failing him to a stranger.[9] The meat of domestic animals was still eaten, and Vashishth adds the interesting fact that camel-flesh was equally served at the Aryan table.[10]

94. The law of adoption is a reproduction of the older texts, in places revised, as for instance, the following: "Let a woman neither give nor receive a son except with her husband's permission."[11] "He who desires to adopt a son shall assemble his kinsmen, announce his intention to the king, make burnt-offerings in the middle of the house, reciting the Vyavhritis, and take as a son not a distant kinsman, but the nearest among his relatives."[12] This would compare favourably with the Roman Law of adoption, but the objurgation does not appear to have attained the dignity of an indispensable condition.

95. Vashishth is quite modern in his law of property. Ten years' continuous adverse possession destroys the owner's right to property.[13] He recognizes possession as evidence of ownership.[14] He entrusts the minor's property to the king.[15] His ideal for the king is noble: "A king will be superior even to Brahmins, if he lives surrounded by servants who are keen-eyed like vultures."[16] "Let him live surrounded by servants who are keen-eyed like vultures. Let him not be a vulture surrounded by vultures."[17] Vashishth had an idea of contracts against public policy.[18]

96. He still recognizes the twelve kinds of sons.[19] Sons by inter-caste marriage are still legitimate.[20] But he reverts to the double share allowed to the eldest son on partition.[21] He disinherits eunuchs, madmen and out-caste sons but allows them maintenance.[22] He recognizes the right to self-acquisition, but allows the acquirer only a double share.[23] In other respects he follows the traditional law of inheritance.

97. In this closing exordium in support of liberality, Vashishth promises beatitude to him "who gives a house obtains a town"[24] and "he who

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(1) I-34, 35.
(2) V-1, 2.
(3) XVII-57.
(4) XVII-62.
(5) XVII-67, 68.
(6) XVII-69, 70; Gautam, XVII-23.
(7) XVII-74.
(8) XVII-78-80.
(9) XVII-80.
(10) XIV-40, 45-46.
(11) XV-5.
(12) XV-6.
(13) XVI-17.
(14) XVI-10.
(15) XVI-9.
(16) XVI-21.
(17) XVI-25.
(18) XVI-31; *cf.* Manu, VIII-159. Vishnu, VI-41. Yajnavalkya, II-47.
(19) XVII-12-39.
(20) XVII-47-50.
(21) XVII-42.
(22) XVII-52-54.
(23) XVII-51.
(24) XXIX-14.

gives a pair of shoes obtains a vehicle."[1] "Practice righteousness, not unrighteousness; speak truth, not untruth, look far not near; look towards the Highest, not towards that which is not the Highest."[2] Happiness is the portion of him who relinquishes all desires which fools give up with difficulty, which do not diminish with age, and which are a life-long disease."[3]

98. The Dharma Shashtra which passed under the name of the God Vishnu is for its size equal to the Code of Manu, from which its contents are largely borrowed. This is, indeed, the leading feature of all Dharma Shashtras, the text of which is mainly borrowed from the earlier Codes, only in parts added to, or modified, to represent the views of the writer of the age. This Smriti contains over 160 slokas from Manu, and it appears that an old recension of this work was older than Baudhayan and Vashishth, for both have borrowed from it. But this recension has been edited by subsequent glossators out of recognition, so that the text translated in the Sacred Books of the East Series is comparatively a modern work.[4] It is now impossible to separate the old from the new and the works now extant may then be taken as the only works known to us, and which might have been 300 or 400 years old at the birth of Christ.

Vishnu, 300-400 B.C.

99. The Smriti belongs to a school studying the Black Yajur-Veda, but there are passages therein showing the writer's leanings towards the Sankhya philosophy of Buddhism. For instance, in the concluding praise of Vishnu by the Goddess of the Earth for his enlightening discourse, she addresses him as "the Lord of the Principle of *Mahat* (Greek Entity).[5] Thou art the sage Kapil,[6] thou art the teacher of the Sankhya."[7] As Buddhism was at the zenith of its power in the third and fourth century B.C., and the orange-coloured robes of its monks were a frequent sight in the towns, Vishnu regards it as a good omen that one should come across them.

100. Leaving out of account the ceremonial and penitential matter in which Vishnu does not differ from the earlier sages, his dissertation on the family relations and the law of inheritance call for a passing notice. Vishnu like his predecessors recognizes inter-caste marriages and the legitimacy of their offspring. He enumerates twelve kinds of sons, the last of whom is a son born by any woman whomsoever.[8] He recognizes the eight forms of marriage, but adds that the first four are only legitimate for a Brahmin while these and the Gandharv are legitimate for a Kshatriya,[9] but this restriction counts for nothing in view of the laxity he observes in counting the sons. In other respects Vishnu voiced the orthodox Hindu sentiment as to women's dependence upon men,[10] and the like. He is the first to regard *Suttee* or self-immolation with her husband's corpse as a wifely duty,[11] but this is regarded as a later interpolation. He recognizes the right of the wife and the daughter to inherit to her husband and father in the absence of male issue.[12] He also allows the mother to succeed to her son.[13] He, moreover, enlarges the scope of stridhan,[14] and prescribes the mode of

(1) XXIX-15.
(2) XXX-1.
(3) XXX-10.
(4) Vol. VII.
(5) CVIII-26.
(6) XCVIII-85.
(7) XCVIII-86.
(8) XV-27.
(9) XXIV-27, 28.
(10) XXVI-13.
(11) XXVI-14.
(12) XVII-4, 5.
(13) XVII-7.
(14) XVII-18.

its devolution.[1] He gives mothers and unmarried daughters a share on partition.[2] Niyog appears to have fallen into disuse and so also the employment of widows to raise offspring to their deceased husbands.

101. Most of Vishnu's law of inheritance has become obsolete with the discontinuance of inter-caste marriages. He apportions the share of each son according to the caste of his mother.[3] The balance is consonance with modern law and will be set out in the ensuing commentary.

102. Vishnu differs from all the previous sages in expressly prescribing the law of the mortgage of land.[4] He allows mortgage of only a bull's hide[5] of land at a time. If the mortgagor mortgages more without redeeming that previously mortgaged, he shall be whipped or imprisoned.[6] In a dispute between two mortgagees the one with possession has priority.[7]

103. In his exposition of Criminal Law, Vishnu is equally modern. He recognizes the right of private defence,[8] and punishes adultery,[9] defamation[10] and insult[11] while his refined moral sense does not suffer beastiality to go unpunished.[12] A tooth for a tooth and an eye for an eye is his standard of punishment for many other offences.

104. The Dharma Shastra of Narad bears so close an affinity to the Code of Manu as to be regarded as one of its versions. From reference to the Roman gold coin *Dinarius*, which was introduced into India about the first century, the Smriti must have been compiled after that date. But inasmuch as it agrees on many points with the *Smritis* of Yadnyavalka, Vishnu, Katyayan, Brihaspati and Vyas and reflects a more developed stage of judicial procedure, it may be safely assigned to the fourth century A.D.

Narad, 400 A.D.

105. In his own preface to the Smriti, Narad admits that the work is no more than an abridgment of Manu, made for the convenience of study by those who should find Manu unmanageably bulky. But if Narad is an abridgment of that work, it is also an improvement thereon in many respects. The opening chapters deal with judicial procedure, the plaint, pleadings and judgment, and the constitution of the Courts. He then deals with the subject of debts and pledges which appear to have tormented the old world as it torments the new. He then deals with evidence and ordeals, deposits, the resumption of gifts, breach of a contract of service, rescission of purchase, trespass and boundary disputes which are followed by the law of impotency and marriage.

106. Narad allows the wife to divorce her husband for impotency:[13] "Women have been created for the sake of propagation, the wife being the field and the husband the giver of the seed. The field must be given to him who has seeds. He who has no seeds is unworthy to possess the field."[14] Narad permits an engagement to be broken in favour of a better suitor.[15]

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(1) XVII-19-23. *See* this subject discussed in the Commentary, *post*.
(2) XVIII-34, 35.
(3) XVIII.
(4) V-181-184.
(5) "Bull's hide." That land, whether little or much, on the produce of which one man can subsist for a year is called the quantity of a "bull's hide." —V. 183.
(6) V-181.
(7) V-184.
(8) V-189, 190.
(9) V-40, 41.
(10) V-27-29.
(11) V-31-36.
(12) V-42-44.
(13) XII-16, 18.
(14) XII-19.
(15) XII-30.

He regards Niyog as still customary.[1] The sonless widow must have intercourse with her husband's brother till she has begotten a son, after which the brother is enjoined to let her go.[2] A married woman could re-marry, if her husband does not return after a stated number of years.[3]

107. Narad's law of partition is indistinguishable from that of Manu, but most of it is now obsolete. For instance, he concedes to the father the right of partition when he is striken in years,[4] or when the mother had ceased to menstruate.[5] He allows the eldest son a larger share.[6] His allotment of share amongst the subsidiary sons is, of course, equally obsolete. But on many other points of partition and inheritance, Narad's rules are still in force.

108. Comparing Narad with the older sages, it is evident that the distinction between Duty (*Dharma*) and Law was becoming more perceptible, though it was not so clear as it had become to the contemporary Roman jurists. Narad was probably the contemporary of Justinian, and if the two works are compared, they present a contrast which is only explicable on the assumption that while the sacerdotal law was still struggling for emancipation from its close confines, the secular law had already assumed a vigorous shape and form in the clear atmosphere of a thinking democracy.[7]

Brihaspati, 450 A.D.

109. Of Brihaspati we have merely a fragment, but its value is held to be in the fact that it affords a key to the age of Manu. Brihaspati is, indeed, regarded as one of its many versions—its other versions being those by Bhrigu, Narada and Angiras. Brihaspati mentions the *Dinar* (*Denarius*) as a current coin which was a copy of the Roman Denarius introduced into India in the first century A.D. The outstanding feature of Brihaspati is his definite pronouncement against Niyog. On "account of the successive deterioration of the four ages of the world" it must not be practised by mortals in the present age according to law.[8] He also advocates the custom of *Sati*, holding that "whether she ascends the fire after him, or chooses to survive him, leading a virtuous life, she promotes the welfare of her husband."[9] It does not appear when and how this custom arose. But one would not be far wrong in ascribing it to the cruelty of the husband's relations, to the contempt with which she was universally regarded, and the persecution which was her lot as one whose very sight and presence was unlucky to the beholder.

110. Inter-caste marriages, were still legal,[10] and the shares of sons are consequently apportioned according to the caste of their mothers,[11] but the tendency to restrict the sonship is outlined in the view that out of the thirteen sons[12] "the legitimate son of the body (*Auras*) and the appointed daughter (*Putrika*) continue the family."[13] Brihaspati allows the wife

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(1) XII-58.
(2) XII-80, 81.
(3) XII-98, 99.
(4) XIII-4.
(5) XIII-3.
(6) XIII-4, 13.
(7) Translated in 33 S.B.E., pp. 271-390.
(8) XXIV-12.
(9) XXIV-13.
(10) XXV-14.
(11) XXV-27, 28, 29.
(12) Brihaspati adds the appointed daughter as equal to a son, and she with the 12 sons already enumerated make thirteen; *Ib.*, XXV-35, 33 S.B.E., 375.
(13) XXV-33.

to inherit to her husband's movables but not to his immovable property.[1] But he allows the daughter to inherit all property in default of the wife.[2]

111. Brihaspati, for the first time, enunciates the condition and the law of reunion.[3] He cites Manu as having prohibited gambling,[4] but the spirit of gambling was abroad and Brihaspati allows it "under the superintendence of keepers of gambling-houses, as it serves the purpose of discovering thieves.[5] For the rest, Brihaspati voices the stereotype views of his predecessor.

112. The Smriti of Yadnyavalka[6] is stated to rank next only to the Code of Manu in its authority. It owes its added importance to one of its commentators Vidnyaneshwar, whose commentary thereon—called the Mitakshara—is nominally still the current law of the land, though in reality most of it has naturally been buried under the dust of ages, and what remains can only be safely relied upon if it is supported by the judicial commentary of the ultimate Court of appeal. But so long as the Dharma-Shastras still adorn and diversify the text of legal treatises, both the Smriti of Yadnyavalka and the commentaries thereon must remain the text, round which all law must cluster.

Yadnyavalka, 350 A.D.

113. The Institutes of Yadnyavalka are probably a versification of a Dharma-Sutra—or a set of aphorisms on Dharma (or Duty)—belonging to a school of the Yajur-Veda which flourished in the third and fourth century A.D.[7] Internal evidence points to the author being a native of Mithila, the capital of Tirhut.

114. The work is divided into three parts: the first deals with *Achar* (or the rules of conduct); the second with *Vyavahar* (or domestic law); and the third with *Prayaschit* (or penances). As usual, the subject is throughout dealt with in a series of incomplete and often unintelligible aphorisms drawn up for justifying a crop of commentaries to be presently noticed (§ 129). These commentaries possess the leading characteristics and the defects of all commentaries noticed later (§ 158). As, moreover, these commentaries reflect the view of a later age, it would perhaps be useful, if following the method hitherto adopted, the Institutes are perused without their attendant commentaries.

115. As regards marriage, Yadnyavalka still allows inter-caste marriages.[8] But he limits with Vashishth the three regenerates to three, two and one wife respectively. Niyog is modified but not abolished. The wife is required to co-habit with the husband's younger brother during his absence, and failing him with a *Sapinda* or *Sagotra* till a son is born.[9] Her perpetual dependence on men is again insisted on,[10] but in some minor respects her lot appears to have been improved by such allusions as that one should not take food before one's wife.[11]

116. The second chapter deals with legal precepts and procedure. As regards debts, Yadnyavalka enacts the rule of *Damdupat*[12] whether on

(1) XXV-54; but see *contra* in *Ib.*, 65, 66, XXV-35.
(2) XXV-55.
(3) XXV-72, 73-77.
(4) XXV-11.
(5) XXVI-2.
(6) Translated by Mandlik (H.L.), pp. 157, 274.
(7) Weber opines its earliest age to be somewhere about 200 A.D.—Hist. Indian Lit., p. 281.
(8) I-57.
(9) I-68, 69.
(10) I-85.
(11) I-31.
(12) II-62, 56.

secured or unsecured debts. His conception of a mortgage is one with possession,[1] but he attaches special value to writing, holding that "a loan contracted by a written document is re-payable in three generations."[2] He prescribes rational rules for its execution and attestation by an even number of witnesses, who must write in their own hands, mentioning first the names of their respective fathers: "I am such and such a person, a witness in this document."[3] A document is of no value if it is obtained by force or threat.[4] "A debtor must enter on the back of the deed the payments he makes or the creditor should grant receipt in his own handwriting for the money received."[5] "After the discharge of the debt the deed should be destroyed; or for the validity of the transaction, a deed of release executed. What is paid before a witness must be re-paid before another witness."[6]

117. Yadnyavalka's law of partition provides for the shares of different sons; but it is, in principle, equitable. It is left to the father to either give his eldest son a larger share or to make all the shares equal.[7] He allows the wives possessing no stridhan of their own to share equally with the sons.[8] The rest of his rules on the important subjects of partition and succession are still authoritative and will have to be set out in the ensuing commentary.

118. Yadnyavalka lays down detailed regulations for the main, tenance of gambling-houses.[9] His Smriti is interspersed with the usual rules about ordeals,[10] disputed boundaries,[11] trespass by cattle,[12] sale of stolen goods,[13] gifts,[14] return of articles purchased and the conditions of its return.[15] The chapter relating to master and servant opens with a generous clause for the emancipation of slaves obtained by force or of those who, from starvation, have delivered themselves into slavery or those who being slaves save their master's lives.[16] But a higher caste could still enslave one belonging to a lower caste.[17]

119. Yadnyavalka prescribes punishment for abuse, insult and defamation, in which aggravation or mitigation of the offence is measured according to the relative castes of the parties.[18] He awards fine as a punishment for petty offences, the nature of which was probably determined by their frequency. Murderers were to be impaled,[19] women causing abortion were to be drowned[20] and those who kill their husbands, children or spiritual guide were to be trampled to death by oxen, after having their ears, fingers, nose and lips cut off.[21] The punishment for adultery varies with the caste of the offender, varying from a small fine to death.[22] Unnatural offence on the wife cost 24 panas.[23] The plea of the thief that he had entered the house at the invitation of one of its inmates is ordinarily as false as it is unquestionably ancient. The plea cost the accused 50 panas.[24] The king was intolerant of the seditionist. "One who indulges in talks affecting

(1) II-65.
(2) II-92.
(3) II-89.
(4) II-91.
(5) II-95.
(6) II-96.
(7) II-116.
(8) II-117.
(9) II-202, 206.
(10) II-97, 115.
(11) II-153, 161.
(12) II-162, 170.
(13) II-171, 177.
(14) II-179.
(15) II-180, 184.
(16) II-185.
(17) II-186.
(18) II-207, 232.
(19) II-276.
(20) II-282.
(21) *Ib.*
(22) II-286.
(23) II-296.
(24) II-304.

the interest of royalty, one who vilifies the king, or one who discloses his secret counsels, should have their tongues cut off and be banished."[1]

120. The age of Yadnyavalka was the age of literacy and co-operative industry. The former is manifest from the provision relating to written instruments, while the latter is manifest from a short Companies Act incorporated in the Smritis.[2] But it does not appear that such companies were anything more than trading partnerships, from whose profits the king received 5 per cent. as royalty.[3]

The third chapter relating to *asouch* or impurity deals with the obsequial rites and winds up with an epilogue on the origin of man from the Great Soul and his final absorption therein.[4]

Angiras, 1000 A.D.

121. The Samhita of Angiras is an anathema on the use of indigo-dyed cloth and the eating of food touched by low-caste people. It marks yet another step in the growth of caste rigour. But the twice-born were yet mutually tolerant of one another. They were only arrayed against the Shudra. "One may always take a Brahmin's food; a Kshatriya's on parva days; a Vaishya's in times of calamity; but never a Shudra's."[5] The protection of cows was also the special solicitude of Angiras who prescribes various penances for striking or maiming a cow.[6] Angiras' excursion into medical science is wild: "Milk and curds are digested within a month; and clarified butter within six months. It is doubtful if oil is digested in the stomach within a year."[7]

Minor Smritis.

122. Yadnyavalka was followed by a succession of minor Smritis, all of which deserve only a passing notice, as they are either mere reproductions or abridgment of the earlier Smritis. The introduction of writing into India by the adaptation of the 22 Semetic ideographic letters into the 52 Devnagri alphabets had given a great impetus to the production of new works modelled upon the old which were copied and put into circulation with great facility. But the hasty production of these works left much to seek. They are all dissertations on rituals, penances and penalties with an occasional fling at the Shudras and women. They, however, record the persistence of old customs, Niyog, for instance. "For knowing a woman brought by another for the purpose of procreating a son one becomes purified by bathing in the water of a river and drinking clarified butter."[8] Caste was growing apace with the diversified occupations. "A washerman, a cobbler, an actor, a varud, a kaivarta, a meda and a Bhilla,—these seven are known in the Smritis as degraded castes."[9] But the house of the twice-born was not as yet divided against itself, though the tendency was to caste exclusiveness. "If a twice-born person drinks water touched by Chandal, he becomes purified by a Krichhapad: So the ascetic Apastamb has said."[10] But "raw-meat, clarified butter, oil and oily substances obtained from fruits even when kept in vessels of degraded castes attain to purification when brought out."[11] Raw-meat was not yet taboo to the Aryan table, though the eating

(1) II-305.
(2) II-262, 268.
(3) II-264.
(4) III-118, 335.
(5) M. N. Dutt's Trans., p. 272, §§ 29-31.
(6) *Ib.*, § 47.
(7) *Ib.*, § 55.
(8) Atri, 182.
(9) *Ib.*, 195.
(10) Atri, 202, 248.
(11) *Ib.*, 247; Likhita, 89.

of beef had by now become sinful.[1] Most of the work of Atri deals with the penance attending on a connection with a Chandal or a Shudra woman. But despite recorded penances and penalties, such connections grew apace, and they account for the large and varied population of the Indian continent. Vyas regards such marriages as perfectly lawful,[2] and in his time, Shudra men appear to have taken to marrying Brahmin girls, though Vyas damns the offspring of such unions as Chandals and as devoid of any religious merit. But Vyas was reflecting only the social disgrace implied in such unions.[3]

123. The patriarch Daksha has some excellent advice for the householder, who must rise early and take a bath following his minute directions. He must not eat his meal alone but must extend his hospitality to all comers.[4] How to be happy, though married, is an eternal problem, and the sage Daksha devotes a whole chapter to connubial canons,[5] amongst which occurs his exhortation in favour of *suttee*: "A woman, who, after the demice of her husband, ascends the funeral pyre, becomes of good conduct and lives gloriously in celestial regions."[6]

124. The Smriti of Sankh is short and there is nothing to distinguish it from the rest of its kind. The sage Likhit idolizes the Ganges,[7] counsels the planting of trees, the excavation of wells and tanks, the letting loose of a bull as an obsequial gift on the eleventh day. A daughter may still be appointed to beget a son.[8] "The sin tantamount to an act of procuring abortion is committed, if through the negligence of her giver, a girl menstruates before her marriage. He who does not give away a daughter in marriage before she attains her puberty becomes degraded."[9]

125. This is a favourite exhortation backed up by the same simile throughout the Smritis. Vyas recognized inter-caste marriages. Exalted position is assigned to the wife as the better half of the man: "The God of Brahma cleft his body into two, of yore. Out of one part sprang the husband, out of the other the wife. This is what the Sruti relates."[10] But the daily duties of the wife, as stated by Vyas, are to rise before her husband, take a bath, clean the pots, cook his food and manage the household. He is to eat first. She is to live upon his offals.[11] A change in the Aryan dietary was made by Vyas. A twice-born was prohibited from eating meat.[12] This is then the commencement of pure vegetarianism. The tendency is noticeable in the earlier Smritis, but a bold bid for a vegetarian diet enjoined on not only the Brahmins, but all twice-born is for the first time made by Vyas who restricts the Aryan diet to merely boiled rice and milk.[13] There is now a definite and distinct cleavage amongst the twice-born themselves. "He who dies with the boiled rice of a Brahmin in his stomach acquires nectar after death. Dying with that of a Kshatriya in his stomach he is punished with indigence in his next birth; with that of a Vaishya in his stomach he is consigned to the vile necessity of eating a Shudra's boiled rice again; and with that of a

Vyas.

(1) Atri, 310.
(2) Vyas, Samhita, 7.
(3) *Ib.*, 9.
(4) Daksha, 49, 51.
(5) *Ib.*, Ch. IV.
(6) *Ib.*, Ch. IV, 19.
(7) Likhit, 7.
(8) *Ib.*, 52, 53.
(9) Vyas, 7.
(10) *Ib.*, 14.
(11) *Ib.*, 29.
(12) *Ib.*, 58.
(13) *Ib.*, Ch. III.

Shudra's boiled rice in his stomach, he is consigned to the torments of hell in his next life."[1]

Pious Forgeries.

126. About the middle of the 12th century A.D., one Ramanuj Acharya of Conjeeveram, in Mysore, founded the sect of Vaishnavas inculcating the supremacy of Vishnu, the supreme God, in opposition to Shiva, the God worshipped by the older sect of Shaivites. In order to lend his creed an antiquity and superior sanctity he forged and caused to be forged a number of new Dharma-Shastras bearing old and honoured names such as those of Apastamb, Gautam and Harit. They call for no further comment.

III

Commentaries.

127. The tenth and later centuries are remarkable for their output of commentaries on the old Smritis. As previously observed, though in form commentaries, they were independent works written to embody the law then current. Of the several commentaries on Manu that were written, that by Kulluka Bhatta, a native of Gour, the ancient capital of Bengal, is commended by Sir William Jones to be "the shortest, yet the most learned, the deepest, yet the most agreeable commentary ever composed on any author, ancient or modern, European or Asiatic."[2] Sir William Jones has incorporated this commentary in his translation of Manu.

128. Next in importance is the commentary of Gobind Raja. But this and all other commentaries have but little value now, as most of Manu is obsolete, and whatever of it survives has been reproduced in the Mitakshara (§§ 163-172). The same remark applies to the commentaries of Narad and other sages.

Mitakshara, 1150 A.D.

129. Of all commentaries that by Vidnyaneshwar, called the Mitakshara,[3] on the Institutes of Yadnyavalkya has obtained the foremost place, and is now acknowledged to be the most authoritative record of the Laws of the Hindus. All over India, its supreme authority is acknowledged, though in Bengal, and Bombay, it is more revered than followed.

130. Of Vidnyaneshwar little is known beyond the fact that he was the son of Padmanabha Bhatt of the Bharadwaj Gotra and that he lived at Kalyan, probably now Kalyani in the Nizam's Dominions, and was attached to the Court of King Vikramarka Vikramaditya VI, who reigned between 1076 A.D. and 1127 A.D.[4] Vidnyaneshwar quotes Bhoj and Dhara who flourished in the first half of the same century, from which his commentary may safely be assigned a date about the middle of that century. He was an ascetic (*Paramhans*) and belonged to the Vaishnav sect to whose activity in fabricating Dharma-Shastras reference has already been made. Vidnyaneshwar was thus a native of Deccan and his book, consequently obtained great vogue in the Western and Southern India, from where its authority and fame spread to the Gangetic valley and the rest of India.

131. Though itself a commentary, Mitakshara has found other commentators. Consequently, we have first the text of Yadnyavalkya, then

(1) Vyas, 66.
(2) Intro. Manu, XVII.
(3) Lit. Sk. *Mit*, short and *Akshara*, letters, *i.e.*, short abridgment, compendium, epitome.
(4) V. A. Smith's Early History of India, (3rd Ed.), p. 432.

its explanation by Vidnyaneshwar, and then other explanations of his explanation.

132. The two commentaries on the Mitakshara are the *Subodhini* by Visveshwar Bhatt and the Lakshmi Vyakhyan or Ballam Bhatta Tika, composed by a lady author by name Lakshmi Devi, whose patronymic was Payagunde. According to tradition, this lady was a victim to early marriage and enforced widowhood. As a child widow, she commenced to while away her time in the study of Sanskrit under her father, and though adopting the traditional method of interpretation, she strives to the utmost to enlarge the rights of her sex, but which unfortunately, could not penetrate the iron conservatism of the age, which was too well agreed on the ruthless subjection of women. Visveshwar's comments explain only selected passages, but Lakshmi Devi gives a full and continuous verbal interpretation of the Mitakshara accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation possible to every term of Yadnyavalkya. Her views are held in comparatively small esteem and are hardly ever cited by the Shastris.[1]

Scheme of the Mitakshara.

133. The Mitakshara follows the Institutes of Yadnyavalkya in its tripartite division of the work into Achar,[2] Vyavahar[3] and Prayaschit parts, and contains 1,185 *slokas* (couplets). Of these, only a section of the second division treating of partition and inheritance has direct legal value. Its opening slokas 1-9 deal with invocation and the difference between *Dharma* (duty) and *Adharma* (sin). In slokas 4-5 Vidnyaneshwar mentions 20 *Rihsis*[4] whose works must be studied. He says that all these works are authoritative and they only supplement one another, and they must all be regarded as authoritative even when they contradict one another but then one is free to follow the one or the other.[2]

134. He then enters into the discussion of a Brahmachari, classifying all society into (*i*) Brahmin, (*ii*) Kshatriya, (*iii*) Vaishya, and (*iv*) Shudra, of whom the first three are Dwija (twice-born) whose life is regulated by the Vedic ritual.[3] He then sets out the rituals to be followed in securing impregnation, and the periodical rites to be performed till the child is six months old when it is to be given food.[5] A Brahmin boy should be invested with the sacred thread in his eighth year from the time of conception, a Kshatriya in his 11th and a Vaishya in his 12th year.[6] The remaining few verses detail the mode of cleaning the body and the like, and the study of the Vedas.[7] The next few verses deal with marriage.[8] Vidnyaneshwar expressly dissents from the view of Manu and the rest permitting inter-marriage between the twice-born and the Shudra.[9] He repeats the earlier text in favour of limited polygamy, permitting the Brahmin three wives, the Kshatriya two, and the rest, one wife each.[10] He recites the usual eight forms of marriages, reprobates re-marriage of widows or their duty to procreate a son to their deceased husband,[11] and does not

(1) W. & B. H. L. 17.
(2) Mit. vv. 4-5.
(3) *Ib.*, S. 10.
(4) (1) Manu; (2) Atri; (3) Vishnu; (4) Harit; (5) Yadnyavalkya; (6) Ushanas; (7) Angiras; (8) Yama; (9) Apastambha; (10) Samvart; (11) Katyayan; (12) Brihaspati; (13) Parasar; (14) Vyas; (15) Shankha; (16) Likhit; (17) Daksh; (18) Gautam; (19) Shatatap and (20) Vashishth.
(5) Mit., S. 12.
(6) *Ib.*, S. 54.
(7) *Ib.*, Ss. 15, 44.
(8) *Ib.*, Ss. 45, 75.
(9) *Ib.*, S. 56.
(10) *Ib.*, S. 57.
(11) *Ib.*, S. 75.

omit to emphasize the woman's perpetual dependence on man.[1] Inter-caste marriages were still in vogue, but they were only confined to the twice-born,[2] though popular opinion increasingly disfavoured them.[3] The rest of the chapter repeats the old rules relating to ritual and the duty of each caste. The second chapter, relating to Vyavahar (or social duty), commences with the rules of common morality, duty of the king, the law of mortgage, the rate of allowable interest, the rules of evidence and the appraisement of oral evidence.[4] His rules about written deeds[5] are mere reproductions of the earlier sages, already mentioned. So are his rules about ordeals.[6] His subsequent sections on partition and inheritance, comprising 307 verses, being his commentary on Yadnyavalkya's, 36 verses on the subject, have been translated by Colebrooke and are the foundation of the modern Hindu Law of Partition and Inheritance. As such, they will be referred to in the ensuing commentary.

135. The rest of his commentary has no present value. It deals with the subject of boundary disputes,[7] delicts,[8] bailments,[9] contract of service,[10] duties of a king, and an unclassified miscellany of precepts, principles, duties and penalties which must, if ever, literally enforced, have made the life of the bewildered Aryan intolerably hard and mechanically monotonous.

The third chapter relating to ceremonial purity and impurity closes the work. It has no immediate value to the lawyer. As previously stated, what is now accepted by the Courts as the Mitakshara is a translation of Vidnyaneshwar's comments on Yadnayavalkya, Chapter II (Dayabhag section), and on this meagre foundation, the vast superstructure of the Hindu Law of Partition and Inheritance has been reared by the Courts.

136. The Mitakshara has gained its present ascendancy merely through the accident of its first discovery by the European scholars and the translation of its "Dayabhag" portion by Colebrooke in 1810, under the patronage of Government, which obtained wide currency and readily secured the *imprimatur* of the Courts who held it to enshrine all the sacred laws of the Hindus, regulating the succession and inheritance to their property.[11] Hindu writers wrote their Dharm-Shastras either in the form of *Nibandhs* (*i.e.*, treatises or digests) or *Tikas* (*i.e.*, commentaries), but whether they were one or the other in form, they were usually both alike in substance, since they were both founded on old texts, in which the writers incorporated or interpolated all the accepted usages then current. How far this was done in each case naturally depended upon the idiosyncracy of the writer. If he was one with a conservative trend of mind disapproving all new fangled innovations, he rigidly excluded them from his text or only alluded to them with a view to condemn them. If, on the other hand, he was a reformer, he readily welcomed the changes and thus gave them wider currency by according them his support. The authors of the Dayabhag and Mayukh belong to the latter class, while the author of the Mitakshara belongs to the former. He was an erudite pandit, but a stern and unbending Tory who overruled all encroachments upon established usages, being of opinion that nothing that is tried by time can fail to be good for the people.

(1) Mit. S. 87.
(2) *Ib.*, S. 88.
(3) *Ib.*, S. 90.
(4) Ss. 244-453.
(5) Ss. 453-477.
(6) Ss. 478-492.
(7) Ss. 602-625.
(8) Ss. 626-668.
(9) Ss. 669-676.
(10) Ss. 677-687.
(11) *See* Mandlik's Hindu Law, Intr., XLIX, *et seq*.

The Dayabhag.

137. The Dayabhag of Jimut Vahan, which rules Bengal, is only a chapter on Partition and Inheritance of a general work or digest of religious and civic duty, called the "Dharma Ratna." This work, like the Mayukh and the Smriti Chandrika, is in the form of a Nibandha or a Digest, rather than a commentary, the purpose of which is to expound the law, and at the same time to inculcate and lay emphasis on the special doctrines which its author specially favours. The common characteristic of the commentaries is that they quote the same text but draw their own deductions therefrom by a process of reasoning and reference to the rules of construction which are said to justify the gloss. Hindu writers make no distinction between digests and commentaries and they speak of them both as commentaries.

138. Of Jimut Vahan nothing is known beyond his name, and that he was a Brahmin of the Paribhadriya class and was the author of another work "Kalavivek," a copy of which, in the Library of the Asiatic Society of Bengal, bears on it the date 1417 Shak, which corresponds to 1495 A.D. Even his age is a conjecture,[1] though it marks an advance upon the development of Hindu Law, as portrayed in the Mitakshara, from which it differs upon many essential points on the subject of inheritance. It appears that the works that held the field prior to his appearance were those of Halayudh, Kulluka Bhatt, and Shulapani. Halayudh was a Judge of Lakshman Sen, the last Hindu King of Bengal, who flourished about the end of the twelfth century, whose work is lost, though from quotations made from it by other writers, it appears to have attained some degree of eminence amongst its contemporaries. Kulluka Bhatt is the celebrated commentator of Manu. He and Shulapani applied the doctrines of the Mitakshara to Bengal, till they were overthrown by the Dayabhag of Jimut Vahan. Jimut Vahan quotes the earlier writers, such as Bhoj Deva,[2] Gobind Raja,[3] Chandeswar,[4] and Vachaspati Misra,[5] which furnish data for a rough computation of his own age. The freedom with which Jimut Vahan discusses the doctrines of Vachaspati Misra, as contained in his treatise, Vivad Chintamani, is stated to show that the two writers were contemporaries. Jimut Vahan professes to base his treatise on the precepts of Manu, which he says have not been fully comprehended. He then cites Manu, Narad, Gautam, Baudhayan, Sankha, Likhit, Yadnyavalkya and other older sages and, upon their authority, refutes the doctrines of the Benares and Mithila School, supporting his own by an appeal to reason oftener than to precepts and precedents. The fact that Jimut Vahan frequently states and refutes the Mitakshara doctrines clearly shows that, after obtaining ascendancy in Bengal, they were in a decadent state and Jimut Vahan who voiced the popular view tries to explain them away without directly condemning them as based on fallacious reasoning.

139. The Dayabhag, like the Mitakshara, became the text for several commentaries, the earliest of which was composed by Srinath, himself an author of a work on Inheritance. The Dayabhag appears to have had its early struggle for fame. Till the early part of the sixteenth century it is mentioned by no other writer. Mr. Ghose opines that Jimut Vahan was attached to the Court of the King Jalaluddin Shah, a Hindu convert to

(1) In *Rajani Nath* v. *Nitai Chandra*, 48 C. 643 (687, 736) F.B. Mookerjee, J., holds that Jimut Vahan was alive in 1092 A.D.

(2) Dayabhag XI-2, 22; XI-2, 29.

(3) *Ib.*, XI-2, 23; XI-2, 29.

(4) *Ib.*, II, 27; IV-3, 23; XI-14; XI-4, 3.

(5) Sarv. Int., p. 402.

Mahomedanism, who, despite his conversion, continued to patronize *Pundits*, and he thinks that the fact that Jimut Vahan strikes out for individual rights in property with the power of alienation, refuting the old notions of coparcenary rights with its consequent survivorship, is due to the influence of his patron. To it he ascribes also the inclusion of females and the sister's son amongst heirs. This argument would have been plausible if Jimut Vahan had made any effort at the secularization of law. At the same time he has striven to modernize and reform the orthodox doctrines of the Mitakshara, which probably accounts for its neglect for about 200 years, till its doctrines were vigorously inculcated and given vogue by Raghunandan and other Pundits of Navadwip, who were formally consulted and influenced the decisions of the Mahomedan Courts.

Vyavahar Mayukh, 1650 A.D.

140. Jimut Vahan's Dayabhag is to Bengal what the Vyavahar Mayukh is to Bombay, an authority modifying the Mitakshara, wherever it expressly differs from it. In form it is an encyclopaedia of the sacred law and ethics of the Hindus. Of its author, Nilkantha Bhatta, all that is known is that he was a Deshastha Maratha Brahmin, born in Benares about 1600 A.D., and wrote his work under the inspiration and patronage of Bhagwant Deo[1] or Yuddha Sur, a Rajput prince of the Sengar clan, ruling over the town of Bharcha near the confluence of the rivers Chambal and Jumna. The work as a whole is named after the patron, the "Bhagwant Bhasker," that is, "the Sun of Bhagwant". This "Sun" consists of twelve "Mayukhs" or "rays" dealing with twelve different topics. They are: (1) Samskar (Sacraments), (2) Achar (Rituals), (3) Samaya (Festivals and religious rites), (4) Shradh (Obsequies), (5) Niti (Polity), (6) Vyavahar (Social duty comprising civil and criminal law), (7) Dan (Gifts), (8) Utsarg (Dedication to tanks, wells, etc.), (9) Pratishtha (Consecration of idols and temples), (10) Prayaschit (Penance), (11) Shuddhi (Purification) and (12) Shanti (Propitiation of evil spirits). Of all these "rays", the sixth is the one which deals with law, and as such possesses a direct legal value. This, like the rest of the "rays", is merely a compilation based on ancient texts interspersed with explanations, both original and borrowed, from other writers on law.

Mayukh and Mitakshara Compared.

141. Vyavahar Mayukh is in form a Nibandh,[2] and though it is independent of the Mitakshara, it differs from it but little, except that it recognizes the sister as heir to her brother,[3] and treats the estate inherited by the daughter as her *stridhan*. It also prescribes a special rule of succession to *stridhan*, technical and non-technical, following the Mitakshara as regards the devolution of the former, but providing for the inheritance of the non-technical *stridhan* by the male issue in preference to the female issue.[4] While the Mitakshara is nominally paramount in the Bombay Presidency it is subject to the Mayukh, which is the accredited work in that Presidency to interpret and supplement it, but only so as to harmonize the doctrines of the two so far as that is reasonably possible.[5]

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(1) Postscript to Mayukh, Ch. XXII, 3-7 (Mandlik, H. L., p. 156).
(2) "Commensary."
(3) Mandlik, H.L., p. 81.
(4) *Dayal Das* v. *Savitri Bai*, 34 B. 385 (387).
(5) *Vasudeo* v. *Venkatesh*, 10 B. H. C. R. 139; *Krishnaji* v. *Pandurang*, 12 B. H. C. R. 65; *Gajabai* v. *Shahajirao*, 17 B. 114 (118); *Kesser Bai* v. *Hunsraj*, 30 B. 431 (442) P. C.; *Bhagwan* v. *Waru Bai*, 32 B. 300 (312); *Dayal Das* v. *Savitri Bai*, 34 B. 385 (390).

142. The five marginally-noted works are those which are regarded as possessing special authority in the Madras Presidency.[1] Of these the Daya Vibhag was written by Madhaviya in the latter half of the fourteenth century. He was a minister of several kings of the Vijayanagar dynasty. The author of Saraswati Vilas is said to be Pratab Rudra Deo, a king of Orissa, who was a contemporary of Chaitanya and reigned between 1503-1524 A.D. The work was probably composed by one of his court pundits. It is not only an authority in the Madras Presidency but also in Orissa. Of Varad Raja, the author of Vyavahar Nirnaya, all that can be conjectured is that he was probably a Tamil and lived at the end of the 16th or in the beginning of the 17th century.

Madras Authorities:
(1) **Smriti Chandrika, 1300 A.D.**
(2) **Virmitrodaya, 1700 A.D.**
(3) **Daya Vibhag, 1450 A.D.**
(4) **Vyayahar Nirnai, 1600 A.D.**
(5) **Saraswati Vilas, 1500-1524 A.D.**

143. The Smriti Chandrika was written by Devanand Bhatt in the middle of the 13th century. It has been held to hold a position parallel to the Mayukh in the Bombay Presidency.[2] In Madras, it is regarded as the most authoritative commentary on the Mitakshara. It is supplemented by Vir Mitrodai which fills up many gaps and omissions in the earlier commentaries, and illustrates and elucidates with logical preciseness the meaning of doubtful expressions.[3]

144. Vivad Chintamani, and Vyavahar Chintamani, written by Vachaspati Misra are held in special esteem in the Mithila country. So are the other two works, Vivad Chandra and Vivad Ratnakar. Vivad Chintamani was probably composed about the middle of the fifteenth century. The Ratnakar was composed under the superintendence of Chandeshwar, minister of Harsingh Deo, King of Mithila, in 1314 A.D. Chandeshwar is also the reputed author of other tracts.

Mithila Authorities:
(1) **Vivad Chandra.**
(2) **Vyavahar Chintamani, 1500 A.D.**
(3) **Vivad Chintamani.**
(4) **Vivad Ratnakar, 1314 A.D.**

But Colebrooke considers Lakshmi Devi to be the author of these works, though she published them under the name of her nephew. The name "Vivad Chandra" owes its title to the tenth reigning prince Chandra Singh, grandson of Harsing Deo.[4]

145. Two special prose works on adoption, the Dattaka Chandrika[5] and Dattaka Mimansa[6] hold a high place in the estimation of Hindu lawyers in all parts of India. But of these, the former work, as now extant, is said to be a forgery prepared by one Raghumani,

(1) **Dattak Chandrika.**
(2) **Dattak Mimansa.**

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(1) *Collector of Madura* v. *Muttu Ramalinga*, 12 M.I.A. 397; 10 W.R. 17 P.C.; *Vedachela* v. *Subramania*, 44 M. 753 P.C.

(2) *Vedachela* v. *Subramania*, 44 M. 753 P.C.

(3) *Ib.*

(4) 1 Colebrooke's Digest, Preface, XX.

(5) *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 P.C.; *Damodarji* v. *Collector*, 7 A.L.J. 927 (931); *Nagindas* v. *Bachoo*, 40 B. 270 P.C.; *Arumith* v. *Arumith*, 44 M. 656 (665) P.C.; *Asita Mohan* v. *Nirode Mohun*, 20 C.W.N. 901 (910). In Bombay, the Dattak Chandrika and Dattak Mimansa are taken to supplement the Mitakshara and the Mayukh; *Laxmipat* v. *Venkatesh*, 41 B. 315 (337).

(6) *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 P.C.; *Radha Mohun* v. *Hardai Bibi*, *Ib.*, 460 P.C.; *Puttulai* v. *Parbati*, 37 A. 359 (367) P.C., as to which see *post*, *Buddha Singh* v. *Latto Singh*, *Ib.*, 604 (618).

Mr. Colebrooke's Sanskrit tutor, to support the claim of the plaintiff, an adopted son, to share equally with an after-born son in the case of *Gopi Krishna* v. *Radha Kant,* which was then pending in the Supreme Court at Calcutta, but which was compromised before proceeding to trial. The parties were Kayasths and the property in dispute a valuable Zemindari. According to the older authorities, the adopted son gets only a fourth of the estate[1] but Dattak Chandrika allows him a moiety.

146. There is a long but by no means an illuminating discussion on the subject in the Dattak Mimansa,[2] in which, however, the Chandrika is cited.[3] The latter admits the old rule but excepts the Shudras in a long argument,[4] which, considering its undue length and emphasis, is out of all proportion to its usual succinctness, and might be, probably was, an interpolation, but it does not prove that the entire work is a forgery as is contended for by several writers on Hindu Law.[5] Indeed, it is of the essence of literary forgeries of this character that something new should be inserted into what was old and venerated as such, and there was little risk of detection at a time when all such works circulated in manuscripts, and the text of no two manuscripts agreed. The work bore for its author the fictitious name of Kuver.

147. The Dattak Mimansa is written by Nand Pandit who is the author of other legal works, of which his commentary on the Institutes of Vishnu, called Vijayanti, and that on the Mitakshara, called Pratyakshara are still extant. The Dattak Mimansa has been treated by the Privy Council as a work "which has had a high place in the estimation of Hindu lawyers in all parts of India, and has become embedded in Hindu Law, but that caution is required in accepting the glosses of Nanda Pandit in the Dattak Mimansa where they deviate from or add to the Smritis."[6]

148. Two other works, the Dattak Tilak and Dattak Siddhant Manjari, on the same subject bear a similar stamp of suspicion, being, it is said, prepared to support the validity of the simultaneous adoptions of two sons, then questioned in a case in the Supreme Court before whom they were cited.[7] Other special works on the same subject such as Dattak Nirnai, Dattak Didhiti, Dattak Darpan, and Dattak Kaumudi are also not free from the same suspicion. But with the exception of the Mimansa and the Chandrika, they have all passed into oblivion and even their survival is not due to their merit but to the fact that they happened to be the first to fall into the hands of an English translator, Mr. J. C. Sutherland, who, in his preface, dated 1st July 1819, admits having completed it in his leisure moments in five years. Both these works are written in a style which renders them of little practical value, while what is not obscure is obsolete, as for instance, the view of Mimansa that a widow cannot adopt at all even though she might possess the express authority of her husband,[8] or that a woman cannot adopt her brother's son.[9] On several other points set out in the sequel these books have ceased to count.

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(1) Vashishth, XV-9; Mitakshara. I-11.
(2) Section VI, 15-7.
(3) *Ib.*, 8.
(4) Dattak Chandrika, V-29-34.
(5) Sarkar's Adoption (2nd Edition), pp. 124, 125; Ghose's Hindu Law (3rd Edition), 664.
(6) *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 42 P.C.; *Radha Mohun* v. *Hardai Bibi*, *ib.*, 460 P.C.; *Puttulal* v. *Parbati*, 37 A. 359 (367) P.C., in which the gloss of Nand Pundit was not followed.
(7) *Monmotho Nath* v. *Onanthnath*, 1 J. (N.S.) 24.
(8) *e.g.*, Dattak Mimansa, Ss. 1 27, 28.
(9) *Ib.*, 34, 35.

149. The age of the Mimansa cannot be ascertained but they both belong to the same critical age when legal texts appealed to divine sanction rather than to human reason for their authority. Of the two, the Chandrika preceded the Mimansa.

150. This closes the first stage of Hindu Law. Its second stage is one of elucidation and exposition by European writers who, charged with the duty of administering the Hindu Civil Law in determining their personal relations, were naturally anxious to know something of that law at first hand.

IV.

151. It is a general principle that the private law of a community is not to be affected by a change of rulers, except on points upon which it conflicts with the public law. The mere establishment of a court to administer the law "according to justice and right" does not of itself imply any change in the law to be thus administered.[1]

Both the Hindu and Mahomedan rulers of India followed the same policy, but they mostly left its elucidation to the Shashtris who were not above moulding their opinions to suit the requirements of their patrons. But even the native rulers felt the necessity of a compact and codified statement of Hindu Law, and the Emperor Aurangzeb had one such digest[2] compiled by one Raghunandan, a learned Shashtri of Bengal.

Law under the East India Company.

152. The real history of Hindu Law under the East India Company begins from 1773 when the Regulting Act[3] was passed. It declared the supremacy of Bengal over the other presidencies, and confirmed the appointment of Warren Hastings, who had already been appointed Governor-General of the company's territories. It reserved to the Crown the power of establishing a Supreme Court of Judicature at Fort William, which was constituted by a Charter, dated 26th March 1774, till its suppression by the establishment of the High Court in 1861. It conferred plenary jurisdiction on the Supreme Court over all the inhabitants of Calcutta "provided that their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentus, by the laws and usages of Gentus; and where only one of the parties shall be a Mahomedan or Gentu, by the laws and usages of the defendant."[4] This was, however, a mere legislative expression of Warren Hastings' plan, for determination of justice proposed and adopted by the company in 1772, which provided that "Moulvis or Brahmins" should respectively attend the courts to expound the law and assist in passing the decrees.[5] Subsequently, when Parliament invested the Governor-General in Council with the power of making regulations, the exact words of Warren Hastings' plan were incorporated into the first regulation[6] enacted by the Bengal Government on the 17th April, 1780.

Anglo-Indian Digests.

153. No sooner were the provisions, mentioned in Art. 196, placed on the statute book than Sir William Jones, then a Judge of the Supreme Court, felt the necessity of digests and authentic translations. In 1796, Jagannath Pandit composed *Vivad Bhangarnava* under Colebrooke's direction, who translated it in the

(1) *In re Khandu*, 5 B. 154.
(2) Named *Fatwai-i-Alamgiri*.
(3) 13 George III, C. 63. In its "short title" this Act is described as an Act of 1772 because Acts then dated from the beginning of the Session, in which they were passed.
(4) *Ib.*, Ss. 13, 14.
(5) Rule 23.
(6) Reg. I of 1871, Ss. 17, 21.

same year into English. Sir Thomas Strange, Chief Justice of Madras, devoted his retirement from judicial office in compiling two volumes of Hindu Law, published in 1825, in which he essayed the task of stating the leading principles of law in his own language, departing from the conventional garb of commentaries and digests. Sir William Hay Macnaughten came to India as a cavalry cadet and used his leisure in acquiring the Persian and other Oriental languages. While serving as Registrar of the Sudder Divani, he published in 1829 his "Considerations on Hindu Law" and "Principles and Precedents of Hindu Law." But the next year he was transferred to political service, in which his distinguished career was cut short by his assassination by the Afghans in December 1841. Many of the topics dealt with in the works of these two authors have since been superseded by the Statutory Law.

Another work on Hindu Law made its appearance in 1878. It followed the historical method of presentation of law which loaded his work with a great deal of obsolete matter. However, it set the standard for other writers to follow. But all of them have since receded into the shade of oblivion.

Numerous attempts were thus made by Anglo-Indian writers to codify Hindu Law, but they all failed, because, instead of re-stating the principles in an independent code, using precise and technical language, the so-called codes were merely an assortment of old aphorisms, collected from the various sources, which contained all the defects of imperfect and loose expressions used therein.

Hindu Law Modified by Statute.

154. The executive and statutory declarations, above referred to, (§ **152**)have not prevented the modification of Hindu Law by statute. As such, the Legislature, though slow to respond to the evolution of Hindu society, has, nevertheless, to interfere in suppressing and punishing cruel practices such as infanticide, *Sati,* and giving to the seceders from the Hindu faith freedom of conscience by removing the penalty which that law imposed upon heretics of forfeiting their rights of property.[1]

The Hindu Widow's Re-marriage Act[2] and some reforms of the marriage laws[3] have been impelled by the same desire, while still later Acts have modified the law of succession and repealed the foreiture of rights by a person born impotent and the like.[4]

Similarly, the Hindu Family Law and that of property and procedure have been modified or repealed to a very large extent by numerous Acts of the Legislature, rendering all but very few principles of Hindu Law, as stated in the Shastras, operative. The fact is that with the growing activity of the Legislature, and the acceleration of the pace of its reforming zeal, forced upon it by the pressure of public opinion, has completely outstripped the primitive condition of existence for which the text-writers provided a legal guide. There is scarcely any principle of the orthodox law that has not been eaten into either completely or partially by the Legislature or by the Codes. So far as the Legislature is concerned, the whole of the Civil Procedure, the Criminal Procedure and the law of Evidence are now subject to the Statute Law superseding the Shastric Law on the subject.

(1) The Freedom of Religion Act, XXI of 1850.
(2) Act XV of 1856.
(3) Special Marriage Act, III of 1872, as amended by Act XXX of 1923.
(4) Hindu Inheritance (Removal of Disabilities) Act, (XII of 1928).

Even as regards the substantive rights, the Transfer of Property Act,[1] the Succession Act[2] the Negotiable Instruments Act,[3] the Guardian and Wards Act[4] and several other Acts have directly superseded the personal law, and more recently important and far reaching of the first two Acts have thrown the Hindu Law of gifts and wills into complete obsolescence. Other Acts have likewise reformed the law of marriage[5] joint family[6] and nontestamentary succession,[7] similarly, the Religious Endowments Act of 1863[8] and another Act enacted in 1920,[9] while relinquishing some measure of judicial control over religious endowments has left untouched official control over all public endowments, and as regards religious endowments. That Act and other later Acts have provided a measure of control in accordance with the general law.

Judicial Decisions.

155. Not only the Legislature but the decisions of the courts, particularly of the Privy Council, have tended to modernize Hindu Law. The process comprises (*a*) the enunciation of rules in accordance with the precepts of justice, equity and good conscience, upon points on which Hindu Law was wholly silent, or guided by the self-same principle, (*b*) the interpretation of ambiguous or contradictory texts, (*c*) the application of the principle of analogy with (*d*) the consequent fertile deductions and corollaries.

156. An instance where the intervention of the courts or the legislature was rendered necessary by the gross inequality of the rule, which made the son and the grandson liable as a matter of pious obligation or religious duty to pay the debt of their ancestor is afforded by the primitive notion of Hindu Law, that all breaches of contract were sins to be atoned for in the next world. The obligation to pay was personal and perpetual and it was independent of the existence of any paternal assets in hand. The law being unjust, the Courts from early times commenced to limit the son's liability to the extent of the debtor's assets in his possession. But the Court in Bombay held the duty literally binding upon the son till the Legislature intervened to limit it to the assets.[10]

Custom.

157. Another attack upon the orthodox doctrine is made by custom, whose force as the precursor and progenitor of all laws is well recognised in the codes of all nations. "Immemorial custom is transcendent law", says Manu.[11] In its inception, custom is the mode of life adopted by one or more persons and copied by others who feel attracted to it by authority or by the community of thought or feeling.

The term custom in legal parlance has been restricted in its use only to unwritten usage confined to a peculiar class or locality, but when it becomes universal it passes out of the region of custom. The Greeks divided their laws into written (*Lex Scripta*) and unwritten (*Lex non Scripta*), the former being well ascertained and authoritative laws, while the latter were customary which owed their authority to popular acceptance. This dis-

(1) Act IV of 1882, as amended by later Acts.
(2) Act XXXIX of 1925.
(3) Act XXVI of 1881.
(4) Act VIII of 1890.
(5) Act XI of 1929.
(6) Act XXX of 1930.
(7) Act XII of 1928; Act II of 1929; Act XVIII of 1937.
(8) Act XX of 1863.
(9) Act XIV of 1920.
(10) Bombay Hindu Heirs' Relief Act, (Bombay Act VII of 1866). *See* this Act printed with the statement of objects and reasons in 2 B.H.C.R. 413, 416.
(11) Manu, I-180. To the same effect, Apastamb, II, 11, 19; Gautam, IV, 20; Vashishth, I-17; Mitakashara, I, S. 3, 4; Dayabhag, I-33; Mayukh, I, S. 15.

tinction was borrowed by the Romans,[1] and it has thence been transferred to English Law. As a branch of Hindu Law, custom plays an important part. It modifies or supplements the written law however well established or ascertained,[2] while in the Punjab custom is the first rule of decision in all questions relating to several branches of the personal law.

Legal Value of the Smritis.

158. The outstanding features of all these sacred compositions and compilations are: (1) They are professedly and designedly moral codes treating of civil obligations merely as a part of the moral duty of an ideal householder. (2) Wherever legal precepts occur, they are consequently, treated as rules of ethics and not as mandates of law. (3) The books are sometimes regarded and spoken of as codes but they are codes in no sense of the term, inasmuch as they do not contain any systematic exposition of the legal doctrine. On the other hand, they are a mere collection of aphorisms or sutras intended to aid the memory in teaching and acquiring religious knowledge. (4) As such, unlike the laws of Solon, or the Twelve Tables, or the institutes of Justinian, the Smritis were written by private individuals for the edification of their pupils, and generally of those who should care to refer to them, but they had no binding force as enactments of a lawfully constituted authority. (5) Since the Smritis stood upon their own merits, they were mostly records of the prevailing customs, accommodated in a certain degree to the idiosyncracies of the writer. (6) No Smritis can be safely regarded as free from interpolations. There is, indeed, internal evidence in several of them that many of them were subjected to systematic interpolations at the hands of the glossators. (7) The interpolations were due to the desire of the latter writers to popularize their own views by passing them off as the views of revered and established ancient authority. (8) Even whole works have been forged and made to bear the *imprimatur* of ancient sages. (9) On the whole however, they reflected in the main the manners and customs of the times, modified only by the private opinions of the Brahmin writers who have given them a shape and character consistent with their self-interest as members of the priestly class; as such, anxious to preserve their supremacy and power. As regards the titles of the several Smritis, it appears that some of them bear the names of the princely patrons to whose court the composer was for the time being attached. Some bear the names of the several gods of the Hindu pantheon, while a few bear descriptive or fancy names or a combination of one or the other. All Smritis claim a divine origin as calculated to insure implicit obedience, and all disguise, as far as possible, any reference to their modernity.

Mimansa Rules of Interpretation.

159. With the growth of a considerable body of legal aphorisms—many of them chaotic and contradictory—some working rules for their interpretation had to be devised. In the sixth or seventh century[3] Jaimini collected these rules in his "Mimamsa Sutras" with the object of introducing some critical insight into his students studying the revealed law. His work does not discriminate between civil law and religious duty,[4] the performance of which secures merit.[5] Jaimini's aphorisms are them-

(1) Institutes, I-1, T. 2, Ss. 3, 9.

(2) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (436).

(3) Not in the 13th century A.D., as assumed, for Jaimini's aphorisms are quoted in the Mitakashara. *See* Max Muller's Six Systems of Indian Philosophy, p. 118.

(4) *Cf.* "What is to be fulfilled as the object of a command is *Dharma*"—Jaimini, 1-i-2.

(5) *i.e.*, "Apurva"—lit, "what one

selves highly artificial, and in their turn, require voluminous commentaries to expound their meaning. An examination of his work discloses the scholastic method of interpretation: *obscurum ab obscurius* though in other respects are quite reasonable, hold good to-day as when they were originally enumerated.

160. It will be noticed from the foregoing pages that the age of the lego-religious codes, of which those of Manu and Yajnyavalka are best known, was followed by the age of commentaries. These were stereotyped and, as often as not, obscured the very texts by slavishly repeating the old aphorisms but placing upon them new meaning so as to reconcile the growing custom of the age, with custom that had long ceased to exist. A revolt against them was marked by the works of the two Macnaughtens and Sir Thomas Strange. In his history of India, Mill had pleaded for a modern code, and in 1832, the House of Commons appointed a Committee to report upon its possibility and utility. It examined a large number of witnesses, including Mill himself, and they recommended the appointment of a Royal Commission to codify both the Hindu and the Mahomedan Laws. A year later, the Charter Act of 1833 created the office of the Law Member of the Governor-General's Council, and Lord Macaulay was appointed as its first incumbent. He was commanded by the Parliament to ascertain and digest the laws of India with the assistance of a Law Commission. Macaulay was confident that he would be able to codify both the laws, and hoped to finish that great work "before the boys who were then entering the Madrassa and the Sanskrit College had completed their studies.[1]

161. But the work, if undertaken at all, was never finished, and the Law Commission, in their Report dated the 13th December 1855, abandoned the attempt on the ground that it would arrest the development of Hindu Law, and, what they regarded as decisive, that the Legislature possessed no power to do it. It is useless to combat these views, for they are so transparently fallacious and stand refuted by the conduct of the Law Commissioners themselves who had, at the same time, drafted the Bill which became the *Lex Loci* Act.

162. This Commission was followed up by several other commissions,[2] which took for granted that their predecessors had spoken the last word on the subject. And in 1878, Mr. John Mayne dismissed its possibility as a miracle.[3] The matter rested there till the first appearance of this Code, since when the two Houses of the Indian Legislature have pressed upon the Government the necessity of legislation in favour of codification, and both its possibility and utility are now recognized as beyond dispute.

163. The essence of a code is to be exhaustive. A modern Hindu Code must eschew the diffuse imperfections of the classical aphorisms. Its language must be precise and its decision free from the artificiality of classical expression. It must be something quite different from a conglomeration of hackneyed quotations from the classical authors who wrote in an age less critical and more in touch with the inner meaning of aphorisms

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had not had before," *i.e.*, merit or virtue, or divine approval.

(1) Macaulay's Minute, dated the 2nd February, 1835.—1 Selections from Educational Records, p. 114.

(2) 2nd Commission, appointed in 1853 by S. 28 of the Charter Act, 1853 (16 & 17 Vict., C. 95). 3rd Commission appointed in 1861 by the Secretary of State. 4th Commission appointed in 1879. 5th Statute Law Revision Committee appointed by the Viceroy with the previous sanction of the Secretary of State, 1921.

(3) Preface, Hindu Law, 1st Edn., reprinted in the 7th Edn., p. xiv.

little useful as a collection of Latin Maxims, which, however, useful as aids to memory, are, nevertheless, mere tags intended to assist the student in his study of law.

164. An ideal code should do more. It must enunciate the leading principles and steer a middle course between scantiness and diffuseness of expression. That our other secular codes cannot be acquitted of this blemish is no reason why the Hindu Code should imitate their example. Time alone will show whether such a code can ever be compiled.

165. But whatever may be in the womb of the future, there can be no doubt that the present state of Hindu Law constitutes an anomaly, unparalleled in the history of the world. The Hindu Law as expounded by the text writers and commentators has been declared to be the law of the Hindus. Though the Legislature possesses the authority to interfere, it is pledged to leave it alone. The old race of commentators, who, by interpretation, annotation and analogy, brought that law into line with the altered social conditions is extinct and their occupation gone. Their place is now assumed by the judges of the British Courts who are all subordinate to the Privy Council in London. It is manifestly out of touch with the current of Hindu opinion. Nevertheless, it interprets, applies and at times, modifies or extends the law, though it is in fact presumed to do no more than administer it. If in doing so it conforms to the altered opinion, it is by a mere accident. If it departs from the accepted view, the Legislature possesses power to correct it. But, nevertheless, the slow evolution of human thought is proceeding apace even in the unchanging East. Western education, the adoption of Western institutions and standards of life and comfort, the establishment of new industries and the amassing of wealth as a result of individual effort and enterprise have created new problems for which the sacred texts afford no satisfactory solution, and to overcome this the Hindu Gains of Learning Act,[1] was passed.

166. An effort was recently made in the Indian Legislature to secularize and codify the law, as had been done in Rome, fifteen hundred years ago, (§ 8) but the Government, though sympathetic, found itself confronted with a large and powerful volume of orthodox opposition, which has given a pause to its codifying ardour. And so for the present, there seems little hope for the Hindus, unless a new *Avatar* arises to overcome their prejudices and reform their laws.

(1) Act XXX of 1920.

THE HINDU CODE.

CHAPTER I.

OPERATION AND EXTENT OF THE HINDU CODE.

Short Title.

1. (1) This Code may be cited as the Hindu Code.

Local Extent.

(2) It extends to the whole of British India.

And except as provided by this Code or by any other law or custom, for the time being in force, the rules herein contained are applicable to all Hindus[a] and such other persons as may have adopted them.

Meaning of "Hindu."

(3) The term "Hindu" in this connection includes not only those who are Hindus by religion, but also those who are commonly known as such.[b]

(a) §§ 186-190. (b) §§ 218-222.

167. **Analogous Law.**—Hindu Law, as expounded by the Smritikars, has always been formulated in the form of codes. In later times, similar attempts have been made under European direction, of which a history will be found given in the General Introduction (§§ 160, 161). All these codes were, however, no more than select extracts from the sacred writings and shared their incompleteness. The present work is the first attempt to reduce it to a system in the shape of a code which the Legislature has left alone on account of its professed neutrality, only interfering on matters of detail, whenever impelled to do so by public policy or public opinion, with the result that the Hindu Law of the present day has to be found—some of it enshrined in the sacred works written in a dead language, some of it in the statutes, much of it in cases, and not a little of it in the commentaries and customs, of which a critical study involves time which every lawyer cannot afford, and even where time is of no consequence the result attained does not give one an assurance of that measure of certainty, which is the acknowledged justification of a code.

168. **History of the Hindu Code.**—The Hindu Dharma Shastras, which embody the rules of law here codified, are all in the form of codes. The laws of Rome, which are the parent of all European jurisprudence, are essentially codes so intended and constructed. The modern Continental and American law is mostly codified. So is the law of Japan. Various attempts have been made to codify the laws of England, but the attempts have so far failed. There is a tendency in the direction of the codification of Indian Law. The advantages of codification are its certainty, simplicity and uniformity; its sole disadvantage is stated to be its artificial rigidity.[1]

(1) *See* on this point the author's view set out at length in his General Introduction to the Law of Transfer, (5th Ed.), §§ 42-45.

The state of Hindu Law before and since the advent of British Rule has been already considered (§§ 152-155). The declared policy of Government to administer the Hindu Law as it finds it, does not preclude the possibility of its codification. The present work is an attempt in that direction.

169. Its Operation and Extent.—The Code is stated to extend only to British India, because many of its rules are based upon decided cases which have no more than persuasive value in the Indian States. But in practice, it is apprehended, its rules will be found generally applicable throughout India.

170. Extended Application of Hindu Law.—A detailed history of the operation of Hindu Law since 1772 has already been given in the General Introduction (§§ 152-155) from which it will be noticed that both in the executive instruction, issued by Warren Hastings,[1] as in all the subsequent statutory enactments,[2] the two communities specially referred to are the Hindus and the Mahomedans, and this sub-division was assumed to exhaust the entire population of India, it being assumed that those who were not Mahomedans must be necessarily Hindus and subject to Hindu Law. Now, as the Mahomedan religion is rigid as to whom it counts within its fold, it is not difficult to differentiate a Mahomedan from a non-Mahomedan. But it is not so easy to do so in fact as to them a Non-Hindu, especially those who live on the verge of Hinduism, by adapting themselves to its external forms. Consequently, the Legislature classed them all alike as Hindus, and declared the Hindu Law as applicable to them.[3]

171. Sources of Hindu Law.—As already observed, the ultimate sources of Hindu Law go far beyond the sacred writings, which are ordinarily held to embody it. Its immediate sources given below are now in the inverse order of their age and sanctity. The Shruti and the Smritis, being the oldest have practically all been superseded.

(1) The Shruti.
(2) The Smritis.
(3) Digests *and* Commentaries.
(4) Custom.
(5) Legislative Enactments.
(6) Judical Decisions.

172. The Shruti and The Smritis.—A general view of the sources of Hindu Law has already been presented in the General Introduction (Part II). It will suffice here to state that the *Shruti* or Revelation is a term applied and confined to the Vedas which possess no legal value (§ 29). The *Smritis* or Tradition, however, nominally constitute the chief source of Hindu Law. But as they constitute a record about 2,000 years old it is obvious that they must of necessity contain many contradictions due to the change of social conditions, which cannot all be reconciled on the complaisant doctrine that all contradictions are equally good law (§§ 39-40). The only rational rule to apply in such cases is that the later *Smriti* supersedes the earlier one.

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(1) Ilbert's Government of India, (2nd Ed.) 325.

(2) Geo. III, C. 70, S. 17; 39 and 40 Geo. III, C. 79, S. 5. See *Kahandas, In re,* 5 B. 154 (165, 166). Fully given in the 3rd Ed. of the present work in §§251-55.

(3) See *Bhagwan Koer* v. *Bose,* 31 C. 11 (29, 30) P.C.

173. Digests and Commentaries.—The Sanskrit legal works of greater value are, therefore, the Digests and Commentaries, which mark the last and comparatively modern period of Brahminical activity. As was to be expected, a few have outlived the time and place for which they were written, and are now acknowledged to possess predominating authority in certain provinces. Such is the work of the ascetic Vidnyaneshwar, called "The Mitakshara," or "The Compendium," which, though originally composed to guide a petty local chief, is now treated as possessing paramount authority in the whole of India, outside Bengal, where the "Dayabhag" of Jimutavahan holds the sway. But the paramount authority of the Mitakshara is now only so in name, since many of its doctrines have been refuted or modified by other works of local authority, and since, with the establishment of British Courts and the Legislature, the paramount authority has naturally become transferred to them, so that the authorities set out before, now possess finality and importance only in their inverse order.

174. But, nevertheless, there still remain points, unsettled by the Courts, on which the authority of the commentaries remains unshaken. Wherever it is so, reference must still be made to the Sanskrit works for authority and guidance. These works may be divided into two main groups: those which follow the old track and those which follow a line of their own. As such, Hindu Law has become divided into two schools known as the Benares and the Bengal school. The former is the orthodox or conservative school, while the latter is the reformed school. The text-book of the one is the Mitakshara, that of the other the Dayabhag; but both the schools and their acknowledged text-books are held to apply only to the inhabitants of certain territories, and in each case, they are subject to local modifications, sanctioned by text-books possessing only special local authority. The leading points of difference between the two schools have already been set out (§§ 129-139), and will have to be more fully considered in the sequel.

175. Their Legal Value.—These works, though they profess to be merely digests and commentaries on the older Smritis, are not to be treated as such, in any sense of the term, since, if they were in fact merely what they profess to be, their views could be corrected or contradicted by reference to the Smritis. But this is not allowable, for they possess an independent authority and are to be treated as works which, without reference to their form, portray the custom and usage of their contemporaries. In a case, Sir George Knox, J., referring to Vidnyaneshwar, said that he was only a commentator, and as regards the latest of the writers, such as Nand Pandit, he held that he was "as much open to review as the text of any commentator of the present school."[1] When this case went up, on appeal, to the Privy Council, their Lordships animadverted on this view of the classical texts,

(1) *Beni Prasad* v. *Hardai Bibi*, 14 A. 67 (114) F.B., O. A. *Sri Balusu* v. *Sri Balusu*, 21 A. 460: 22 M. 398 P.C.; *Muthu Karuppa* v. *Shellathammal*, 16 M. L.T. 587: 26 I.C. (M.) 785 (786, 787), in which it is observed: "The fact is that commentators felt that any attempt to prescribe rules of inheritance on their own initiative will not find acceptance amongst the people. They had to justify their position by a reference to the sayings of the Rishis. This led them not infrequently to depart from the literal meaning of the texts commented upon. They found a body of usage which was not in strict accordance with the *Smritis*. They had to recognize the force of such usage; but they preferred to say that the usage was within the meaning of the text. The commentaries indicate an attempt to reconcile the text law with the actual usage of the people."

adding: "Their Lordships cannot concur with Mr. Justice Knox in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatise on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognized law and settled arrangements. But so far as saying that caution is required in accepting their glosses, where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge."[1]

176. In another case, referring to Sir W. Jones' translation of a verse of Manu, in which certain words were said to have been interpolated by a later and inferior commentator named Prakash, and not by the ancient and eminent commentator named Kulluka Bhatt, as Sir William Jones believed, their Lordships said: "Their Lordships assume for the purposes of their judgment that Sir William Jones was mistaken in attributing the words interpolated in verse 122 to Kulluka Bhatt. But they observe that Sir William Jones' version was probably founded on the tradition of the time at which he wrote, and has been accepted in the Indian Courts without question. *Communis error facit jus* is a sound maxim."[2] To the same effect their Lordships had delivered themselves as far back as 1868, when they observed: "The duty, therefore, of an European Judge who is under the obligation to administer Hindu Law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has been sanctioned by usage."[3] Again, twelve years later, they said: "The Hindu Law contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should the Courts interpret the text by the application to the language of strained analogies."[4] But while the Digests and Commentaries have, now, with the passing of time, attained a status of their own, they do not necessarily exclude a reference to the Smritis which they profess to annotate. This was conceded to by the Privy Council in a case in which they said: "Many of the precepts of Manu have been undoubtedly altered and modified by the modern law and usage, but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law."[5]

Principles deduced.

177. The cases, then, settle the following points: (*i*) That the statements in the Digests and Commentaries, though professing to be merely comments on the original Shastric texts, cannot be examined with reference to the latter, but must be received as embodying the current accepted law; (*ii*) that even if the statement be an interpolation, it is no blot upon its validity if it has remained unquestioned for a considerable period, for the interpolation may itself represent the accepted popular view; (*iii*) that whenever it is necessary to refer to the first principles in order to ascertain the law, reference to the Smritis is still justifiable; and (*iv*)

(1) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 (411, 412) P.C.
(2) *Jagdish* v. *Sheo Partab*, 23 A. 369 (381) P.C.
(3) *Collector of Madura* v. *Muttu Ramalinga*, 12 M.I.A. 397 (436).
(4) *Bhayah Ram Singh* v. *Bhayah Ugur Singh*, 13 M.I.A. 373 (390).
(5) *Ramalakshmi* v. *Sivanatha*, 14 M. I.A. 570 (591).

that if there be a conflict between any text and its commentary, by a recognized authority, the latter should be accepted as reflecting the existing custom.[1]

178. **Custom.**—As a source of law, custom takes a conspicuous place in the legal systems of all the nations. As a matter of fact custom is the mother of all laws, and whether it be the *Shruti* or the *Smriti* they are both alike founded on custom. Indeed, "custom is powerful and overrides the sacred law."[2] The general influence of custom upon the Aryan law has been already considered (§ 157), and its particular significance in moulding the current law will be considered in the sequel.

179. **Judicial Decisions.**—The sacred books enshrine the written law. The Courts interpret and administer it. In doing so they place before themselves certain principles which have come to be regarded as rules for the interpretation of Hindu Law (§ 185). Where the Court finds a text suitable to the matter it has to adjudicate upon, it has naturally to interpret it. Now, the difficulty of understanding the texts is by no means small for they are often cryptic and contradictory, and are all written in a dead language which can only be interpreted by the learned *Pandits* whose aid the Courts have now ceased to take. They now interpret the texts for themselves with the aid of such published translations as they can find; and in doing so, they naturally accommodate them to their own view of what is just and proper. In other words, the judges, while professing to administer law, sometimes make it. This they have necessarily to do in cases not covered by any direct authority. But in either case, they test their decision by reference to reason and convenience.[3]

180. Then again, even where the Sanskrit text covers a point, it does not necessarily follow that the Courts are to give it the force of a statute.[4] Before giving effect to a text the Court has to consider whether it is precatory or mandatory, merely directory or absolutely compulsory. This view of the law had to be considered by the Privy Council who had to decide as to the validity of the adoption of an only son. The Smritis condemn it,[5] and the question which their Lordships had to consider was whether the scriptural prohibition was mandatory or merely monitory, and in adopting the latter view, their Lordships quoting from an earlier case decided by their own Board[6] remarked: "If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it, the law must be so declared. And the mere fact that a transaction is condemned in books like the smritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant."[7]

Stare Decisis.

181. Then referring to the conflicting decisions on the subject, their Lordships observed: "In estimating the weight of reasoning in the various litigated cases their Lordships have not forgotten the weight of actual decisions; that they

(1) *Atmaram* v. *Baji Rao*, (1935) P.C. 57.

(2) Narad 1-40; *Collector of Madura* v. *Muttu Ramalinga*, 12 M.I.A. 397.

(3) *Ramalaxmi* v. *Sivanath*, 14 M.I.A. 570 (593, 594).

(4) *Ganga Sahai* v. *Lekhraji* 9 A. 253 (296).

(5) Mitakshara, Ch. 1, S. XIV, 11: "So an only son must not be given nor accepted. For Vasishth ordains, 'Let no man give or accept an only son.'"

(6) *Rao Balwant Singh* v. *Rani Kishori*, 20 A. 267 (285, 286) P.C.

(7) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 (419) P.C.

represent the opinions of eminent and responsible men, arrived at after public and anxious discussion, carrying with them an authority not legally disputable in the provinces under their jurisdiction, and it may be affecting many lands and many titles to property or to personal status. Such decisions are not to be lightly set aside."[1]

182. Legislative Enactments.—The effect of legislation on Hindu Law is, unlike the influence of custom and judicial decisions, immediate and direct. The Legislature is paramount and it can make or unmake laws. It assured to the Hindus their personal law (§ 152) but finding it intolerable on many points it had to modify it. In other respects, for the sake of uniformity or public convenience, it had to legislate irrespective of racial law. A list of such enactments has already been given. (§ 154) Their particular effect will be found set out in the sequel.

183. Caste Autonomy.—Caste is an essential institution of Hinduism and the reservation of their personal laws to the Hindus implies the reservation of the jurisdiction of caste. This is ensured by the enactment which limits the jurisdiction of the civil Courts only to matters of a "civil nature." This term which occurs in the Civil Procedure Codes,[2] enacted since 1859, has, as regards caste, acquired a somewhat settled sense which limits and defines the respective authority of the caste and of the Courts in matters affecting personal status, the leading principles of which may be thus stated:—

(1) In all matters affecting any property, office or dignity carrying with it the right to any perquisite or emoluments, the Courts possesses jurisdiction to adjudicate, but in doing so the Court is limited to giving effect to what are considered as customary rights subject only to the just limitations within which they are operative. For instance, where a marriage takes place between persons, one or both parties to which are illegitimate children, or persons of any caste, its legality depends not upon what the Court considers right but rather upon how the caste people regard it. If the latter treat it as a good marriage, then the Court must assume it as such.[3] On the other hand, where the caste sanctions as marriage an alliance between a man and a married woman, who has neither been divorced nor deserted by her husband, the Court cannot give effect to the custom, as that would be tolerating adultery which is both immoral and opposed to the established law.[4]

(2) It is within the jurisdiction of the caste to appoint a man to an office of dignity, *e.g.*, that of a priest, and so long as it is connected with no right to property, the Court cannot control his appointment, retention or removal. But where there are annexed to it certain incidents in the nature of civil rights as against members of a community, then, in adjudicating upon the question the Court has necessarily to assume jurisdiction over the whole question.[5]

(3) Thirdly, for the protection and better management of public, religious and charitable endowments, the Legislature has armed the Court with certain powers of supervision and control in which it inherits the

(1) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 (430) P.C.
(2) *Bisheshur* v. *Matagolam*, 2 A.W.N. 300.
(3) *Muthuswami* v. *Masilamani*, 33 M. 342; *Ram Kumari, In re*, 18 B. 264.
(4) *Uji* v. *Hathi*, 7 Bom.H.C.R. (A.C.) 133; *Narain Das* v. *Tirlok*, 29 A. 4; *Emperor* v. *Lazar*, 30 M. 550.
(5) *Ghelabhai* v. *Hargovan*, 13 Bom. L.R. 1171.

powers, which the Hindu Shastras acknowledge, belongs to the Sovereign as the protector of *Dharm*.

(4) For the rest, the powers of the Court are confined to the interpretation and administration of the caste rules to persons acknowledging its supremacy.

A postacy or loss of caste by the husband is of itself no ground for refusing restitution of conjugal rights,[1] though the Court would be slow to decree it, since, by reason of the conversion to an alien faith, co-habitation has become impossible.[2]

184. It has already been pointed out (§ 6) how Hindu Law remained unsecularized by the divorce of legal from moral obligations. The tendency of judicial decisions by the European Judges has, in a measure, effected that severance, by the pure legal rules being separated from their religious figment, and crystallized into separate rules and principles, enunciating the living personal Hindu Law of the Hindus. Even where any matter is not the subject of a direct judicial decision, the reasoning and the rules given below, by which the Judges now consider themselves bound, have established canons for the construction of the sacred and secular Sanskrit texts, which should afford solution to the novel problems which must continue to arise in practice.

185. Rules of Interpretation.

(1) *Stare decisis.* In dealing with property and status, the Courts are essentially conservative, following their own precedents and never departing therefrom, unless very cogent reasons impel the departure.[3]

(2) All legal texts must be separated from moral injunctions, the former alone followed, the latter ignored, if their union is casual and not essential.[4]

(3) In interpreting old texts regard must be had to usage; for no text is binding unless it is accepted as binding on the community to which it relates.[5]

(4) When the two texts are equally authoritative but contradictory, the Court is entitled to select the one which is in conformity with reason and convenience.[6]

(5) In a conflict between the text and the recognized commentary, the latter is to be preferred as stating the later law.[7]

(6) Where a rule is ambiguous or uncertain the Court construes it reasonably.

(7) Where there is no rule, the Court decides according to the rule of justice, equity and good conscience.

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(1) Act XXI of 1850; *Emurtee* v. *Nirmul*, (1864) N.W.P.H.C.R. 853; *Sahadur* v. *Rajwanta*, 27 A. 96; *contra* 2 Dig. p. 413, overruled by the Legislature.

(2) *See* XXI of 1866, Ss. 16, 18; *Muchoo* v. *Arzoon*, 5 W.R. 235. *Cf. Moola* v. *Nundy*, 4 N.W.P.H.C.R. 109.

(3) *Rampiyari* v. *Mulchand*, 7 A. 114; *Bai Kesser Bai* v. *Hansraj*, 30 B. 431 (452) P.C.

(4) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 P.C.

(5) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (436); *Kumar Gangadher* v. *Kumar Hira Lal*, 20 C.W.N. 489 (499).

(6) *Vedanayaga* v. *Vedammal*, 27 M. 591; *Vedammal* v. *Vedanayaga*, 31 M. 100.

(7) *Atmaram* v. *Baji Rao*, 62 I.A. 139: (1935) P.C. 57.

(8) The Court always gives effect to the policy of the Legislature paying due regard to its behests.

(9) No rule, however sacred, is enforced if it is opposed to public morality.

(10) In construing the standard texts, the Court considers what is mandatory, and, therefore, legally enforceable, and what is merely monitory and, therefore, not legally enforceable.

(11) In administering the law the Court pays due regard to consistency assuming the body of law, so far as possible, to be consistent with itself.

(12) As such, the same word must be given the same meaning throughout the book.[1]

(13) A well-established usage overrides the written law.

(14) In giving effect to legal presumptions it pays due regard to the altered conditions of the present day.

(15) In construing deeds and bequests, the Court assumes what was tacitly and necessarily implied.

(16) Transactions prejudicing natural heirs must be supported by cogent reason and evidence.

(17) In all acts the Court presumes in favour of legality and morality.

(18) Where a legal precept is not wholly applicable, subject to the other rules, it applies it by analogy.

The concrete exemplification of these rules will be found in the ensuing commentary.

186. Who are the Hindus?—In the first place, Hindu Law applies to Hindus. But who are the Hindus? This is by no means an idle question, for, beyond a certain number who observe the correct rituals of Hinduism—an ever-diminishing class—there remain the vast body of those who, though, owing no allegiance to any other revealed religion, do not conform to the tenets of Hinduism, and would, if the question were submitted to the judgment of the orthodox, be voted as nondescript outcastes. But in the eye of law these might be as good Hindus as any. The term 'Hindu' is of comparatively recent origin (§ 71) and the tenets of Hinduism are uncertain and ill-defined. Like Judaism, Hinduism is not a proselytizing creed. A Hindu, like a poet, is *nasciter non fit*. If he is sprung out of any of the twice-born people then he is unquestionably a Hindu; but, otherwise, he may be a Hindu nevertheless. The true test of Hinduism now implies the observance of caste, the worship of a Hindu deity and the paying of homage to Brahmins who are the hierophants of that religion. The ceremonial observance of the Hindu fasts and feasts is another index. With the decline of Brahminical influence these symbols have been shorn of their support, and the Hindu has ceased to believe in them, not because his belief has undergone a change, but because the narcotic that produced the symptom has lost its potency.

187. The term Hindu was originally a mere geographical expression. Its present meaning is still vague since it comprises not only those who are

(1) *Gajadhar* v. *Gawri Shankar*, (1932) A. 417 F.B. the Chap. on Inheritance and in the (*e.g.*, *Sapinda* in *Achar Kand*).

Hindus by religion, but also those who, though Hindu by race, do not subscribe to the doctrine of Hinduism, and are in fact Hindu dissenters; while Hindu Law may apply to yet another class who do not follow Hindu religion at all, and may, indeed, be converts to an antagonistic creed, such as Christianity or Mahomedanism. Considered as religion, Hinduism is rather a system than a creed. It has no dogma or articles of faith. A man may be a Theist or an Atheist, he may believe in Krishna or Conte: he will continue to be a Hindu if he was born one.

188. All Hindus were primarily divided into four castes (§§ 34-36) the first three were classed as Dwijas or the twice-born, and the last, Shudras, who, though Hindus, were not entitled to its privileges. All were enjoined certain duties by the Shastras, but these duties have long since ceased to be operative with the liberalizing forces created by the advent of Mahomedans and the establishment of the British rule.

A Hindu may, therefore, follow the conventional creed or he may not, but law still treats and regards him a Hindu, if he is acknowledged as such, because he has sprung from a Hindu stock and has, by his conduct or course of life, not become allied to another essentially non-Hindu faith.

189. Essence of Hinduism.—Though Hinduism possesses no formula which distinguishes its creed from the other revealed religions, and though its catholicity has ushered into its fold the more divergent and heterodox faiths, still there are some elements more or less essential in which Hinduism with all its family members ordinarily agree. These are belief in (1) the unity of Godhead, (2) Maya, (3) Pantheism, (4) the doctrine of Karm, and (5) its consequent pessimism. All Hindu speculation centred round these subjects which afford a key to the many dogmas and beliefs, which, to the mind of an outsider, present a maze of bewildering confusion of ideas, theories and rituals between whom there seems to be nothing in common. But a close examination of them all reveals their essential unity on these five points of which a succinct account was attempted, in the previous edition of this work.[1]

190. Present-day Hindus.—The subject of practical Hinduism may be presented in the following order: (1) those who follow the orthodox creed; (2) those who without following it are still classed as Hindus; (3) those who have been admitted into another creed; and (4) those who follow the Hindu Law without following the Hindu religion.

(1) Orthodox Hindus.

191. The first class presents comparatively little difficulty. Persons born of the first three castes still remain Hindus, whatever may be their caste or status. The fact that an issue of an irregular alliance has forfeited his caste is no blot on his Hinduism, since the forfeiture of one's caste does no longer entail its pristine penalities.[2] But the following ceremonies are still in vogue both amongst the orthodox and reformed Hindus.[3]

192. Taking first the Dwijas or twice-born, for whom the sacred books were written, the orthodox Hindu is enjoined to perform the sixteen

(1) *See* Hindu Code (3rd Ed.), pp. 199, 200, §§ 287-291.

(2) *Cf.* Caste Disabilities Removal Act, 1850, printed in Appendix.

(3) The ceremonies mentioned in Manu ii-27 are now obsolete, except the severance of the umbilical cord, which is of course necessary and the tensure of its head (if male) with a lock of hair left on it, which is still customary.

Shastric ceremonies given in details in the last edition of this work[1] but now omitted as they are obsolete with the exception of the following:—

(1) *Namkaran* (नामकरण): naming-ceremony, performed on the 10th, 11th, or 12th day; (2) *Annaprashan* (अन्नप्राशन): ceremony of taking food performed in the 6th month; (3) *Upanayan* (उमनयन)—popularly called "Manj": the thread ceremony, generally performed at the ages of 8-16 years; 11-12 years and 12 to 24 years, by the Brahmins, Kshatriyas and Vaishyas respectively; (4) *Vivah* (विवाह): Marriage; and (5) *Shraddh* (श्राद्ध): the obsequies. Of these the only ceremonies now important are (1) thread bearing, and (2) marriage, the last being common to the non-Hindus.

Shudras.

193. The difference between the different castes of the Hindus is great but for the purpose of law it is immaterial, inasmuch as all the three regenerate castes are equally subject to the same rules. But the case of Shudras is different, both because the Sanskrit texts are not primarily addressed to them, as also because, being free from the rigid supervision of the priest, their customs had a free scope for development. Consequently, ceremonies which might suffice to validate a Shudra adoption or marriage do not necessarily have that effect in the case of a Dwija, and so while the illegitimate son of a Shudra is an heir, that of a Dwija is no heir at all. Considerable latitude still exists as regards intercaste marriages amongst Shudras, amongst whom divorce and re-marriage of women are customary and common. It is, therefore, often a question of some importance, as it is one of some nicety, whether a person is a Dwija or a Shudra.

194. The following are some of the recognized tests by which a Shudra may be known:—

(1) The Shudras bury their dead. They do not ordinarily burn them.
(2) They do not don the sacred thread.
(3) Intercaste marriages amongst them are customary.
(4) Divorces are common amongst them, and even a woman may divorce her husband, and marry another. But this is not encouraged, though it is tolerated, and the second husband is mulcted in costs of the marriage of the bereaved husband, who is thereupon compelled to give a "Marti Jiti" feast, which means that the woman is dead to her previous husband but has become alive to her new one.
(5) Brahmins, as a rule, do not officiate at their marriages.
(6) Their caste occupations are menial and manual.
(7) Their gods belong to a lower order and stand outside the Hindu pantheon.
(8) They eat the forbidden flesh, such as the flesh of fowls, and domestic pigs, while the lowest of them eat even beef.
(9) Their men do not stamp marks of sandal or saffron upon their temples.
(10) They are so regarded by the general Hindu community.

195. As already observed these criteria have now lost much of their value by reason of the general social upheaval now proceeding in Hindu

(1) *See* Hindu Code (3rd Ed.), § 297, pp. 201, 202.

society and the removal of all social barriers created by old religion. All the same they cannot be altogether ignored in judging of the *status* of a Hindu. Some well-known castes have already been the subject of judicial decisions. For instance, the Kayasths of Bengal have been held to be Shudras,[1] though some of their leaders lay claim to be Kshatriyas.

196. Outcast Hindus.—Caste is an integral part of the Hindu religion and the Shastras enjoin the forfeiture of all civil rights with the deprivation of caste. But the Caste Disabilities Removal Act passed in 1850[2] has repealed all such texts and usages as have that effect—the result being that the forfeiture of one's caste now no longer entails any of its prescribed civil disabilities, and an out-cast Hindu is, in the eye of law, as good a Hindu as one who has never lost his caste.[3]

197. Illegitimate Children of Hindus.—Hindu Law makes no distinction between the legitimate and illegitimate children of Hindu parents,[4] or even where one of them is a Hindu and the other non-Hindu, provided they are brought up and received as Hindu.[5] The same rule applies equally to children of mixed parentage.[6]

198. The following rules may be deduced from the decided cases: (1) That Hindu Law applies not only to those who are Hindus, strictly so called, but also to those who, though not following the Shastric rituals still conform to some of its outward forms. (2) That even those who have become converted from Hinduism to another religion, such as Mahomedanism or Christianity, may still continue to retain their old law, customs and usages provided they are not repugnant to their new religion.[7] (3) Lapses from orthodoxy do not imply abandonment of Hindu Law[8] and (4) Descendants, even illegitimate offspring of the Hindus, may become subject to Hindu Law if, by their habits and mode of life, they conform to the rules of Hinduism and are generally treated as belonging to its fold.

Rules deduced.

199. The Hindu Society is a fluctuating mass of people nominally divided into *Dwijas* or twice born and the Shudras. The Shastras being equally applicable to the twice born, it is immaterial which particular regenerate caste a person belongs to. But this is not so of the Shudras and others who come into the Hindu fold and lay claim to higher status in the Hindu society. In such cases, the Courts have formulated for their own guidance a few working rules which, though not inflexible, have become invariable guides in the determination of such cases. These are (*i*) what they think of themselves and (*ii*) what others think of them. So in the question arising as to the caste of an illegitimate son of a Kshatriya by a Shudra woman, the Privy Council put the question to that test and held him to be above the Shudra.[9]

The Four Castes.

(1) *Raj Coomar* v. *Bissessur*, 10 C. 688.

(2) Act XXI of 1850.

(3) S. 290; *Somaria* v. *Bhularya*, 54 I.C. (Pat.) 820; *Ma Yait* v. *Maung Chit*, 42 M.L.J. 193 P.C. reversing O. A. 10 Bur.L.T. 194: 37 I.C. 780.

(4) *Ramkumari*, (*In re*), 18 C. 264.

(5) *Myna Bayee* v. *Ootaram*, 8 M.I. A. 400; *Lingappa* v. *Esudasan*, 27 M. 13.

(6) *Myna Bayee* v. *Ootaram*, 8 M.I. A. 400 (420); *Abraham* v. *Abraham*, 9 M. I.A. 195 (239, 240, 241).

(7) *Myna Bayee* v. *Ootaram*, 8 M.I. A. 400; *Abraham* v. *Abraham*, 9 M.I. A. 195; *Sri Gajapathy* v. *Sri Gajapathy*, 14 W.R. 33 P.C.; *Lopez* v. *Lopez*, 12 C. 706; *Ghosal* v. *Ghosal*, 31 B. 25, dissenting from *Tellis* v. *Saldanha*, 10 M. 69; *Rahimat Bai* v. *Hirbai*, 3 B. 34; *Abdul Kadar* v. *Turner*, 9 B. 158.

(8) *Bhagwan Koer* v. *Bose*, 31 C. 11 (33) P.C.

(9) *Chuoturya* v. *Sahub Purhulad*, 7 M.I.A. 18 (48); *Brindavana* v. *Radhamani*, 12 M. 72 (78).

In a similar case in Madras, it was found that such people form a distinct intermediate caste called the Ugra,[1] higher than that of the mother and lower than that of the father.[2] The question is essentially one of opinion. As Chandavarkar, J., pointed out, the membership of a caste is like the membership of a club, with the only difference that entry into the one is by birth, while entry into the other is by election. But the members of the one as of the other, are free to continue in membership or leave it: "To hold that the membership of a caste is determined by birth is to hold that the caste cannot, if it likes, mix with another caste and form both into one caste. That would be striking at the very root of caste autonomy."[3]

Kayasths.

200. The Courts have adjudicated upon the position of several castes in the Hindu system. Thus for instance, the Bengali Kayasths, though claiming to be Kshatriyas[4] have been held to be Shudras.[5] The same view has been taken of the Kayasths of Behar, but who have latterly been held to be Kshatriyas.[6] In so holding Field, J., pointed out that the question was not one of origin or pedigree but one which depended upon popular recognition and observance of the ceremonial prescribed for the twice-born. Such was the view of Babu Shyama Charan Sarkar, who, in his Vyvastha Darpan, explained that while the Kayasths were, according to the preponderance of authorities, of Kshatriya origin, they had become degenerate since several centuries by giving up their surname of "Varma" and taking to "Das" appropriate to the servile class, and by not performing the thread ceremony characteristic of the Dwijas.[7] But Mahmud, J., was inclined to doubt this view so far as regards the twelve castes of Kayasths of the United Provinces[8] though he confessed that the authorities were against his view. He appears, however, to have been impressed by the fact that Kayasths constitute the literary caste amongst Hindus; but caste is scarcely based upon the modern notion of literacy and social status, though, as previously remarked, these facts are slowly and silently undermining the old barriers. But, as observed by a census officer, the test of social pre-eminence as a guide to grading the castes is impracticable.[9]

Marathas.

201. The Marathas are held to belong to the Kshatriya caste[10] while the Bhumibar Brahmans are held to be Dwijas, though it would be incorrect to call them

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(1) So mentioned in Yadnavalkya (Mandlik, p. 173.)

(2) *Brindavana* v. *Radhamani*, 12 M. 72 (78, 79); *Jwala Singh* v. *Sardar*, 41 A. 629.

(3) *Nathu* v. *Keshawji*, 26 B. 174 (186, 187), following *Advocate-General* v. *Devakar*, 11 B. 185 and *Vengamuthu* v. *Pandaveswara*, 6 M. 151, dissenting from *contra* in *Jagannath* v. *Akali Dassia*, 21 C. 463.

(4) Sarkar's Adoption, (2nd Ed.), 419-*c*, 419-*d*.

(5) *Asita Mohun* v. *Nirode Mohun*, 20 C.W.N. 901.

(6) *Raj Coomar* v. *Bissessur*, 10 C. 688 (693-696); doubted *per* Mahmud, J., in *Tulsi Ram* v. *Behari Lal*, 12 A. 328 (334); *Iswari Prasad* v. *Rai Hari*, 6 Pat. 506; *Rajendra Prasad* v. *Gopal Prosad*, 7 Pat. 245 (251, 252): 9 Pat.L.J. 123, (in which Kayasths were held to be Kshatriyas).

(7) Vyavasthadarpan, (3rd Ed.), p. 549 *et seq.* *Ratan Chand* v. *Anandi Bai*, (1933) S. 53.

(8) *Tulshi Ram* v. *Behari Lal*, 12 A. 328 (334).

(9) Cited in *Virasangappa* v. *Rudrappa*, 8 M. 440 (444).

(10) *Subrao* v. *Radha*, 52 B. 497.

Brahmans in all respects.[1] There is in fact no decisive test for the purpose, though in the popular estimation, the three tests usually employed to determine, a man's caste are: (*i*) the consciousness of the caste, (*ii*) the acceptance of that consciousness by other castes, and (*iii*) its customs, such as the wearing of the sacred thread, the eligibility to perform the *Homa*, the rules as to the period of impurity, the incompetency of the widows to re-marry and of the illegitimate sons to inherit; these are perhaps important. But with a general social upheaval, taking place in the country, there is a growing confusion of castes, which can only end in their abolition altogether. But so long as they linger, their existence has to be recognized. The

Prabhus.

Prabhus who correspond to the Kayasths of the Mahratta country claim to belong to the Kshatriya caste[2] but their claim does not appear to have been ever judicially recognized.

202. Hindu Dissenters.—The Sikhs,[3] like the Lingayats and the Jains are Hindu non-conformists, but nevertheless, they have always been held to be Hindus,[4] though Sikhism admits of conversion to its fold from Mahomedanism and no special ceremony is prescribed for it.[5]

Sikhs.

203. The Jains[6] are another sect of Hindu dissenters, who still remain Hindus and to whom the Hindu Law applies.[7] The sect is now recognized as a well-known sub-division of the Vaishya caste, which is divided into Agarwalas, Mahesris and Jains, the two former being orthodox Hindus, while the last are classed by the latter as heretics. They are again sub-divided into Digambaris and Sitambaris, the former worshipping their God stripped of all attire, while the latter worship him clothed in costly raiments.[8] The founder of this sect was a Kshatriya by name Mahabir, a contemporary of Buddha from whom he differed in his extreme asceticism.

Jains.

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(1) *Sita Devi* v. *Gopal Saran*, (1928) Pat. 375: 111 I.C. (Pat.) 762.

(2) Steele's Law of Caste, (1st Ed.), 95, 100; *Gopal* v. *Hanmant*, 3 B. 273 (282).

(3) The religion of the Sikhs (Lit. Skt. *Shishya-disciple*, of which Sikh is a curruption) was founded by Nanak, a Kshatriya, who was born in Lahore in 1469. His aim being to reconcile and unite Hinduism and the Islam, he recognised the divinity of the Hindu deities as also the claim of Mahomad to be the Prophet of God. Sikhism has become divided into many sub-sects, the chief ones being the Udasis, the Nirmals, the Gobind Singhas and the Ramrajis.

(4) *Doed Kissenchunder* v. *Baidam*, (1815) 2 Mor. Dig. 22; followed in *Bhagwan Koer* v. *Bose*, 31 C. 11 P.C., affirming O.A. *Bose* v. *Bhagwan Koer*, (1900) P.L.R. 51; to the same effect, *Dhalip Kuar* v. *Fatti*, (1913) P.R. 99: 18 I.C. 930; *Sohanlal* v. *Ishar Singh*, (1934) L. 800.

(5) *Dhalip Kuar* v. *Fatti*, (1913) P.R. 99: 18 I.C. 930.

(6) *Lit.* worshippers of *Jinas*, the twenty-four immortalized mortals of each of the past, present and future ages.—Wilkins' Modern Hinduism, pp. 99-101.

(7) *Sheo Singh* v. *Dakho*, 1 A. 688 P. C.; *Bashebi* v. *Malkhanlal*, 3 A. 55; *Lakhmichand* v. *Gatto Bai*, 8 A. 319; *Dalip* v. *Ganpat*, *ib.*, 387; *Rukhob* v. *Chunilal*, 16 B. 347; *Amava* v. *Mahad Gavda*, 22 B. 416 (418, 422); *Ambabai* v. *Gobind*, 23 B. 257 (263, 264); *Chotay Lal* v. *Chunno Lal*, 4 C. 744 P.C. *Manickchand* v. *Jagat Settani*, 17 C. 518 (533-536); *Bhagwan Koer* v. *Bose*, 31 C. 11 (30) P.C.; *Mandit Koer* v. *Phool Chand*, 2 C.W.N. 154; *Zunkari* v. *Budhmal*, 57 I.C. (N.) 252; *Sheokuar Bai* v. *Jeoraj*, 25 C.W. N. 273: 61 I.C. 481 P.C.

(8) *Mount Stuart Elphinstone*, History of India, (4th Ed.), Ch. IV, p. 103, cited with approval *per* Westropp, C.J., in *Bhagwandas* v. *Rajmal*, 10 B.H.C.R. 241 (247), approved in *Sheo Singh* v. *Dakho*, 1 A. 688 (701, 704) P.C.; Prof. Jacobi, Jain Sutras, 22 S.B.E.

204. As such the Jains differ from the Hindus not only in their tenets but also in their practices. They perform no obsequies after the corpse is cremated. They regard the birth of a son as having no effect on the future state of his progenitor, and consequently, adoption to them is a merely temporal arrangement and has no spiritual meaning.[1] The Jain widow has consequently an absolute right of adoption and requires no express or implied authority of her husband or his kinsmen. Her adoption is not controlled by the orthodox texts. She may adopt her daughter's son,[2] and in fact any one and of any age, in accordance with the usuage of the sect. The Jains are allotted a place amongst the twice-born in the Hindu hierarchy.[3]

Brahmos.

205. It is now settled that a Hindu does not forfeit his Hinduism by a mere conversion to Brahmoism,[4] though the Brahmos were not Hindus within the meaning of the Special Marriage Act[5] before its amendment.[6]

Arya Samajists.

206. If the Brahmos are Hindus, the Arya Samajists are the more so because, though professing to be monotheists, they believe in the supremacy of the Vedas.[7] This faith was founded by Pandit Dayanand Saraswati, who like the Brahmos, opposed idolatry and caste and advocated female education and the re-marriage of widows. The Arya Samajists are now mainly confined to the Punjab, though they have a few enthusiasts in other provinces.

Prarthana Samaj.

207. The same cult is preached by Dayanandis, a sect of Arya Samajis,[8] and by the monotheists of the Bombay side under the name of "Prarthana Samaj."[9]

Kabir Panthis.

208. A similar campaign against caste and idolatry was led by the Zealous reformer Kabir Das, a weaver by caste and a disciple of the Vaishnavite[10] Ramanand, who, about the beginning of the fifteenth century, invited both Hindus and Mahomedans to join his faith, which the latter did not. Kabir Panthis now comprise of the Vaishyas, Shudras, Telis, Mahars and other castes.

The most famous work of Kabir is his Bijak or will, the perusal of which is said to have inspired Nanak to found Sikhism.

Shivites and Vaishnavites.

209. The Shivites and Vaishnavites are two other sects of Hinduism, the followers of which, however, still follow Hindu law. Of the two sects, the Shivite is older and was founded by Shankaracharya, also said to be the founder of Gossavis, and inculcates phallus worship, while its rival, the Vaishnavites, inculcate the worship of the god Vishnu. This sect has become split up into several sub-sects of which the oldest is that of

(1) *Sheokuar Bai* v. *Jeoraj*, 25 C.W. N. 273: 61 I.C. 481 P.C.

(2) *Sheo Singh* v. *Dakho*, 1 A. 688 P. C.

(3) *Rupchand* v. *Jambu Prasad*, 32 A. 247 P.C. (Case of Agarwal Jains).

(4) *Bhagwan Koer* v. *Bose*, 31 C. 11 P.C. affirming O.A., *Bose* v. *Bhagwan Koer*, (1900) P.L.R. 51. The contrary conceded by Sale, J., in *Kusum Kumari* v. *Satya Ranjan*, 30 C. 999 can no longer be maintained.

(5) Act III of 1872; *Sonaluxmi* v. *Vishnu Prasad*, 28 B. 597.

(6) Act XXX of 1923.

(7) *Suraj Jote* v. *Attar Kumari*, 1 Pat. 706.

(8) *Suraj Jote* v. *Attar Kumari*, 1 Pat. 706 (714).

(9) *Lit. Prarthana*-Prayer and *Samaj* an association.

(10) The worshipper of Vishnu as the Supreme God. The Bengali leader of Vaishnavism was Chaitanya who was born in 1485.

Ramanuja, or Sri Sampradai, founded by Ramanuja Acharya, in the twelfth century, who taught at Conjeeveram, tenets in opposition to the older sect. Its other offshoot is the Vallabha Charis or Rudra Sampradain, popularly known as the religion of Gokul Gossains. Its founder, Vishnu Swami, flourished in the sixteenth century. He lived at Gokul near Mathura, and then at Brindaban, where he transformed his religion into a voluptuous epicureanism. It numbers adherents drawn both from the Brahman and Vaishya castes. The two sects of Shivites and Vaishnavites are rival sects which have nothing in common except that they both follow Hindu law. A Jati Vaishnava is a Hindu.[1]

210. Minor Sects.—Numerous minor sects, many of mushroom growth, have sprung out of the Hindu religion. Such are the *Satnamis,* (or believers in the "True Name"), a sect founded by a Chamar named Ghasidas, a follower of Ramanand, now confined to the Chattisgarh division of the Central Provinces. They despise alike idolatry and the idolators, Brahmans in particular, but their hostility to Brahmanism has now become mitigated and a new sect called *Ramnamis* has emerged out of the Satnamis who tattoo their heads with the word "Ram" and to whom that word is as the breath of life. Another sect, little different from the rest, is that of the *Sadhus* founded by a Brahman, named Birbhan who was born near Delhi in 1658. They also worship God as the *Satnam.* The *Shiv Narayanas* are followers of a Rajput teacher, Sheo Narayan, who lived in the eighteenth century. Like the Kabir Panthis they make no distinction between Hindus and Mahomedans, both being equally admitted to their creed. They inculcate truth, temperance and mercy and repudiate all religious rituals and faiths.

(i) Satnamis.
(ii) Ramnamis.
(iii) Sadhus.
(iv) Sheo Narayans.

211. The Lingayats lay claim to belong to the Vaishya caste. But their efforts have hitherto failed, for they have been treated as Shudras in several cases decided at periodical intervals.[2] They are a heretical sect, and though not subject to the Brahmanical laws, are, nevertheless, subject to Hindu law. Any Hindu may become a Lingayat.[3]

Lingayats.

212. Ascetics.—The ascetic castes amongst Hindus are the Gossains, Bairagis, Brahmacharis, Sadhus and Sanyasis who were all pledged to celibacy and religious mendicancy, but many of whom have settled down to the ordinary avocations of the householders. But inasmuch as their original history has engrafted upon their community certain relics of their famous order, it has aroused controversy in the Courts as to how far they are amenable to the unadulterated rules of Hindu Law.

According to the Smritis, the ascetic is qualified to hold no property; and whatever little he does, is subject to a special rule of devolution, but this is a counsel of perfection,[4] and Hindu asceties now not only own large estates but actively engage in commerce, marry and beget children, make wills and otherwise dispose of their property. This is one of those cases in which the Shastric rules fail, but as has been already

(1) *Nalinaksha* v. *Rajani Kant,* 58 C. 1392.

(2) *Gopal* v. *Hanmant,* 3 B. 273 (283); followed in *Somashekhararaja* v. *Subhadramaji,* 6 B. 524 (526); *Baswa* v. *Lingangauda,* 19 B. 428 (465); *Fakirgauda* v. *Ganji,* 22 B. 277; *Virsangappa* v. *Rudrappa,* 8 M. 440 (450).

(3) *Per* Ranade, J. in *Basva* v. *Lingangauda,* 19 B. 424 (457, 458).

(4) *Chhajju Gir* v. *Diwan,* 29 A. 109 (112); *Jagannath* v. *Bidianund,* 10 W. R. 172.

observed, the Courts are not to administer all the Shastric rules but only such rules as are still kept alive by usage.

Gosavis.

213. Shankaracharya, the founder of the Shaivite sect, is said to be also the founder of the sect of Gosavis who accordingly worship Lingum (Phallus) of the god Shiva, as the Bairagis, another sect of the same order, worship Vishnu in his incarnation of Ram.

The Gosavis constitute a religious order, now divided into several groups such as the *Dundis* or those who carry a staff and still affect mendicancy, the *Dunglee* or the traders, and the *Grihast* or *Gharbari Gosavis* who have forsaken the order and relapsed into ordinary life. As such, the Gosavis[1] have long since become sub-divided into two classes: (*a*) *Nihang*, or celibates, that is to say, those who still conform to the original form and mode of life, and (*b*) *Grihast* or *Gharbari*, or householders, that is, those who have given up their religious vow and entered the confederacy of householders. But, nevertheless, they also keep up the old form of adoption of a *Chela* or a spiritual disciple[2] who is treated as, and passes for, a son.

The Gosavis observe no caste, and any Hindu may join the sect. It then follows that any Hindu boy might be taken in adoption, but such adoption can only be made by the Gosavi. It cannot be made by the widow.[3] The Chela so adopted succeeds to the estate of his adoptive Guru, if he was his *mundit* or tonsured Chela, even in preference to the natural son, but one son cannot be so adopted to the prejudice of the other and in the absence of an adopted stranger, sons succeed equally.[4] Except then as to certain matters which have become established as usages of the sect, the Gosavis are Hindus, and as such governed by the general Hindu Law.[5] So

Bairagis.

are the Bairagis who only differ from the Gosavis in that they worship Vishnu instead of the god Shiv. And inasmuch as both the sects admit converts from the Shudra caste, and marry women irrespective of caste, they would be classed as Shudras.

Brahmacharis, Sadhus, Sanyasis.

214. Brahmacharis, Sadhus, and Sanyasis[6] are the other sects belonging to the monastic order who are equally subject to the Hindu Law applicable to householders, modified by the rules and customs of their respective orders. The Smritis lay down a special rule for the devolution of property of an ascetic to the following effect: "The heirs of a hermit, of an ascetic, and of a professed student, are, in their order, the preceptor, the virtuous pupil and spiritual brother and associate in

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(1) *Lit.* Skr. *Go* passion, and *Swami* master, *i.e.*, one who has mastered his passions.

(2) *Ramdhan* v. *Dalmir*, 14 C.W.N. 191: 2 I.C. 385.

(3) *Balgir* v. *Dhondgir*, 5 Bom.L.R. 114. In some cases it is held that the *Chela* must be nominated by the Mahants of the order; *Nirunjan* v. *Padaruth*, (1864) S.D.A.N.W.P. Vol. 1, p. 512; *Madho Das* v. *Kamta Das*, 1 A. 539; *Jugunnath* v. *Bidianand*, 10 W.R. 172; *Chhajju Gir* v. *Diwan*, 29 A. 109. But this is not the invariable rule; *Ramdhan* v. *Dalmir*, 14 C.W.N. 191. A *Chela* who deserts his Guru, manifesting an intention to be permanently absent, is not entitled to a share in the succession; *Soogunchand* v. *Gopalgir*, 4 N.W.P.H.C.R. 101; *see* post, "Adoption."

(4) *Chhajju Gir* v. *Diwan*, 29 A. 109 (115).

(5) *Chhajju, Gir* v. *Diwan*, 29 A. 109 (112). For the customs of Gosavis, *see* Steele's L.C., pp. 432, 446; as to marriage, see *Gitabai* v. *Shivbakas*, 5 Bom.L.R. 318.

(6) *Nirunjun* v. *Padaruth*, (1864) N.W.P.S.D.A., Vol. 1, p. 512; *Madho Das* v. *Kamta Das*, 1 A. 539.

holiness."[1] But this rule postulates adherence of the ascetic to his religious vow. It does not extend to an ascetic who has forsaken the order, and contrary to its precepts and purpose amassed wealth. They cannot be held bound by the rules framed for another purpose.[2]

215. **Aboriginal Hindus.**—Besides the Hindus, properly so-called and those who are commonly so-called, there remain a number of people belonging to the aboriginal tribes, such Gonds,[3] Gujars of the Nimar district in the Central Provinces,[4] Rajbansis of Bengal,[5] Lachmipur Rajchaurasis,[6] the Mundaris of Ranchi District[7] Bhils, Kurds, Santals, Kochees of Assam,[8] Bouiyas,[9] Rajbansis of Cooch Behar,[10] Aroras of the Punjab,[11] Khatiks[12] Kumhars[13] and the like who have become absorbed into the Hindu society and who are, consequently considered and consider themselves Hindus, and as such bound by Hindu Law. The test in their case is: How do they regard themselves and how are they regarded by the rest of the Hindu community? The test applicable is not the Shastric test which has ceased to be applicable to the most orthodox Hindu. The fact is that the Shastras never contemplated the absorption of non-Aryan plebian people into the Hindu hierarchy. But no Shastra could stem the tide of human progress, and the non-Aryan races were not slow to take advantage of the Hindu civilization to which they became attached, and in the course of time, assimilated. Such are the Gonds and Bhils, who, though aborigines, are now universally classed as Hindus. They retain their old customs to a certain extent, but they equally acknowledge the supremacy of the Brahmins, worship some of their gods and have commenced to observe some of their caste conventions. Some of them have intermarried with Hindus, thereby originating distinct castes. So the alliance of Rajputs with Gond women has produced the caste of Raj Gonds, that with Bhils "Bhilalas", of whom quite a number own Jagirs and Zemindaris in the Nimar and adjoining districts of the Central Provinces. All such and similar castes admit allegiance to the Shastras by which they profess to be bound.[14]

216. **Dancing Girls and Prostitutes.**—Though the class of dancing girls and prostitutes have formed themselves into a caste apart from the four castes, they are, nevertheless, subject to Hindu Law.[15] Manu classes them in the residuary caste of Shudras, but this is, since the removal of caste disabilities immaterial.[16]

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(1) Yadnavalkya, 37; Mitakshara, S. 8; Dayabhag XI-6 Ss. 35, 36; *Chhajju Gir* v. *Diwan*, 29 A. 109 (112).

(2) *Nirunjun* v. *Padaruth*, (1864) N. W.P.H.C.R. Vol. 1, p. 512; *Madho Das* v. *Kamta Das*, 1 A. 539 (541).

(3) *Ramanath* v. *Sukalsi*, (1924) N. 330, but in *Ujiar* v. *Tilochan*, 44 I.C. (N.) 435, *Janki Bai* v. *Parwati*, 87 I.C. (N.) 1036: (1925) N. 353, and in *Kallue* v. *Bet Singh*, 17 N.L.R. 183; *Vithoba* v. *Lab Singh*, 19 N.L.R. 104, in which a Gond was held not to be subject to Hindu Law; which is opposed to the view of the Privy Council in *Bhagwan Koer* v. *Bose*, 31 C. 11 (P.C.).

(4) *Rambhabai* v. *Tota Ram*, 71 I.C. (N.) 727: (1923) N. 188.

(5) *Santala Bewa* v. *Badaswari*, 50 C. 727; *Narendra Narain* v. *Nagendra Narain*, 50 C.L.J. 267: 118 I.C. 342: (1929) C. 577.

(6) *Sahdeo* v. *Kusum Kumari*, 2 Pat. 230 P.C.: (1923) P.C. 21.

(7) *Doman Sahu* v. *Buka*, (1931) Pat. 198.

(8) *Aiti* v. *Aidew*, 24 C.W.N. 173: 54 I.C. 695; *Dino Nath* v. *Chundi*, 16 C.L.J. 14: 16 I.C. 349; *Harbans* v. *Atra*, 53 I.C. (L.) 858.

(9) *Sahdeo* v. *Kusum Kumari*, 2 Pat. 230 P.C.: (1923) P.C. 21.

(10) *Santata* v. *Badaswari*, 50 C. 727.

(11) *Chandan Mal.* v. *Wasindi*, (1915) P.R. 92: 31 I.C. 541.

(12) *Bholar* v. *Emp.*, (1914) P.L.R. 131: 24 I.C. 947.

(13) Cf. *Ballia* v. *Emp.*, (1914) P.L.R. 161: 25 I.C. 839.

(14) Steele's Law of Caste, 122, 123.

(15) *Meenakshi* v. *Muniandi*, 38 M. 1144 (A case of a degraded woman).

(16) *See* Act XXI of 1850; *Ram Pargash* v. *Dahan Bibi*, 3 Pat. 152.

217. Jats.—Jats are governed by Hindu law in the absence of special custom, which they must prove.[1]

218. Non-Hindu Followers of Hindu Law.—But outside the circle of those who follow the Hindu religion and those who pass as Hindus, there stands a class of people who, though now converted to the religion of Islam, were by origin and descent Hindus, and who have, consequently, despite their conversion, continued to follow the Hindu Law of succession. Such are the Khoja Mahomedans,[2] Kachi Nassaparia,[3] and the Bantwa,[4] Cutchi Memons,[5] Halai Memons,[6] the Sunni Borah Mahomedans of the Dhandhuka Taluq in Guzerat,[7] the Molesalem Girasias,[8] the Navayate,[9] and Labbais of Madras,[10] Moplas of the Malabar,[11] the Basichowrasi Gaddidars of Behar[12] and Mahomedans of the Satpura plateau in the Central Provinces,[13] who are, as regards succession and inheritance, governed by the rules of Hindu Law; but apart from this, they do not follow it. For instance, the law of joint property is inapplicable to them[14] The judicial view of these and other similar converts from Hinduism is settled in a series of cases which lay down the nature of Hindu Law and the extent to which it is applicable to them. But all such converts are now given the option of following the Mahomedan law of intestate succession, if they make a declaration to that effect as provided in the Muslim Personal Law (Shariat) Application Act of 1937.[15]

Khojas.

219. The Khojas are converts from Hinduism. Their original home was in Sindh whence they migrated to Cutch and Kathiawar and thence to Bombay where they have left their original pursuit of agriculture and taken to trade and have amassed great fortunes.[16] The first case on the law applicable to the Khojas and Memons was decided by the Supreme Court in 1845[17] and it has been followed since in a succession of cases.[18] The general principles

(1) *Bhagwani* v. *Khushi Ram*, 24 I. C. (A.) 982; *Nauli* v. *Kheri*, 15 I.C. (A) 607; *e.g.*, Hindu Jats of Delhi held governed by customary law—*Basant Singh* v. *Brij Raj*, 57 A. 494 P.C.

(2) *Ahmedbhoy* v. *Cassumbhoy*, 13 B. 534; *Rashid* v. *Sherbanoo*, 29 B. 85.

(3) *Abdul Rahim* v. *Halima Bai*, 20 C.W.N. 362 P.C.

(4) *Safuran Umer* v. *Emna*, (1916) 26 Kath.L.R. 174.

(5) *Mahomed Sidick* v. *Haji Ahmed*, 10 B. 1; *Sahoo Sidick* v. *Ally Mahommed*, 30 B. 270. But the Halai Memons of Bombay unlike those of Kathiwar, are governed by Mahomedan Law in matters of succession; *Mhd. Yusuf* v. *Govindas*, 24 Bom.L.R. 753.

(6) *Khatabai* v. *Mahomed Haji*, 47 B. 146 P.C.

(7) *Bai Baiji* v. *Santok*, 20 B. 53.

(8) *Fatesangji* v. *Harisangji*, 20 B. 181; *Moosa* v. *Abdul Rahim*, 30 B. 197.

(9) *Hussain Sahib* v. *Hassan Sahib*, (1915) 2 L.W. 1140; 31 I.C. 927, O. A. 5 L.W. 835; 41 I.C. 184.

(10) *Ibrahim* v. *Ibrahim*, 39 M. 664, reversed O. A. by the Privy Council 30 M.L.T. 85 P.C.

(11) *Azamanila* v. *Kayinari*, (1914) M.W.N. 883: 26 I.C. 337.

(12) *Shahdeo* v. *Kusum*, 5 Pat.L.J. 164: 46 I.C. 929.

(13) *Uima Bi* v. *Mahomed Sarwar*, C. P.D.C.R. (Part VIII), 78.

(14) *Mangaldas* v. *Abdul Razhak*, 16 Bom.L.R. 224; *Advocate-General* v. *Jimabai*, 41 B. 181; *Haji Osman* v. *Haroon Salleh*, 47 B. 369.

(15) Act XXVI of 1937; as to Cutchi Memons, *see* The Cutchi Memon's Act, XLVI of 1920.

(16) *Ahmedbhoy* v. *Cassumbhoy*, 13 B. 534 (544).

(17) Perry's Or. Cases, 110.

(18) *Gangbai* v. *Thavar Mulla*, 1 B. H.C.R. 71; *Hirbai* v. *Gorbai*, 12 B.H. C.R. 294; *Rahimatbai* v. *Hirbai*, 3 B. 34; *Haji Ismail, In re*, 6 B. 452; *Ashabai* v. *Haji Tyeb*, 9 B. 115; *Abdul Kadir* v. *Turner*, 9 B. 158; *Mahomed Sidick* v. *Haji Ahmed*, 10 B. 1; *Ahmedbhoy* v. *Cossumbhoy*, 13 B. 534; *Baibaiji* v. *Bai Santok*, 20 B. 53 (57); *Rashid* v. *Sherbanoo*, 29 B. 85; *Saboo Sidick* v. *Ally Mahomed*, 30 B. 270.

applicable to these communities can be stated as follows:—(1) That presumably they follow the Hindu Law of succession and inheritance; (2) that in regard to other matters they are presumably governed by the Mahomedan Law; but (3) that it is open to them to show that they have adopted any usage of Hindu Law at variance with their own law. The question how far the Khojas were governed by Hindu Law was considered by the Bombay High Court in a case in which the evidence disclosed that the Hindu Law of succession and inheritance, as administered in Bombay, that is, according to the Mayukh school of law, in the absence of custom to the contrary, applied to them; but that as regards the law of joint family and partition, there was the greatest doubt and difference of opinion, and consequently, there could be no presumption in favour of its applicability and he who asserted it had to prove it like any other fact.

The case shows that the same community may adopt different usages upon their migration to another place. So while the Khojas of Kathiawar and Cutch recognize in the son a right to obtain his share on partition of the family property, both ancestral as well as self-acquired, no such right exists amongst the Khoja settlers of Bombay and for an obvious reason. For while the Khojas of the former place are mere agriculturists, those of Bombay are enterprising traders who have acquired valuable estates by their individual capacity and exertion.[1]

Cutchi Memons, Sunni Borahs, Molasalem Girasias.

220. The same rules apply equally to the other Mahomedan sects formed out of Hindu converts, such as the Cutchi Memons,[2] Sunni Borahs,[3] Molasalem Girasias. It will be noted that all these retain and follow their own communal law. But an instance of territorial extension of Mahomedan Law is afforded by the case of Mahomedans, inhabiting the Satpura plateau of the Central Provinces, who, from their association with the Hindus, have adopted their law of succession and inheritance.[4]

Christian Converts.

221. But while Hindu converts to Mahomedanism retain their freedom of following the Hindu Law of succession and inheritance, the same cannot be said of Hindu converts to Christianity, who, since the passing of the Succession Act[5] are held to have left no option but to conform to its provisions on the subject of succession to be found in the Succession Act.[6]

222. Two questions then arise: are Hindu converts to Christianity "Hindus" within the meaning of the Succession Act and do its provisions necessarily preclude the application of Hindu Law upon matters not directly dealt with in that Act? The Succession Act does not define that term, but there can be no question that after their conversion they cannot be called Hindus even in common parlance. They are, therefore,

(1) *Ahmedbhoy* v. *Cassumbhoy*, 13 B. 534.

(2) Who may, however, now make a declaration that they, their minor children and dependants, shall in matters of succession and inheritance be governed by the Muhamadan Law—Act XLVI of 1920; Act XXXIV of 1923.

(3) *Bai Sakar* v. *Ismail*, (1937) B. 65.

(4) *Umdobi* v. *Mahomed Sarwar*, C. P. D. C. R. (Part VIII) 78.

(5) Act X of 1865; now Act XXXIX of 1925.

(6) Ss. 29, 58, Succession Act XXXIX of 1925; S. 3 provides for exemptions.

bound by the Act,[1] and as it saves no usage or custom to the contrary they are inevitably so bound unless they are exempted by Government under S. 3. In this view, there is no room for survival of the essentially Hindu doctrines of coparcenership and survivorship,[2] but this has not been acceded to by Sir Lawrence Jenkins who, in a considered judgment, held that notwithstanding the conversion of a family to Christianity, it may still continue or become an undivided joint family holding and enjoying property in coparcenership with the right of survivorship, which is unaffected by the Succession Act,[3] which merely deals with the *devolution* of rights on intestacy and does not purport to enlarge the category of heritable property.[4] In other words, since the Act merely deals with succession and not survivorship, it has not the effect of excluding the possibility of succession by survivorship. The Succession Act is not a consolidating statute, though it must be deemed to be exhaustive so far as it goes. Such however is the Indian Christian Marriage Act, 1872,[5] the provisions of which exclude the possibility of any marriage being solemnized according to Hindu Law,[6] and similarly, a marriage so solemnized, being subject to dissolution as provided in the Indian Divorce Act,[7] there is no room for the applicability of Hindu Law so far and to the extent these Acts are applicable.

223. Conversion to Hinduism.—It has been stated before, that Hinduism does not admit converts. This is true. But nevertheless, the process by which non-Hindus are admitted into its fold is, in its effect, little, if at all, distinguishable from conversion. This result is achieved by acknowledgment and recognition of non-Hindus as Hindus. It is thus that the creedless barbarians of a by-gone age have been brought into its fold. Whole provinces have been thus become Hinduised. More recently, the Courts have recognized the validity of conversion[8] or reconversion[9] to Hinduism; but they insist upon a ceremony as distinct from a mere confession or conformity with the mode of Hindu life.

224. The Manipuris were so converted wholesale to Hinduism, only about a hundred years ago by a wandering Sanyasi, who converted one Garib Niwaz, the founder of the family of the present Raja, and all Manipuris to Hinduism by declaring that they were all Hindus but had forgotten their privileges and duties. After ordering the people to bathe and make expiatory offerings for their long neglect, he declared them all to be good Hindus of the Kshatriya caste.[10] The people of Cachar were similarly converted.

In one case, ultimately decided by the Privy Council, the illegitimate issue of a Kshatriya Taluqdar of Balrampur in Oudh, who had been brought up and married as Hindus were treated as such.[11] Nor is this

(1) *Vathiar, In re,* 7 M.H.C.R. 121; *Ponnusami* v. *Dorasami,* 2 M. 209; *Administrator-General* v. *Ananda,* 9 M. 466; *Appavu* v. *Susaiudayan,* 15 M.L.J. 235; *Dagree* v. *Pacotti,* 19 B. 783; *Nepenbala* v. *Sittikanta,* 15 C.W.N. 158: 8 I.C. 41.
(2) *Tellis* v. *Saldhana,* 10 M. 69.
(3) Act X of 1865.
(4) *Ghosal* v. *Ghosal,* 31 B. 25 (32), following *Navroji* v. *Perozbai,* 23 B. 80, dissenting from *contra* in *Tellis* v. *Saldhana,* 10 M. 69.
(5) Act XV of 1872.
(6) Act XV of 1872, S. 4.
(7) Act IV of 1869.
(8) *Ratansi* v. *Administrator-General,* 52 M. 160; *Guruswami* v. *Irulappa,* (1934) M. 172.
(9) *Ramayya* v. *Mrs. Elizabeth,* (1937) M. 172.
(10) Wilkins' Modern Hinduism, p. 178.
(11) *Sher Bahadur* v. *Ganga Baksh,* 36 A. 101 (116) P.C.

view unsupported by authority.[1] Such a case may be treated as one of conversion, a process which accounts for the development of Hindu society by incorporating into it the mixed and aboriginal races.[2] Even direct conversion is being attempted by the Arya Samajis and other Hindu reforming societies, and it is only a question of time when the status of such converts will become undisputed and indisputable.

225. The process of conversion was incomplete when the Cooch Behar Raj case went up for decision to the Privy Council. In that case, the dispute related to the succession of a Zemindari called the Baikantpur Raj and the question their Lordships had to determine was as to the validity of the defendant's adoption to the deceased Zemindar. It was found that the family of Cooch Behar, to which the parties belonged, originally belonged to the Cooch aboriginal tribe which had abandoned their old customs, altered the name of their country to "Behar," called themselves Rajbansi Kshatriyas, adopted Hinduism as their religion and a divine ancestry for the chief was even manufactured by the Brahmins who traced his pedigree to the god Shiv.[3] Upon this the High Court presumed that the parties were Hindus and cast upon the plaintiff, a rival claimant, the burden of proving the invalidity of the defendant's adoption. On a review of the family history, their Lordships held that it showed "that, although they affected to be Hindus, they had retained and were governed by family customs, which as regards some matters, were at variance with Hindu Law." They, therefore, held the family subject only to customary law, and as no custom in favour of adoption was proved, the defendant lost his estate though he held an adoption deed from the deceased Zemindar, but which failed to convey the property to a *persona designata*.[4] This decision has naturally had the effect of arresting the indirect conversion of this family to Hinduism, but in later cases of Rajbansis[5] and Surajbansis[6] the Court held the conversion complete and applied the ordinary Hindu Law. The distinction between the two class of cases was, however, only this that while in the one the origin and history of the family was known, in the other it was not, and there being nothing to show that the conversion of his family was incomplete, the Court assumed the ostensible state to be the real state and held them to be Hindus bound by the *lex loci*, adding: "It must be taken that they have adopted in its entirety one form or other of that law, and it being uncertain which form they adopted, it is not unreasonable to infer that they adopted the form which prevailed in the locality."[7] Apart from conversion of classes and communities, even an individual, for example, an Austrian, may become a Hindu by conversion,[8] and the Court cannot ignore the recent but widespread movement in favour of "*Shuddhi*" or reconversion of converted Hindus and the conversion of the non-Hindus,

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(1) Sir A. A. Williams' Religious Thought and Life in India, pt. 1, p. 57; Sir Alfred Lyall's Asiatic Studies, pp. 101-104; W. J. Wilkins' Modern Hinduism, p. 177; Carnegy's Notes on the Races, Tribes and Castes of Oudh, (1868), pp. 37-40, 50.

(2) *Muthusami* v. *Masilamani*, 33 M. 342 (349); *Ma Yait* v. *Maung Chit Maung*, 42 M.L.J. 193 (200) P.C.

(3) *Fanindra* v. *Rajeswar*, 11 C. 463 (475) P.C.

(4) *Fanindra* v. *Rajeswar*, 11 C. 463 (485) P.C.

(5) *Ram Das* v. *Chandra Dassia*, 20 C. 409 (412); *Santala* v. *Badaswari*, 50 C. 727 (733) P.C.

(6) *Sahdeo* v. *Kusum Kumari*, 2 Pat. 230 P.C.

(7) *Ram Das* v. *Chandra Dassia*, 20 C. 409 (413).

(8) *Morarji* v. *Administrator-General*, 52 M. 160.

while the Arya Samaj, an offshoot of Hinduism, is a well-recognized militant proselytizing creed.

226. **Buddhists.**—The question whether Buddhists are Hindus can only admit of one answer. Whatever may be its association and affinity with Hinduism, it is a creed apart, and Buddhists cannot be classed as Hindus, both because they do not regard themselves as such, nor are they so regarded by the other Hindus, and they have distinct religion and family law.[1]

2. In the absence of anything appearing to the contrary, the natives of each of the following provinces are governed by the schools of law noted against them:—

Lex Loci.

(*i*) Bengal and Assam ..	Dayabhag, supplemented by the Mitakshara.
(*ii*) United and Central Provinces, Behar (except Mithila), N.W.F. Province, Orissa, Sindh.	Mitakshara.
(*iii*) Mithila	Mitakshara, supplemented by Vivad-Chintamani and Vivad-Ratnakar.
(*iv*) Island of Bombay, Gujrat, Northern Konkan and Berar.	Mitakshara, modified by the Mayukh.
(*v*) Madras Presidency ..	Mitakshara modified by (1) Smriti Chandrika, (2) Parasar Madhav, (3) Vir-Mitrodai.
(*vi*) The Punjab ..	Customary law, supplemented by the Mitakshara.

227. **Analogous Law.**—There is this distinction between the Hindus and the non-Hindus. The personal law of the one being mostly customary follows them upon migration to another locality, but the law of persons subject to the Christian law is the *lex loci*. So a Frenchman or a Portuguese, migrating from French or Portuguese India to British India renders himself subject to the Indian Succession Act.[2] But a Hindu and a Mahomedan[3] would in the same circumstances carry with him his own personal law. The general history of the Hindu schools has already been given (§§ **127-144**). Strictly speaking, there is no *lex loci* in Hindu Law, since the existence of a *lex loci* is inconsistent with the existence of personal communal law. Take

Lex Loci.

(1) Buddhism was founded by Shakya Muni, afterwards known as Gautam Buddha, who was born in the borders of Nepal in 563 B.C., whence he wandered to Behar, where he fasted, taught and died. In the third century B.C. the great monarch Ashoka adopted Buddhism under whom it spread as far as Ceylon. But in the eighth century A.D. there was a revival of Brahmanism which drove out Buddhism from India where now the Buddhists number only about half a million.

(2) *Abu* v. *Khatubai*, 43 B. 647.

(3) *Abdur Rahim* v. *Halimabai*, 20 C. W.N. 362: 32 I.C. 413 P.C.

for instance, the case of Calcutta. The Bengali Hindus resident there are governed by the Dayabhaga, not because they are residents of Calcutta but because they are Bengali Hindus and, as such, they would be so governed whether they were resident in Calcutta or Cawnpore.[1] Similarly, the Marwadi Hindus from Rajputana would be governed by their personal law, whether it is the Mitakshara or custom, and the Sikh from the Punjab would, similarly, follow his ancestral customs. But while with the heterogenous population of an Indian town it is not safe to premise that any people resident therein are subject to any particular school of law, still there is the *lex loci* in the sense that the indigenous natives of a particular place are presumably subject to the school of law, which has, by common consent, been held to bind that locality. Though, strictly speaking, there is no such thing as *lex loci* as regards the personal law applicable to the Hindus, still the Courts administer the personal law obtaining in any locality to a Hindu living there unless there is evidence to show that he has adopted any other law or custom.[2] A family, migrating from Guzerat, where the Mayukh prevails, to Madras where the Mitakshara is supreme, will be presumed to continue to be bound by the Mayukh.[3]

228. Books of Local Authority.—The Bengal school, also known as the Gaudiya school, dominates the Bengali speaking provinces of Bengal and Assam, in both of which provinces the primary authority is that of Dayabhag.[4] The Mitakshara is treated there with respect, but it holds only a secondary place, merely supplementing the Dayabhag together with its commentaries[5] upon points upon which they are silent.[6] Of these the two following are considered as commentaries of great authority:

Bengal, Assam.

(1) *Dayatatwa* by Raghunandan,[7]

(2) *Daya-krama-sangrah* by Shri Krishna.[8]

The two works on adoption, namely, (3) the *Dattak-mimansa* and (4) the *Dattak-chandrika* are equally considered as works of the highest authority in Bengal,[9] but in case of conflict the Chandrika is preferred to the Mimamsa.[10] (§ **145**).

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(1) *Kulada* v. *Hari*, 40 C. 407; *contra* a general statement in *Bhadia* v. *Bhaji*, 10 N.L.R. 34, is unsound.

(2) *Ramdas* v. *Chundra*, 20 C. 409; but see *Murle Das* v. *Manick*, 5 M.L.T. 181.

(3) *Murle Das* v. *Manicka*, 5 M.L.T. 181.

(4) *Uma Sunker* v. *Kali*, 6 C. 256 (263); *Abhai Churn* v. *Mangal*, 19 C. 634 (638); *Basanta* v. *Jogendra*, 33 C. 371 (375).

(5) The leading commentaries are by Srinath Acharya Chudamani, Achyuta Chakravarti, Raghunandan, Maheshwar and Shri Krishna (1700 A.D.), of which Raghunandan's ranks highest; *Ramnath* v. *Durga*, 4 C. 550 (554); *Ramanand* v. *Raj Kishore*, 22 C. 347 (351). Shri Krishna also ranks high, *Raj Kishore* v. *Gobind*, 1 C. 27 (39); *Hari Dayal* v. *Grish Chunder*, 17 C. 911 (914); *Ramananda* v. *Rai Kishore*, 22 C. 347 (353).

(6) *Bhugwandeen* v. *Myna Bai*, 11 M. I.A. 487 (507, 508); *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (435).

(7) *Ramananda* v. *Rai Kishore*, 22 C. 347 (351).

(8) *Raj Kishore* v. *Gobind*, 1 C. 27 (39).

(9) *Padma Coomari* v. *Court of Wards*, 8 C. 302 (311) P.C.; *Puddo Kumari* v. *Jugut Kishore*, 5 C. 615; *Asita Mohan* v. *Nerode Mohan*, 20 C.W. N. 901: 35 I.C. 127; *Uma Shunkar* v. *Kali*, 6 A. 256.

(10) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (437).

229. The preferential position accorded to the Dayabhag in Bengal is accorded to the Mayukh in the city of Bombay, Berar[1] and Gujrat,[2] though with this qualification that the two works should be sought to be reconciled as far as possible, and the Mayukh view only accepted where such reconciliation is impossible or the Mitakshara is silent or ambiguous. This appears to be the prevailing view,[3] though in the earlier cases the Mayukh was assigned only a second place, the Mitakshara being regarded as paramount,[4] and on the subject of adoption, the two special treatises, Dattak-chandrika and the Dattak-mimansa possess special authority[5] but, as the Privy Council observed with reference to the latter, caution is required in accepting the glosses of its author where they deviate from, or add to, the Smritis.[6]

Bombay, Berar and Gujrat.

230. The ruling authorities in Sindh are the Mitakshara and the Mayukh when not in conflict. But if the two are in conflict, the Mitakshara prevails, unless the Mayukh rule is proved as a part of the customary law.[7]

Sindh.

231. The authority of the Mitakshara (§§ **129-136**) is paramount in the United,[8] and the Central Provinces.[9] Other works governing the same school are:—

U.P. and C.P.

(1) *Vir-Mitrodai*—a work of special authority.[10] It is a collection of notes concisely elucidating the obscure passages of the Mitakshara.[11]

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(1) *Girja Bai* v. *Venkatesh*, 2 Berar L.J. 135; *Ram Prasad* v. *Subu Bai*, 4 N.L.R. 31 (32); *Dawlat Rao* v. *Govind Rao*, 5 N.L.R. 13; *Ramji* v. *Nursha*, 7 N.L.R. 116; *Chandrabhaga* v. *Vishwanath*, 9 N.L.R. 102 (108); *Bhadia* v. *Bhagi*, 10 N.L.R. 24; *Madho* v. *Janki*, 12 N.L.R. 148; *Sadasheo* v. *Jaikrishna*, 14 N.L.R. 6; *Kasam* v. *Jagavad*, 18 N.L.R. 127 (129, 130) P.C.; *Narain* v. *Tulsiram*, 22 N.L.R. 183 F.B.

(2) Where it was introduced by the Maratha conquerors after 1720 A.D.; and where, therefore, it became the *lex loci* only by adoption; *see* Per West, J., in *Bhagirathi Bai* v. *Kanujirav*, 11 B. 285 (294, 295) F.B.

(3) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (438); *Vinayak* v. *Lakshmibai*, 1 B.H.C.R. 117 (122), approved O.A. *Vinayak* v. *Lakshmibai*, 9 M.I.A. 516 (536, 537); *Bhagawandeen* v. *Myna Bai*, 11 M.I.A. 487 (508); *Krishnaji* v. *Pandurang*, 12 B.H.C.R. 65; *Rahi* v. *Govind*, 1 B. 97 (106); *Bhagirath* v. *Kanujirav*, 11 B. 285 (295) F.B., in which West, J., explains the reasons for the ascendancy of the Mayukh; *Gojabai* v. *Shahajirao*, 17 B. 114 (118); *Bai Kesser Bai* v. *Hunsraj*, 30 B. 431 (442); *Tukaram* v. *Narayan*, 36 B. 339 (357); *Basanta* v. *Jogendra*, 33 C. 371 (375); *Narayanaswamy* v. *Kuppusami*, 11 M. 43 (48).

(4) *Vallabh Ram* v. *Bai Hariganga*, 4 B.H.C.R. (A.C.) 135 (138); *Narayan* v. *Nana*, 7 B.H.C.R. (A.C.) 153 (166, 167); *Rakmabai* v. *Radhabai*, 5 B.H.C.R. (A.C.) 181 (185); *Bachha Jha* v. *Jugmon Jha*, 12 C. 348 (355); *Balkrishna* v. *Lakshman*, 14 B. 605 (612).

(5) *Laxmipati Rao* v. *Venkatesh*, 41 B. 315; *Bachoo* v. *Nagindas*, 16 Bom. L.R. 263 O. A. *Nagindas* v. *Bachoo*, 40 B. 270 P.C.

(6) *Puttu Lai* v. *Parbati*, 37 A. 359 P.C.

(7) *Bodo Mal* v. *Kishni Bai*, 93 I.C. 844: (1926) S. 231.

(8) *Bhayh Ram* v. *Bhyahugur*, 13 M. I.A. 373 (390); *Sri Balusu* v. *Sri Balusu*, 22 M. 398 (410) P.C.; *Bachira Ju* v. *Venkatappadu*, 2 M.H.C.R. 402 (406); *Tulshi Ram* v. *Behari Lal*, 12 A. 328 (335); *Bhagwan Singh* v. *Bhagwan Singh*, 17 A. 294 (347); *Debai Sahai* v. *Sheo Shankar Lal*, 22 A. 353 (356); *Jagannath* v. *Ranjit Singh*, 25 C. 354 (366).

(9) *Balwant Rao* v. *Baji Rao*, 48 C. 30 P.C. (C.P. case).

(10) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (438); *Girdhari Lal* v. *Bengal Government*, *Ib.*, 448 (465); *Moneram* v. *Kerry Kolitany*, 5 C. 776 (786) P.C.; *Bachha* v. *Jugmon*, 12 C. 348 (353, 356); *Ranjit Singh* v. *Jagannath*, *Ib.*, 375 (381); *Jogdamba* v. *Secretary of State*, 16 C. 367 (374); *Abhal Chwran* v. *Mangal Jana*, 19 C. 634 (638); *Tulshi Ram* v. *Behari Lal*, 12 A. 328 (340, 341).

(11) Cole, Preface to Mitak, p. *viii*.

(2) *Subodhini*—by Visheshwar Bhatt, author of Madan-Parijat, an authority in Mithila. Subodhini is only a collection of notes explanatory of obscure passages in the Mitakshara.

(3) *Madan-Parijat.*

(4) *Keshava-Vaijyanti.*

(5) *Balam Bhatta Tika*—a work by a Brahmin lady named Laxmi Devi (§ **132**) overstrains the text to favour the rights of women.[1] In other respects, neither this commentary nor her *Vaijyanti* can equal the *Vir-Mitrodaya.*[2]

(6) *Vaijyanti—see* Balam Bhatta.

(7) *Vyavhar-Madhav.*

(8) *Kalpataru*—by Lakshmidhar (1130 A.D.).

(9) *Vivad-Tandav*—author Kamlakar—contemporary of Nilkanth and said to be his cousin—deals only with inheritance and followed, if "his work is not in conflict with any higher authority."

Mithila.

232. As previously observed, except the Bengal, Eastern or Gaudiya School, whose text-book is the Dayabhag, and the Maharastra school, which favours the Mayukh, the rest of India is subject to the Mitakshara and its sub-schools of which the Mithila school, its nearest neighbour, is least dissentient. The country comprised in the ancient Mithila is variously described, some holding it to correspond to the whole of modern Behar[3] while others hold it to comprise only North Behar including Tirhoot[4] and Purneah.[5] According to Messrs. Golap Shastri and D. Chatterjee, the translators of the Vivad Ratnakar, the province of Mithila is that territory which lies between the rivers Gandak and the Coosee.[6] Whatever may be the exact boundaries of Mithila, it was at one time the seat of great literary activity. Yadnavalkya, the author of the Institutes, annotated in the Mitakshara, lived and taught here; and it still boasts of a distinct sub-school which has been prolific in the production of treatises, which, though professedly commentaries on the Mitakshara, do not fail to introduce small local variations under the license of interpretation. But the Mitakshara remains there as the paramount authority[7] the following works being regarded as merely supplementing it and as such entitled only to local preference:—

(1) *Vivad-Ratnakar*—composed by or under the superintendence of Chandeshwar. Leading text-book of the school.

(2) *Vivad-Chintamani*—by Vachaspati Misra, is also a leading text-book.[8] It follows the *Ratnakar.*

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(1) *Tulshi Ram* v. *Behari Lal,* 12 A. 328 (368); *Ananda* v. *Nownit Lal,* 9 C. 315 (324); *Jogdamba* v. *Secretary of State,* 16 C. 367 (372); *Dwarka* v. *Sarat Chandra,* 39 C. 319 (336).

(2) *Ananda* v. *Nownit Lal,* 9 C. 315 (324).

(3) Tagore's Preface to Vivad Chintamani, p. xxvii.

(4) *Thakoor Deyhee* v. *Rai Baluk Ram,* 11 M.I.A. 139 (175); *Bhagwandeen* v. *Myna Bai,* 11 M.I.A. 487 (507).

(5) *Rutcheputty* v. *Rajendra,* 2 M.I.A. 132 (155).

(6) Babu Golap Shastri, in his Law of Adoption, treats Mithila as co-extensive with Tirhoot (2nd Ed.), 92.

(7) *Sourendra* v. *Hari Prasad,* 5 P. 135 (155) P.C.; *Chandreshwar* v. *Bisheshwar, ib.,* 777.

(8) *Thakoor Deyhee* v. *Rai Baluk Ram,* 11 M.I.A. 139 (174 175); *Dhondu* v. *Jaganath,* 1 B.H.C.R. (A.C.) 47 (49); *Balwant Singh* v. *Rani Kishore,* 20

(3) *Vivad-Chandra*—by Misaru Misra—holds as high place.[1]

(4) *Krita-kalpadruma.*

(5) *Madan-parijat*—written by Vishweswar Madan Upadhyaya—better known as the author of Subodhini.

(6) *Dwaita-Parishishta*—by Keshav Misra.

(7) *Smriti-Sar.*

(8) *Smriti-Samuchchai*—by Hari Nath Upadhyaya.

But though these are all text-books of this school, in case of conflict between any of them, the Mitakshara alone is regarded as the final guide.[2]

Madras.

233. In the Madras Presidency[3] the supreme authority of the Mitakshara, though unshaken,[4] is supplemented by the following works:—

(1) The *Smriti-Chandrika* ranks highest after the Mitakshara,[5] though it cannot override its explicit provisions.[6] It holds a parallel position to the Mayukh in the Bombay Presidency.[7]

(2) *Vir-Mitrodai*—has a high position in Western India. It supplements many gaps and omissions in the earlier commentaries and illustrates and elucidates, with logical preciseness, the meaning of doubtful expressions.[8]

(3) *Subodhini*—by Vishweshwar Bhatt.

(4) *Saraswati-Vilas*—by Pratap Rudra Deo of some authority in Madras.[9]

(5) *Parasar-Madhaviyam*—written by Narainswamy—especially esteemed in the Canara District.[10]

(6) *Vyavhar-Nirnai.*

(7) *Aparark.*[11]

A. 267 (290) P.C.; *Damodar* v. *Senabutty*, 8 C. 537 (541); *Birajun* v. *Luchmi Narain*, 10 C. 392 (399); *Bachha* v. *Jugmon*, 12 C. 348 (351); *Sunimani* v. *Mullammal*, 3 M. 265 (268); *Mari* v. *Chinnammal*, 8 M. 107 (113).

(1) *Rutchputty* v. *Rajunder*, 2 M.I.A. 132 (155).

(2) *Bachha* v. *Jugmon*, 12 C. 348 (356).

(3) Variously called the Penisular, the Dravid District, or the Southern School.

(4) *Collector of Masulipatam* v. *Cavaly*, 8 M.I.A. 500 (522); *Katama Nachiar* v. *Srimut Raja Mootoo*, 9 M.I.A. 539 (606, 607); *Nagalinga* v. *Subhiramaniya*, 1 M.H.C.R. 77 (80); *Srinivasa* v. *Kuppan*, 1 M.H.C.R. 180 (182); *Bachiraju* v. *Venkatappada*, 2 M.H.C.R. 402 (403).

(5) *Bhagwandeen* v. *Myna Baee*, 11 M.I.A. 487 (508); *Collector of Madura* v. *Muthu Ramalinga*, 2 M.H.C.R. 206 (219) O.A. 12 M.I.A. 397 (437); *Kissen* v. *Javallah*, 3 M.H.C.R. 346 (351); *Gajapathi* v. *Gajapathi*, 1 M. 290 (299) P.C.; *Muttu* v. *Dora Singha*, 3 M. 290 (302) P.C.; *Mari* v. *Chinnammal*, 8 M. 107 (123); *Subramania* v. *Muthuswamy*, 21 M.L.J. 856 (864); *Appandai* v. *Bagubali*, 33 M. 439 (441).

(6) *Summani* v. *Mullammal*, 3 M. 265 (269); *Muthappanarayan* v. *Ammani*, 21 M. 58 (62); *Raju Gramony* v. *Amani*, 2 M. 358 (360); *Chinnasami* v. *Kunju*, 35 M. 152 (159); *Vedachela* v. *Ranganathan*, 26 C.W.N. 159 P.C.

(7) *Vedachela* v. *Ranganathan*, 26 C.W.N. 159 P.C.

(8) *Ib.*

(9) *Kattama* v. *Doraswamy*, 6 M.H.C.R. 310 (333); *Jajyamp* v. *Kamakshi*, 3 M.H.C.R. 424 (452); *Appandai* v. *Bagubali*, 33 M. 439 (441); *Chinnaswami* v. *Kunja*, 35 M. 152 (159); *Vedachela* v. *Ranganathan*, 26 C.W.N. 159 (166) P.C.

(10) *Collector of Madura* v. *Muthu Ramalinga*, 2 M.H.C.R. 206 (220), O.A. 12 M.I.A. 397; *Bhagwandeen* v. *Myna Baee*, 11 M.I.A. 487 (508).

(11) Both Aparark and Vyavhar Nirnai may be usefully consulted on points on which the Mitakshara is silent.

(8) *Vaithinath-Dikshatiyam.*
(9) *Dattak-chandrika.*[1]

The Punjab.

234. In the Punjab, in all questions relating to adoption, guardianship, succession, women's property and female relations such as betrothal, dower, marriage, divorce and bastardy, family relations, partitions, gifts, wills and legacies, religious usages and the rights of alluvion and diluvion, the first rule of decision is custom[2] which is recorded in the Riwaz-i-Am prepared by the settlement officers charged with this duty.[3] But in the absence of ascertained custom, the Punjabi Hindus are governed by the Mitakshara, though the scope for its applicability is much limited by the considerable body of customary law which has become crystallized into well-ascertained rules.

235. Special Treatises on Adoption.—The two special treatises on adoption, the Dattak-chandrika[4] and the Dattak-mimansa,[5] are recognized as of high authority in every part of India, of these the Dattak-Chandrika is the older and considered of higher authority,[6] but the observation of the Privy Council made with reference to the Dattak-mimansa apply equally to both, *viz.*, that caution is required in accepting the glosses of their authors where they deviate from or add to the Smritis.[7]

Persons subject to *Lex Loci.*

3. (1) All persons domiciled in a given place are *prima facie* subject to the law of that place.[8]

Law applicable to Migrants.

(2) (*a*) **But, since Hindu Law is personal, and a person has the right to carry it with him upon his migration to another place in India,**[9] **where a different system or a rule of law prevails, it follows that where a person has migrated from the home of his origin to another place in India, subject to different law, he is entitled to adhere to the law of his origin, and it will be so presumed unless it appears that he had abandoned that law and had adopted the law of his new domicile.**[10]

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but should not be accepted if their opinion is clearly opposed to it; *Chinna Swami* v. *Kunja Pillai*, 35 M. 152.

(1) *Rungama* v. *Atchama*, 4 M.I.A. 1 (97); *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (437); *Gurulingaswami* v. *Ramalakshmamma*, 3 C.W.N. 427 P.C.; *Arumilli* v. *Arumilli*, 44 M. 656 P.C.

(2) S. 2, Reg. XI of 1825; S. 5, Punjab Laws Act (Act IV of 1872); *Krishna Singh* v. *Nur Din*, (1917) P.W. R. 156: 42 I.C. 193; Rattigan's Dig. Civil Law Punjab, pp. 1-4.

(3) *Bey* v. *Alla Ditta*, 44 C. 749 P.C.

(4) *Rungama* v. *Atchama*, 4 M.I.A. 1 (97); *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (437); *Gurulingaswami* v. *Ramalakshmamma*, 3 C.W.N. 427 P.C.: 26 I.C. 113 (132); *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 P.C., *Bachoo* v. *Nagindas*, 16 Bom. L.R. 263: 23 I.C. 912, O.A. *Nagindas* v. *Bachoo*, 40 B. 270 P.C., *Arumilli* v. *Arumilli*, 44 M. 656 (665, 666) P.C.; *Damodarji* v. *Collector*, 7 A.L.J. 927: 7 I.C. 418.

(5) *Puttu Lal* v. *Parleali*, 37 A. 359 P.C.; *Sri Balusu* v. *Sri Balusu*, 22 M. 398 P.C.; *Pralhad* v. *Mahadeo*, 9 N.L.R. 130.

(6) § 145, *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (437).

(7) Per Sir John Edge in *Puttu Lall* v. *Parbati*, 37 A. 359 P.C.

(8) *Balwant Rao* v. *Baji Rao*, 48 C. 30 (38, 39) P.C.; *Banamali* v. *Arjun Sen*, (1932) C. 730.

(9) But not where a person migrates out of India to say East Africa—*Abdurahim* v. *Halimbai*, 43 I.A. 35: 32 I.C. 413 P. C.; *Mailathi* v. *Subharaya*, 24 M. 650 (a converse case—widow from French India migrating to British India remains subject to French law).

(10) *Ib.* p. 40; *Jiwan Bras* v. *Myindra*, (1934) Pat. 260; *Bhim Rao* v. *Punjab Rao*, (1935) N. 24; *Kasamsha* v. *Baban Rao*, 30 N.L.R. 322; *Basanta* v. *Lala Ram Sankar*, 59 C. 859.

(*b*) Where an area, originally a part of one province subject to one law, is transferred to another province subject to another law, it involves no change of the law to which it was subject.[1]

Explanation 1.—The "law of origin" means and includes the law established in the original domicile of the ancestors of the family, and not merely of any members thereof, as determined by the caste, race and language of the family at the time of its migration.

Explanation 2.—In order to show that in spite of his migration a person has continued to follow the law of his origin the evidence given must be such as suffices to prove a special or family custom regarding its observance.[2]

Illustrations.

(*a*) *A*, a Mahratta Brahman from Poona, subject to the Mayukh law, migrates to Nagpur where the Mitakshara law is the *lex loci*. In the first place, it will be presumed that he is subject to the Mitakshara law, but *A* may shew that both he and the other branches of his family have maintained a connection with Poona and followed the manners and customs of that place.[3]

(*b*) *A*, a Bengali from Calcutta, settled down in Allahabad. The fact that several families of Bengalis had done the same, but were following the Dayabhag law is evidence from which it will be presumed that *A* and his descendants had continued to be subject to their own law.[4]

(*c*) *A*, a Marwadi from Bikaner, joined a large colony of Marwadis in Calcutta for business. It is notorious that Marwadis follow their own customs wherever they go. *A* will be presumed to be governed by such customs, in Calcutta.[5]

(*d*) In North Kanara, the adoption of a married man is invalid. In 1861, it was transferred to the Bombay Presidency, where, in places subject to the Mayukh law, such adoption is valid. *A*, a Lingayat resident of North Kanara, adopted a married man in 1907. There was nothing to shew that *A* had become identified with the people of Maharashtra. The adoption is invalid.[6]

236. Analogous Law.—Since Hindu law is a part of the religious law of the Hindus and is inextricably blended with their religious rites and worship, the policy of the Government not to interfere with their religion leads to the necessary corollary not to interfere with their law as well; though since the Legislature enacts no limitation upon its own powers, it follows that the policy of non-interference is to that extent limited, and the Legislature has repealed some of its rules and modified others in the larger interest of society. The tenacious adherence of Hindus to their customs and usages, and their territorial diversity, justify the rule here enacted. In this sense, there is a *lex loci* as stated in clause (1).[7] But the *lex loci* applies only to persons of which the place is the domicile of origin.[8] This is presumed to be as stated in Section 2. It follows the linguistic test. For instance, those who speak Bengali will presumably be governed by the Dayabhag law wherever they may happen to reside, for

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(1) *Somashekhara* v. *Mahadeva*, 53 M. 297.

(2) *Balkinson* v. *Kunjilal*, (1930) P. C. 133.

(3) *Balwant Rao* v. *Baji Rao*, 48 C. 30 (39) P.C.

(4) *Surendra Nath* v. *Hiramani*, 12 M.I.A. 8; *Parbati Kumar Debi* v. *Jagadis Chunder*, 29 C. 433 (451) P.C.

(5) *Ib.*

(6) *Somasekhara* v. *Mahadeva*, 53 M. 297 P.C.

(7) *Soorendranath* v. *Heeramonee*, 12 M.I.A. 81 (96); *Parbati* v. *Jagadish Chunder*, 29 C. 433 (452) P.C.; *Govind* v. *Radha*, 31 A. 477 (479) P.C.; *Nobin Chunder* v. *Janaradhan*, (1862) W.R. 67; *Otun Chander* v. *Obhy Churn*, W.R. (Sp.) 67 (68); *Koomud Chunder* v. *Seetakanth*, (1863) W.R. (Sp.) 75; *Sonatum* v. *Rutton*, (1864) W.R. (Sp.) 95.

(8) *Ramdas* v. *Chandra Dassia*, 20 C. 409 (413).

Bengal was and remains their "domicile of origin." This term has been defined in the Succession Act as the country in which, at the time of a person's birth, his father was domiciled.[1] But this is not the sense in which a Hindu takes with him his personal law, and therefore, a different term had to be coined to describe it.

Lex Loci.

237. The question whether a person is bound by the *lex loci* or the prevailing law of the place depends upon the subject-matter of the right if it relates to immoveable property, it is generally subject to the law where the property is situate (*lex rei situ*).[2] The same rule applies to gifts and commercial transactions.[3] But in the matter of contracts, their validity depends upon the law of the place where the contract is made (*lex loci contractus*), but where it is made in one country, but is to be performed in another country, it will be presumably subject to the law of the place of performance (*lex loci solutionis*).[4] But since Hindu law is a local family law, it may be generally stated that the presumption of the applicability of that law applies to India; but since that law is not uniform and has become territorial, the presumption arising in the case of a person domiciled in a given place is that he is *prima facie* subject to the school of law prevailing there.[5] But where it is known or is proved that a person, though domiciled in one place, has continued to maintain the individuality of his caste, race language, manners or custom, prevailing in the country from which he or his ancestors had migrated, and which, at the time of his migration, was subject to a different rule of law, then the law applicable to him would be such law, namely, the law of his original domicile (*lex domicilii*)[6] or, indeed, the law of his original domicile, if it had come into existence since his migration, even though it may have become incorporated in that law,[7] and by which he would have been bound if he had not migrated, and by which, indeed, his other relations who have not migrated might still be bound.

But in such a case it would be permissible to the migrant to shew that he had adopted the later custom as a part of his family law. The preservation of personal law is the necessary corollary to the preservation of the religious rites and worship with which the Hindu Law is inextricably blended. The question was considered by the Privy Council as far back as 1839 when, affirming the finding of the Sadar Diwani Adalat, their Lordships said that in a case where a family migrates from one territory to another, if it preserves its ancient religious ceremonies, it also preserves the law of succession.[8] It should be noted that this presumption only applies

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(1) Act XXXIX of 1925, S. 7.

(2) Dicey, Conflict of Laws (5th Ed., Ch. 33, p. 583; *Nobin Chunder* v. *Janardhan*, (1862) W.R. 67 F.B.

(3) *Ib.*, p. 609.

(4) *Hamlyn* v. *Talisher Distillery*, (1894) A.C. 202 (212).

(5) *Ratcheputty* v. *Rajunder*, 2 M.I.A. 132; *Soorendranath* v. *Heeramonee*, 12 M.I.A. 81; *Parbati* v. *Jagdis Chunder*, 29 C. 433 P.C., cited in *Balwant Rao* v. *Bajirao*, 48 C. 30 (39) P.C.

(6) *Parbati Kumari* v. *Jagadish Chunder*, 29 C. 433, P.C.; *Tularam* v. *Shyam Lal*, 49 A. 848 (852, 853).

(7) *Vasudevan* v. *Secretary of State*, 11 M. 157 (162), approved in *Balwant Rao* v. *Baji Rao*, 48 C. 30 (39) P.C.

(8) *Rutchepatty* v. *Rajender*, 2 M.I.A. 132; *Surendranath* v. *Heeramoni*, 12 M.I.A. 81 (92); *Parbati* v. *Jagadis Chunder*, 29 C. 433 (451) P.C.; *Otum Chunder* v. *Janardhan*, W.R. (F.B.) 67 (68); *Kumud Chander* v. *Seetakant*, *ib.*, 75 (76); *Lekkea* v. *Ganga Govinda*, 8 W.R. 56; *Prithee Singh* v. *Sheo Soondaree*, 8 W.R. 261; *Huro Pershad* v. *Shib Shunkari*, 13 W.R. 47; *Sonatan* v. *Rutton*, *ib.*, 95; *Gobind* v. *Radha*, 31 A. 477 (479); *Murli Das* v.

to persons as to whose nationality or race there is no dispute; there may be cases where the same degree of presumption cannot be made, as for instance, in the case of persons of mixed descent, or of those whose assimilation to the Hindu society is yet incomplete.[1]

Law at the Time of Migration Applicable.

238. It has been held that the personal law by which a party is bound is the personal law in vogue at the time of his migration and not any subsequent development of that law which may have come into prevalence after his migration.[2] But it is submitted, that this limitation is by no means in accord with the principle underlying the rule. The reason why a Hindu is permitted to carry his personal law with him is founded on the fact that that law is disseverably connected with his religion, and that Hindus are notoriously conservative in the matter of their religious observances and that they do not wholly break away from their place of origin to which they repair on occasions of marriage and death and for the performance of their religious observances. Consequently, they are held free to take with them both their religion and their law wherever they go. Now, it cannot be denied that if they had not migrated they would have been bound by any changes and development which that law might undergo from time to time. If so, how can they be the less bound merely because they have changed their domicile. Moreover, the rule assumes a continuous connection with the place of origin in spite of the change of domicile. Moreover, the change may be a mere correction of an erroneous view of law; or it may be the revival of an old custom. So, where in a case of migration proved to have taken place before the composition of Mayukh, their Lordships of the Judicial Committee referring to that work, said: "Although the migration of the Abhan Thakurs took place before the Mayukh was written, it may well be that the rule was in force in earlier times, and that on this point the Mayukh only embodied and defined a pre-existing custom."[3]

Lex Loci.

239. While a person is entitled to his personal law, he cannot simultaneously have two such distinct and inconsistent laws, for example, one governing his rights in respect of property, taken by him from paternal ancestors, and the other in respect of properties received by him from maternal ancestors.[4] The *lex loci*, as set out in S. 2, governs a person whose place of origin is unknown.[5] Even when known, a long continuous residence in a given locality and the severance of all ties with the domicile of origin may make the migrant amenable to the local law. Such is the case of the Brahmans and Kayasths of Bengal who are reputed to have migrated from Kanauj,

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Manicka, 5 M.L.T. 181; *Amba Bai* v. *Gobind*, 23 B. 257; *Jagannath* v. *Narayan*, 34 B. 553 (557, 558); *Basudev* v. *Secretary of State*, 11 M. 157 (161, 162); *Mailathi* v. *Subcaraya*, 24 M. 650; *Bhagabai* v. *Sohodra*, 16 C.W.N. 834: 13 I.C. 691; *Kulada Prosad* v. *Hari Prosad*, 40 C. 407 (416); *Balwant Rao* v. *Raji Rao*, 48 C. 30 P.C.; *Sukbir Singh* v. *Mangeistar*, 49 A. 302.

(1) *Fanindra* v. *Rajeswar*, 11 C. 463 (481, 482) P.C.; *Balwant Rao* v. *Baji Rao*, 48 C. 30 P.C. *contra* in *Madho Rao* v. *Kesho Rao*, 55 I.C. (N.) 175.

(2) *Vasudevan* v. *Secretary of State*, 11 M. 157 (162).

(3) *Chandika* v. *Muna Kunwar*, 24 A. 273 (280) P.C.; *Jawalita Lal* v. *Jaran Lal*, 46 A. 182.

(4) *Bhagabati* v. *Sohodra*, 16 C.W.N. 834: 13 I.C. 691.

(5) *Ram Das* v. *Chandra*, 20 C. 409 (412).

and to have brought with them the Mithila Law. But after their settlement in Bengal, the Dayabhag school was founded, and it became applicable to them and is *prima facie* the *lex loci* of Bengal, though it is still open to any Bengali to show that his family had, nevertheless, retained the law of his origin.[1] Such was held to be the case of a family of Nagar Brahmans of Gujrat who were domiciled for over a century in Benares, and were ignorant of any rules to be found in the Mayukh country, and were unable to prove a single instance of special succession under the Mayukh.[2]

240. Principle.—If Hindu Law were uniform, and had not been divided into schools, nor varied by local customs and usages governing only certain castes, communities and families, it would, in the same sense, have been the *lex loci* as are the laws of the Indian Legislature. But since that law is only, loosely speaking, territorial, it follows that it would apply as stated in the last section, where nothing is known of the origin of a person found domiciled in a given place. But since this can be predicated of very few families who have migrated from their original homes, it follows that where they have preserved their contact with the home of their origin or retained its custom they will be entitled to observe and enforce them in spite of the fact that generations separate them from their homes and that they have become permanently domiciled in a place where another system of law prevails. Ordinarily, all persons living in any locality are subject to the law in force there.[3] And as regards immovable property, the general rule is that it is subject to the *lex rei situ.*[4] But inasmuch as Hindus are now declared by law to be bound by their own personal laws,[5] it follows that they are equally entitled to be judged by those laws wherever they may be living. This is of some consequence as Hindus are to be found scattered all over India, and if their laws were to be altered by each movement of their domicile, or in accordance with the rule of *rei situ,* then they might be subjected to a variety of rules as divergent as the schools of Hindu Law. Moreover, that rule only applies to countries which possess a more or less uniform territorial law. Such laws now exist in this country, and so far as they are applicable, they apply to the exclusion of Hindu Law (**§ 154**). They, however, still leave Hindu Law intact on several subjects here dealt with, and on those the rules here prescribed, hold good. But since the statutes reserving this law only extend to India, a Hindu migrating beyond the shores of India, *e.g.,* to Africa, England or elsewhere, cannot carry his personal law with him, but would be bound by the *lex loci* prevailing in the land of his domicile. But a Hindu migrating from foreign territory to India is entitled to bring his personal law with him.[6]

241. Personal Law when applicable.—This section lays down a rule in consonance with the unanimously accepted view of the Courts (**§ 237**). It declares that a Hindu is primarily governed by the law of his origin. Such law is set out in S. 2. Consequently, persons who have long lived rooted to the soil of any province and speak the language and follow

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(1) *Pitambar* v. *Nishi Kant,* 24 C.W.N. 215; *Ramesh Chandra* v. *Elahi Buksh,* 50 C. 898.

(2) *Lakshmi* v. *Hari Ram,* 52 I.C. (A.) 25.

(3) *Lalla Mahabir* v. *Mt. Kundar,* 8 W.R. 116 (118, 119); *Pitambar* v. *Nishi Kant,* 24 C.W.N. 215; *Balwant Rao* v. *Baji Rao,* 48 C. 30 P.C.

(4) *Nobin Chander* v. *Janardhan,* W.R. (F.B.) 67.

(5) Government of India Act, 1915, S. 112 (5 & 6 Geo. V, c. 61), and the statutes previously cited.

(6) *Mailathi* v. *Subbaraya,* 24 M. 650.

the customs there prevalent, are governed by the *lex loci*. But in the case of migrating families, who leave the place of their origin to settle down in another place where the prevalent law is different, the rule is that their own personal law follows them on migration. But this is merely a presumption, and may be rebutted by proving that the family had by its adoption of the customs and usages of its domicile, declared its intention to abandon its law of origin and follow that of the domicile.[1] But the mere adoption of local customs, festivals and ceremonies of the people around is not sufficient to displace this presumption.[2] The real test is whether the family has continued to adhere to the essential ceremonies of its place of origin, such as those performed at the time of birth, marriage and death,[3] especially the last, which Hindu Law regards as the most important.[4] It is not necessary to prove migration from the place of origin, as this would, in many cases, be impossible.[5] Of course, where a Hindu has become a convert to Mahomedanism he is presumed, by the very act of his conversion, to have abandoned Hindu Law and usage to which he was subject, and those who allege that the Hindu Law and usage have been still retained must prove it.[6]

242. Law of Domicile when applicable.—It has been stated before that a Hindu is only presumably bound by the law of origin, and that that presumption is rebuttable, and may be rebutted by proof of adoption of the law of domicile in essential ceremonies, such as those attending birth, marriage and death. The question in each case is one of fact. Where a family originally subject to the Mithila Law, migrated to Bengal and had, for several generations, intermarried with Bengal women, though the rites and ceremonies connected with funerals and marriages had been sometimes performed according to the Bengal Shastras, the court held the fact of intermarriages sufficient to justify the application of the law of domicile.[7] But the converse proposition does not necessarily hold good, since a family may have for generations become merged in the local population, and yet it may not be permitted to intermarry with the people of that locality; but if, in such case, the law of succession be in accordance with the *lex laci*, then the court would presume that the family had abandoned its law of origin and adopted that of domicile.[8] But this statement requires to be qualified. The fact that a Hindu is entitled to carry with him his communal law depends upon the fact that inspite of the change of domicile he still remains a member of his community and attached to his original home. He visits it on the occasions of birth, marriages and funeral obsequies, and it would be strange if he were bound by one law, his wife by another, and his children by its latest development. Moreover, in such a case, a preliminary enquiry into the period of migration

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(1) *Byjnath* v. *Kopilmon*, 24 W.R. 95 (96); *Kulada* v. *Haripada*, 40 C. 407.

(2) *Huro Pershad* v. *Shibo Shunkuree*, 13 W.R. 47.

(3) *Koomud Chunder* v. *Setakanth*, W.R. (F.B.) 75 (76): *Login* v. *Princes Gowramma*, 1 I.D. (O.S.) 109; *Padmavati* v. *Doolar Singh*, 4 M.I.A. 259.

(4) *Ram Bromo* v. *Kaminee*, 6 W.R. 295 (296); *Ramesh Chandra* v. *Elahi Buksh*, 50 C. 898.

(5) *Ramesh Chandra* v. *Elahi Buksh*, 50 C. 898, explaining *Pitambar* v. *Nishikanta*, 31 C.L.J. 52.

(6) *Machhu Bai* v. *Hira Bai*, 35 B. 264; *Ibrahim* v. *Ibrahim*, 30 M.L.T. 85 P.C.

(7) *Raj Chunder* v. *Kokul Chund*, 6 I.D. (O.S.) 42: (1801) 1 Sel. R. S. D.A. (Macnaghur) 43; *Koomud Chunder* v. *Seetakanta*, W.R. (F.B.) 75 (76).

(8) *Chundro Sekhur* v. *Nobin Soondur*, 2 W.R. 197.

and the state of the law then current would be almost a necessary prelude to every such litigation. Fortunately, as the old fiction of interpretation still obtains and as interpretation of law is not its alteration, it follows that Hindus are entitled to insist upon the administration of their personal law with all its latest "interpretations."[1] From what has been said before, it is clear that the *lex loci* will apply to persons whose origin is unknown, or who have become permanently domiciled elsewhere and identified with its people. Such is also the case of aborigines, who are presumably governed by the Hindu Law of the place where they reside, in the absence of proof of a custom at variance therewith.[2]

243. The Jains are no exception to the rule.[3] Like the rest of the Hindus they also carry on migration, their own personal laws with them. But inasmuch as, being traders and merchants, they have for generations become settled in all parts of India it is not always possible to ascertain the law of their origin. In that case their personal law would be the law of their domicile, in other words, the *lex loci*.[4]

Law applicable to Converts.

4. (1) Hindu Law, as such, ceases to bind a Hindu upon his conversion to an alien faith[5] and in the absence of anything appearing to the contrary, he will be presumed to follow the law applicable to his new religion[6] but it is open to him to continue to follow Hindu Law as a matter of custom so far as it is consistent with his new religion[7] and with the rights of the other members of his family.[8]

(2) The question whether a convert continues to follow the old law or elects to follow the new law is a question of intention to be decided in each case with due regard to the course of his conduct, habit and mode of life.

244. Analogous Law.—This section enunciates three main propositions of law all of which have been the subject of judicial decisions. The first proposition is that a Hindu, upon his conversion to a non-Hindu faith, *e.g.*, Mahomedanism or Christianity, becomes at once free from the obligations of Hindu Law.[9]

The second proposition is that a convert *prima facie* becomes subject to the law applicable to his new religion.[10]

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(1) *Balwant Rao* v. *Baji Rao*, 48 C. 30 (43) P.C. approving *Vasudevan* v. *Secretary of State*, 11 M. 157 (162); *Madho Rao* v. *Kesho Rao*, 55 I.C. (N.) 175.

(2) *Rukhab* v. *Chunnilal*, 16 B. 347; *Amava* v. *Mahadgauda*, 22 B. 416; *Ambabai* v. *Govind*, 23 B. 257 (263); *Lalla Mahabeer* v. *Mt. Kundun*, 8 W.R. 116; *Chotay Lall* v. *Chunao Lal*, 4 C. 744; *Manik Chand* v. *Jagat Settani*, 17 C. 518.

(3) *Bhagvandas* v. *Rajmal*, 10 B.H.C.R. 241; *Sheo Singh* v. *Dakho*, 1 A. 688 P.C.; *Chotay Lall* v. *Chunnoo Lal*, 4 C. 744 (752, 753) P.C.

(4) *Official Assignee* v. *Bidya Sundari*, 24 C.W.N. 145: 54 I.C. 700.

(5) *Bhagwan Koer* v. *Bose*, 31 C. 11 P.C.

(6) *Abraham* v. *Abraham*, 9 M.I.A. 195.

(7) *Rowther* v. *Rowther*, 45 M. 308.

(8) *Kulada Prasad* v. *Haripada*, 40 C. 407 (418, 419).

(9) *Bhagwan Koer* v. *Bose*, 31 C. 11 P.C.; *Rowther* v. *Rowther*, 45 M. 308 P.C.; *Najimuddin* v. *Abdul Hamid*, (1923) L. 175; *Jamna Bai* v. *Gonda Ram*, 6 L.L.J. 84; *contra* in *Ramjee* v. *Anandappa*, 2 Mysore L.J. 92 (submitted, based on a misapprehension of the Privy Council).

(10) *Abraham* v. *Abraham*, 9 M.I.A.

The third proposition is that a convert may, despite his conversion to an alien faith, elect to follow the old law, but he can only do so in its entirety (*a*) so far as it is consistent with his new religion,[1] and (*b*) so far as he can do so without prejudicing the rights of his unconverted relations.[2]

A convert continuing to follow Hindu Law can only do so as a matter of custom,[3] since Hindu Law, as such, ceases to apply to him upon his conversion to another faith with the personal and property law of its own.[4]

Clause 2 lays down a rule of evidence and is equally supported by authority.

These several propositions will now be examined in detail.

Clause I.

245. New Religion: New Law.—Since Hindu Law is a part of the Hindu religion and is claimed to possess divine origin, it follows that he who renounces that religion in favour of another, possessing a system of its own law, the convert, upon his embracing his new religion, equally embraces his new system of law. But it is only a presumption, since a person may become a convert to a new religion, such as Christianity, and Islam and yet continue to retain his old law, but the presumption is otherwise.[5] Where however, a Hindu becomes a convert to a religion which is only a sect of Hinduism, *i.e.*, Sikhism, which has no separate system of its own law, and which conversion is, moreover, to an allied and not to an alien faith, since conversion does not entail any presumptive break in the continuance of old law by which he was bound in spite of his conversion. Hindu Law is essentially a religious law. It has not been yet secularized. Technically, it remains a set of divine commands which are obligatory upon all Hindus so long as they are Hindus by religion. But outside this narrow and steadily narrowing circle, there remain a class of Hindu reformers, dissenters and apostates, such as, Sikhs,[6] Brahmos, Arya Samajis, Prarthana Samajis and the rest, who, though disavowing the essential tenets of Hinduism are still regarded as Hindus and are subject to the Hindu Law. But there is a limit beyond which apostacy is intolerable; and it has been held that the moment a Hindu plunges into apostacy by allying himself to an alien faith with a legal system of its own, he ceases to be subject to Hindu Law, and it is presumed that, with the acceptance of a new religion, he had also accepted its law, which, again, he was not bound to do, since Christian and Mahomedan Laws are, unlike the Hindu Law, apart from the Christian and Mahomedan religions, and the acceptance of one does not necessitate the acceptance of

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195; *Rowther* v. *Rowther*, 45 M. 308 (314) P.C.; *Advocate-General* v. *Jimba Bai*, 41 B. 181; *Bai Maeh Bai* v. *Hir Bai*, 35 B. 264; *Asha Bibi* v. *Ma Kya Yin*, 64 I.C. (R.) 514; *Chedambaram* v. *Ma Yein*, 6 R. 243 (253).

(1) *Rowther* v. *Rowther*, 45 M. 308 (314) P.C.

(2) *Kulada Prasad* v. *Haripada*, 40 C. 407 (418, 419).

(3) *Abu* v. *Khatubai*, 43 B. 647, affirmed O.A. *Khatubai* v. *Abu*, 47 B. 146 (152, 153) P.C.

(4) *Dalipa* v. *Dallu*, 4 L.L.J. 336; *Haji Osman* v. *Haroon*, 24 Bom.L.R. 978: 68 I.C. 862; *Abu* v. *Khatubai*, 43 B. 647, affirmed O.A. *Khatubai* v. *Abu*, 47 B. 146 (152, 153) P.C.

(5) *Abraham* v. *Abraham*, 9 M.I.A. 195 (237, 238); *Tellis* v. *Saldanha*, 10 M. 69; *Subbayya* v. *Rangayya*, (1927) M. 883: 105 I.C. 206.

(6) *Bhagwan Koer* v. *Bose*, 31 C. 11 P.C.

the other; from which again it follows that a Hindu may become a convert to Christianity and Mahomedanism, and yet retain his personal law unaffected by the change of his religion.

246. It was so laid down by the Privy Council in the case of *Abraham* v. *Abraham*, in which it had to consider the applicability of the law of coparcenership to the two brothers who were descendants of Hindu parents, but had themselves become converts to Christianity, and one of them, Mathew, having married an English woman of mixed descent, the question was whether, on his death, his brother succeeded to his estate by survivorship, which the Privy Council held that he did not, on the ground that with the conversion of a Hindu to Christianity the Hindu Law, as such, ceased to apply to him, though it was conceded that the convert may abide by the old law notwithstanding that he had abandoned his old religion, a fact which must be proved in each case; but in such a case, Hindu Law would apply to the convert not because it is Hindu Law, but because it is adopted by the convert as his family custom.[1]

247. This case was decided in 1863 before the enactment of the Succession Act, 1865, under which, while Hindus, Mahomedans and Christians are exempted from its provisions[2] others not subject to any other law, are made subject to it.[3] The question whether this enactment has had the effect of overruling their Lordships' view[4] by making it no longer possible for a Hindu convert to retain his own law has been answered in the negative by the Board.[5]

248. In another case, a similar question arose upon a Hindu becoming a convert to Mahomedanism. Here one Ratan Singh was a born Hindu, but became converted to Mahomedanism, the effect of which their Lordships held, was to have *ipso facto* dissolved the coparcenership of which he had till then been a member.[6]

249. Joint family implies that members thereof are entitled to joint mess, joint worship, joint residence and joint estate. But where joint mess, joint worship and joint residence become impossible the jointness of estate cannot continue in the sense it is understood of a coparcenary estate. The converted member becomes entitled to enjoy his share, but he can only do so on partition. The underlying religious foundation of a coparcenership being swept away by his act of conversion all that remains to him is his share safeguarded to him by the statute. He cannot continue to remain joint. If he fails to assert his right in time it is apt to be lost by the efflux of time, since the possession of those who continue to remain joint would be adverse as to him and on the expiry of the statutory period, his right of recovery would be extinguished.[7]

250. Forfeiture of caste may follow other acts besides conversion to an alien faith. It may equally result from a marriage out of caste. Such would, for instance, be the marriage of a coparcener to a European Christian

(1) *Abraham* v. *Abraham*, 9 M.I.A. 195 (237, 238); *Tellis* v. *Saldanha*, 10 M. 69; *Subbayya* v. *Rangayya*, 1927 M. 883: 105 I.C. 206.

(2) S. 332, now *see* S. 3 of Act XXXIX of 1925.

(3) S. 2, Succession Act (X of 1865).

(4) *Napel Bala* v. *Sitikanta*, 15 C. W.N. 158: 8 I.C. 41.

(5) *Rowther* v. *Rowther*, 45 M. 308 (314) P.C., following *Abraham* v. *Abraham*, 9 M.I.A. 195.

(6) *Khunnilal* v. *Gobind Krishna*, 33 A. 356 (363) P.C.; followed in *Kulada Prasad* v. *Haripada*, 40 C. 407 (418, 419); *Chidambaram* v. *Ma Nyein Me*, 6 R. 243.

(7) See this subject further discussed in the Chapter on "joint family."

lady who would inherit to her husband under the Succession Act. His issue by such marriage would not be of his caste, and they could not render the spiritual services to his ancestors for which the right to property is regarded as a solatium.[1] But, nevertheless, he does not now forfeit his heritage.[1]

251. So far as the wholesale conversion of families is concerned, it is open to the members of such families and their descendants to adhere to the old law, or renounce it. But Hindu Law, as such, ceases to apply to him. As the Privy Council observed: "Upon the conversion of a Hindu to Christianity, the Hindu Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion."[2] In another place, they said: "The profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity had no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu Law or by any other positive law may, by his course of conduct after his conversion, have shown by what law he intended to be governed as to these matters."[3]

252. In another case it was observed: "A convert, *i.e.*, a Hindu or a Mahomedan, who becomes a convert to some other faith, is not deprived *ipso facto* of his rights to property by inheritance or otherwise. *Prima facie* he loses the benefits of the law of the religion he has abandoned, and acquires a new legal status according to the creed he has embraced, if such creed involves with it legal responsibilities and obligations. Thus a Hindu adopting the Mahomedan faith, from the moment of his conversion, by that act affects all the property he may acquire subsequently to it, so as to render it subject to he Mahomedan Law of inheritance. His apostasy has an immediate and prospective, not a retrospective effect; and his subjection to the new law dates from the moment of his profession of the new religion."[4]

253. It will be noticed that these and other cases[5] in which the same view was reiterated were cases of wholesale conversions of all members of the family, or of descendants of the convert, to whom it is open to follow the law of their old religion, or adopt that of their new religion. But it will be presumed that, upon his conversion, the convert has not only adopted the new religion but also its new law. But this is only a presumption which he may rebut by shewing that, despite the change of his religion, he had continued to adhere to the old law; and where this has been found to be the case amongst converts generally, it becomes a custom of the caste as became established in the case of Hindu converts to Mahomedanism, known as Khojas and Cuchi Memons.[6]

(1) See Act XXI of 1850.

(2) *Abraham* v. *Abraham*, 9 M.I.A. 195 (241).

(3) *Ib.*, p. 245.

(4) *Raj Bahadur* v. *Bishen Dayal*, 4 A. 343 (347).

(5) *Lopez* v. *Lopez*, 12 C. 706 (722); *Jalbhai* v. *Manoel*, 19 B. 680; *Baiji* v. *Santok*, 20 B. 53; *Hastings* v. *Gonsalves*, 23 B. 539 (543); *Ghosal* v. *Ghosal*, 31 B. 25 (30, 32), dissenting from *contra* in *Tellis* v. *Saldanha*, 10 M. 69.

(6) *Abdul Cadar* v. *Turner*, 9 B. 158 (162); *Mahomed Sidick* v. *Ahmed*, 10 B. 1; *Ahmedhoy* v. *Cassumbhoy*, 13 B. 534; *Jaswantsangji* v. *Fatesangji*, 20 B. 181; *Abu* v. *Khatubai*, 43 B. 647, affirmed O. A., *Khatubai* v. *Abu*, 47 B. 146 (152, 153) P.C.

So the Hindu rule of exclusion of females from succession has been held to persist as a custom amongst the Hindu converts, known as the Halai Memons of Porebunder, though the Halai Memon settlers in Bombay follow the orthodox Mahomedan rule.[1] In a Madras case, it was held that coparcenership and the right of survivorship were incidents peculiar to Hindu Law, which law, so far as it affected Native Christians, was repealed by the Succession Act.[2] This view was dissented from in Bombay, where it was pointed out that there was nothing in the Succession Act to support it, and that on the other hand S. 93 of that Act actually recognized a joint tenancy with the right of survivorship[3] (§§ 221-223, 254).

5. No Court shall enforce any law or usage having the force of law, inflicting on a Hindu, forfeiture of rights or property other than a right to hold a religious office or in any wise imparting or affecting any right of inheritance not so connected by reason of his renouncing or having been excluded from the communion of the Hindu religion, or being deprived of caste.[4]

Effect of Apostasy.

Illustrations.

(*a*) *A*, a Hindu, dies, leaving him surviving two sons, *B* and the son *C*, who had previously become a convert to Christianity. *B* and *C* will inherit equally to *A*.

(*b*) In the last illustration if *C* predeceased *A*, leaving him surviving his Christian son *D*, the latter will inherit equally with *B*.[5]

(*c*) *A*, a Shebait of a temple, dies leaving him surviving *B*, who had previously turned a Christian. *B* cannot succeed to the Shebaitship, nor claim its emoluments, received by the holder of that office.

254. Analogous Law.—This section is drawn from S. 9 of the Bengal Regulations enacted as the Caste Disabilities Removal Act, 1850,[6] otherwise known as the *Lex Loci* Act, passed to remove the disqualification attending a person upon his renunciation of the tenets of Hinduism, whereupon he might be outcasted or his right to property depended upon the observance of the orthodox practices of Hinduism forfeited. The Act itself is based upon the provisions of an earlier Regulation,[7] which removed the penalty for freedom of conscience. Consequently, where the Rajput father had become a convert to Mahomedanism in 1845, whereupon it was claimed that he forfeited his share in the ancestral estate, which became solely vested in the son, the Privy Council held that the intention of both the Regulation of 1832 and of the Act of 1850 was perfectly clear in that they both withdrew from the parties the arm of the Court to enforce any penalty or forfeiture of right of property consequent thereupon. In such case, the forfeiture was in fact incurred, but it did not give the son any enforceable right to his father's share in the joint estate, which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice.[8]

255. The Act of 1850[9] lays down that a person deprived of his caste by conversion to another faith or otherwise does not forfeit on that account

(1) *Khatubai* v. *Abu*, 47 B. 146 (151, 152) P.C., affirming O.A., *Abu* v. *Khatubai*, 43 B. 647.

(2) *Tellis* v. *Saldanha*, 10 M. 69.

(3) *Nauroji* v. *Perozbai*, 23 B. 80; *Ghosal* v. *Ghosal*, 31 B. 25 (32).

(4) Act XXI of 1850. The Act in its turn is based on S. 9 of the Beng. Reg. VII of 1832.

(5) *Bhagwant Singh* v. *Kallu*, 11 A. 100.

(6) Act XXI of 1850.

(7) S. 9, Beng. Reg. VII of 1832.

(8) *Khunnilal* v. *Gobind Krishna*, 33 A. 356 (365, 366) P.C., reversing O.A. 29 A. 487.

(9) For full text, *see* Appendix.

(*a*) his rights, (*b*) his property, or (*c*) inheritance, the last two being merely illustrative of the first, as both the "forfeiture of property" and a "right of inheritance" are included in the word "rights." The Act does not abolish the forfeiture of such rights, but is limited merely to their non-enforcement by the Court. If the intention were otherwise, the section might have been worded thus: "No rights which a person possesses shall be forfeited, impaired or in any way affected by reason merely of his renouncing, etc."[1] The effect of this enactment is to remove partially certain disabilities imposed by the Hindu Law on an outcast Hindu, it being immaterial whether the deprivation of caste is due to conversion to another religion, in which case the convert ceases to be a Hindu, or whether it is due to non-compliance with its rules. Consequently, an outcast does not forfeit his right of guardianship of his children if he is otherwise qualified.[2]

256. **Principle.**—Since Hindu Law is religious law, the right to property is made by that law dependent upon the observance of the tenets of that faith. Consequently, a lapse from the orthodox practices of Hinduism would under that law entail forfeiture of the caste and all rights to property and inheritance. The pioneer missionaries influenced the Government to remove the iniquity visiting a Hindu convert of the deprivation of his civic rights, resulting in the enactment of the Caste Disabilities Removal Act,[3] otherwise known as the *Lex Loci* Act. This measure applies equally to those who change their religion or are outcast for failing to comply with any of its precepts. But in either case, the Act is limited to this that the court will not enforce or recognize the forfeiture as affecting his right to property or inheritance.[4] It does not otherwise interfere with the autonomy of caste. For instance, the Court cannot restore him to the privileges of caste lost by his exclusion.[5]

257. **Effect of Apostasy.**—The last section deals with the effect of Hindu Law upon Hindu converts. This section deals with the penalties which Hindu Law imposes upon converts and defines the extent to which they have been statutorily mitigated. The Act applies equally to converts and non-conformists, that is to say, to those who have renounced Hinduism as also to those who do not conform to its usages. The question may be examined with reference to (*a*) the persons protected, (*b*) the rights protected, (*c*) and the rights lost.

(1) Persons Protected.

258. The operation of the Act is ambiguous and has given rise to a conflict of decisions. It will be observed that so far as regards the persons, it prohibits the court from inflicting "on any person forfeiture of rights or property" and then goes on to add "or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste." If the latter clause be read as explanatory of and enlarging, with special reference to inheritance, the more general clause rendering unenforceable through the medium of court, the forfeiture of rights or property "on any person," it

(1) *See* the subject further discussed in the chap. on the General Principles of Inheritance.

(2) *Khunnilal* v. *Gobind*, 33 A. 356 (365, 366) P.C.; *Kamlesra* v. *Jarai Kasaundan*, 28 A. 233; *Muchoo* v. *Arzoon*, 5 W.R. 235; *Ram Nath* v. *Durga*, 4 C. 550 (552, 555); *Sundari* v. *Pitambari*, 32 C. 871 (873, 874); *Gul Muhammed* v. *Wazir Begum*, (1901) P.R. No. 60; *Taij Sing* v. *Kousilla*, (1902) P.R. 104.

(3) Act XXI of 1850.

(4) *Honamma* v. *Timannabhat*, 1 B. 559.

(5) *Subbaraya* v. *Ramasami*, 23 M. 171.

would support the view, taken in Allahabad to the effect that these words not only protect the apostate, but also his descendants. Where, therefore, a Hindu turned a Mahomedan, his son, also a Mahomedan, was held entitled to succeed as reversioner to his Hindu uncle on the death of that uncle's widow.[1] But this view, though followed by the other courts, has been dissented from in Madras, where so far as regards the right of inheritance specifically provided for, stress is laid on the language of the second clause containing the words "*by reason of his or her renouncing* or having been *excluded* from the communion of any religion, or being *deprived* of caste"—all words pointing to the person who has renounced the religion, or is excluded from or deprived of caste. In this view, the Mahomedan son of a converted Hindu would not succeed to the reversionary right of his uncle.[2] In Sindh, the question arose whether a Hindu son of the father converted to Mahomedanism was his heir. It was held that "any right of inheritance" extended equally to a right accruing to a person, which right is not affected by conversion. Consequently, a Hindu son was held entitled to inherit the property of his father. But it was added, that though, under the Mahomedan Law, a son is *prima facie* entitled to a share, yet the fact of his being a Hindu shifted the burden of proof on him to shew that he was not excluded as a *Kafir*.[3] This case shows the difficulties which beset a liberal construction of the section. The fact is that the Act ill-defined the rights intended to be protected, and the second clause, while intended to be supplementary, is susceptible of a double construction according as it is taken to be illustrative or exhaustive of the rights protected by it.

(2) Rights Protected.

259. Secondly, as regards the rights protected, the Act refers to "forfeiture of rights or property." It is, therefore, clear that the Act merely saves existing rights, but has not the effect of creating new ones.[4] Consequently, a member of a tarwad in Malabar which is impartible, cannot, on his conversion to Mahomedanism, acquire a right to a partition of the tarwad property.[5] And even as regards the existing rights, the Act does not prevent their being forfeited or lost upon apostasy—all it provides is that the Court will not *enforce* such forfeiture. So where a person was outcast by a Caste Panchayat, whereupon he claimed damages, the court refused to interfere with the autonomy of caste, provided that its decisions were within its own jurisdiction and were not oppressive or contrary to natural justice.[6] So where a Hindu married woman, having embraced Islam, married a Mahomedan according to the forms of Mahomedan Law and had sons by him during the lifetime of the Hindu husband, from whom she had not obtained divorce, she claimed to inherit to her father, whereupon the court held her to possess no such right on the ground that having been married to a Hindu, her second marriage was illegal and that, therefore, she was in the eye of the law an unchaste daughter, who was excluded from inheritance under Hindu Law. The Act did not apply to her case because, possessing as she did, no right, she had forfeited none which the Act could

(1) *Bhagwant Singh* v. *Kallu*, 11 A. 100, followed in *Mabna* v. *Chan*, (1902) P.R. 104; *Rupa* v. *Sardar Merza*, 1 L. 376; *Hasoinmal* v. *Ghulam Mahomed*, 8 S.L.R. 185: 27 I.C. 357; contra *Vaithilinga* v. *Ayyathorai*, 40 M. 1118.

(2) *Vaithilinga* v. *Ayyathorai*, 40 M. 1118.

(3) *Hassomal* v. *Ghulam Mahomed*, 8 S.L.R. 185: 27 I.C. 357.

(4) *Matungini* v. *Ram Ratton*, 19 C. 289 (291) F.B.

(5) *Pathumma* v. *Raman*, 44 M. 891 (896) F.B.

(6) *Bishambar Das* v. *Gobind Das*, 12 A.L.J. 552: 23 I.C. 301.

save.[1] It is apprehended that if the Act will not enforce forfeiture of rights, it will not equally enforce assertion of rights lost by the apostate which are involved in his deprivation of caste. Such is a right to enter a temple, or to participate in a caste dinner or a religious or social ritual, all of which are bound up with the observance of the caste rules. There are some texts which deny to the outcast and his offspring the right of maintenance.[2] Such rights are now protected by the Act. The father does not forfeit his right to the guardianship of his children by his conversion to another faith (**S. 76**), though in the case of the mother and other relations that fact may influence the Court in appointing another guardian as more conducive to the minor's benefit. A person may continue to enjoy his right of adoption even on his conversion to Mahomedanism (**§§ 254, 255**), but whether the adopted son of a Hindu, upon his conversion to an alien faith, still retains his right as son in his adoptive father's family is one upon which the early text writers had opined against him.[3] But a different answer would have to be given now in view of the Act which preserves his "rights" in spite of his conversion and the withdrawal of spiritual benefit which his adoption was held to convey. In other words, on his adoption, an adopted son is as good as an *aurus* son and the conversion of one no more than of the other prejudices his rights.

Persons married under the Special Marriage (Amendment) Act[4] are, as regards their rights and liabilities, made subject to the provisions of this Act.[5]

(3) Rights Lost.

260. Apart from their enforcibility through the medium of court, this Act does not encroach upon the provisions of Hindu Law, which determines the rights of an apostate. Some of these rights, being welded with religious observances, would be necessarily lost on the renunciation of the religion of which they are only an attribute. Such would be the right of coparcenership,[6] the right to perform the obsequial rites, the right of worship or to act as a Shebait or representative of the founder of a religious endowment, to attend a Caste Panchayat or caste dinners and other ceremonial functions.

Hindu Law when Applicable to non-Hindus.

6. Subject to the provisions hereinbefore contained, non-Hindus, whether Hindu converts or others, residing in a Hindu country, and adopting the custom of the Hindus, may become subject to such of the incidents of Hindu Law as are implied in the custom they have adopted.[7]

Illustrations.

(*a*) A family of aborigines lives as a Hindu family joint in mess and estate. It will be governed by the Hindu Law of coparcenership, and the legal presumption applicable to the position of a joint Hindu family will be applied to it.[8]

(*b*) A family of Hindu converts to Mahomedanism, domiciled in India, continue to live joint in mess and estate. It will be deemed to possess the incidents of a Hindu joint family.[9]

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(1) *Sundari* v. *Pitambari*, 32 C. 871; *Matangini* v. *Jaykali*, 5 B.L.R. 466; *Kerry Kolitaney* v. *Moneeram*, 19 W.R. 367 O.A. *Subbaraya* v. *Ramasami*, 23 M. 171 (177, 178).

(2) Vishnu, XV-§§ 35, 36; Deval and Baudhyayan, cited in Dayabhag, V-§§ 11, 12; May., IV-11-§ 10; Sm. Ch., V-§§ 2, 12; Manu, cited in Sm. Ch., V-1.

(3) 2 Mon.H.L. 200; Steele, 181.

(4) Act XXX of 1923.

(5) *Ib.*, S. 23.

(6) *See* S. 120 (*iii*) *post.*

(7) *Rup Chand* v. *Lalu*, 3 C.L.R. 97 (99, 100).

(8) *Ib.*

(9) *Suddentonnissa* v. *Najada*, 3 C. 694.

(*c*) But in the last case, if the family were domiciled out of India, *e.g.*, in Burmah,[1] or Mombasa,[2] the same presumption would not arise.

261. Analogous Law.—"Where persons who are non-Hindus reside in a Hindu country, and adopting the customs of the Hindus have lived as Hindu families do, joint in mess and estate, they will be governed by the Hindu Law of coparcenership and the legal presumption applicable to a joint Hindu family will be applied to them."[3] The combined effect of this section and the last is to recognize the right of non-Hindus, whether Hindu converts, or others, to follow by custom some of the incidents of Hindu Law. But this they can do only in India, where the vast majority of the population being Hindus, others, residing in their midst might conceivably be imbued by their surroundings.

262. Effect of Emigration.—The question to what extent a non-Hindu who has adopted Hindu Law as a part of his family or communal custom remains subject to that custom, upon his migration to another province outside India, or to another country, has been settled by the Privy Council who have held that since the territorial extent of Hindu Law is limited to Hindusthan, though a Mahomedan family governed by that law would be deemed to be still subject to that law upon its migration from one province to another within that country, still it cannot but cease to apply where the migration is to a non-Hindu country, *e.g.*, Africa, which has a *lex loci* of its own.[4]

263. Even Hindus may upon their migration to a non-Hindu country become subject to such law, though in their case, the presumption would remain that they follow their personal law in spite of their migration to a foreign country. But where the *lex loci* of such country enacts a rule inconsistent with the personal law, the latter cannot prevail in preference to the *lex loci* of that country.[5] It was so held in a case of one Maung Ohn Ghine, whose paternal grandfather was a Hindu emigrant from Madras to Burmah, where he had married a Burmese woman. His son was, therefore, a Kalai who married a Kalai and had practically settled down in Burmah. Ghine was a resident of Rangoon and had evinced great interest in Buddhism and was as much a Buddhist as he was a Hindu. But the question was which one of the two he must be classed as for the purpose of succession. The Privy Council thought that the question depended upon the combined effect of migration, intermarriage, new occupation and identification with the new community and the extent of departure from the orthodox law. In the case of Kalais, it was found that they had become a distinct community domiciled in a non-Hindu country where they intermarried with the people, and had, therefore, become so far removed from the influence of Hinduism that they could not be classed as Hindus. "To the members of such a community," they observed, "the expression Hindu in the Indian Succession Act and the Burma Laws Act would not be applicable."[6]

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(1) *Ma Yait* v. *Maung Chit Maung*, 66 I.C. 609 (612, 613) P.C.; *contra* in *Raghubar Dayal* v. *Rani Dulare*, 6 R. 367.

(2) *Abdur Rahim* v. *Halimabai*, 20 C. W.N. 362: 32 I.C. 412 P.C.

(3) *Per Curiam* in *Rupchand* v. *Latu*, 3 C.L.R. 97 (99, 100).

(4) *Abdur Rahim* v. *Halimabai*, 20 C. W.N. 362: 32 I.C. 413 P.C.

(5) *Ib.*

(6) *Ma Yait* v. *Maung Chit Maung*, 49 C. 310 (322) P.C.

CHAPTER II.

CUSTOMARY LAW.

Custom defined.

7. Custom is an established practice at variance with the general law.[1]

264. Analogous Law.—The definition in this section is taken from the undernoted case.[2] "Immemorial custoi is transcendent law", says Manu.[3] Custom as the source of Hindu Law is well recognized by the Shastric texts,[4] Indeed, the whole Hindu Law is itself founded on immemorial customs, and, therefore, it naturally assigns a high place to communal customs and usages. This is recognized by the courts. So the Privy Council in one case said, "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence."[5]

265. In this and other cases the courts have used the two terms "custom" and "usage" as interchangeable; but they are clearly distinguishable on the grounds stated in section 13, and apparent from the following descriptions given of them by the same high tribunal.

Custom in Other Laws.

266. The rule that custom overrides the law is not merely a rule of Hindu Law, but is equally the rule in England and America and even in countries possessing the advantage of codified laws.

Distinction between custom and usage.

267. There is as much confusion in the indiscriminate use of the two terms "customs" and "usage" in England, as there is in this country.[6] Ordinarily, the term "usage" lacks three of the distinguishing features of custom properly so called:—

(*i*) It need not have existed from time immemorial;

(*ii*) It need not be local;

(*iii*) It cannot override the positive law. But on close examination, none of these tests would stand scrutiny; since the first two are not exclusive, and the last is equally applicable to custom.

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(1) *Hur Parshad* v. *Sheo Dayal*, 26 W. R. 55 (70) P.C.

(2) *Ib.*

(3) Manu, Ch. I, Ss. 108-110. *See* also *Ib.*, Ch. VII, S. 203; Ch. VIII, Ss. 41, 46.

(4) Yadnavalkya, II, Ss. 4, 5; (Mandlik's Trans., p. 198); *Vrihaspati*, 33 S. B. E., pp. 282, 287; Mitakshara Ch. 1, Ss. 1-25 1-ii 1, S. 2; Narad, Intro. S. 40; Gautam, Ch. XI, S. 20; (S. B. E. II, p. 237); Vasishth, S. 1-10 (S.B.E. XIV, p. 2); Baudhayan (S. B. E. XXX, pp. 147, 167); Saraswati Vilas (Foulkes Tr.), pp. 16, 99, 100; Virmitroday, Ch. II, p. II, S. 19. Sarkar's Tr. p. 127.

(5) *Ramlakshmi* v. *Sivanatha*, 14 M. I.A. 570 (585).

(6) 10 Halsbury's L.E., *Tit* Custom, S. 422, p. 221.

268. The real distinction is stated in the definition, and when the two terms are not interchangeably used, as they very often are, those appear to be the leading attributes of usage. This term is however frequently used to denote a local custom.[1] It is used in this sense in the Evidence Act.[2] It will, however, be used in this Code in the definite sense assigned to it in the section. In the ethnological development of law, usage usually precedes custom. Many customs have so developed; and sometimes, the custom of a particular community remains no more than a usage of another.

Nature of Custom.

8. (1) A custom varying the general law may be a general,[3] local,[4] tribal[5] or family custom.[6]

Explanation 1.—**A general custom includes a custom common to any considerable class of persons.[7]**

Explanation 2.—**A custom which is applicable to a locality, tribe, sect or a family is called a special custom.**

269. **Analogous Law.**—Custom has been defined as some established practice at variance with the general law.[8] Now, such practice may be universal or confined to a particular people, or locality, or again, it may even be confined to a particular family.

Universal Custom.

270. A universal custom is the common law of the people,[9] and is soon transformed into the statute law, for its universality is itself a guarantee of its popularity and it is popularly known as the common law of the people. Such may be said to be the custom of polygamy prevalent amongst the Hindus.

271. The existence of a general custom as distinct from law is, however, possible and is assumed in the Evidence Act[10] where it is thus described:—

"The expression general custom or right includes customs or rights common to any considerable class of persons."[11]

Local Custom.

272. A local custom is a custom confined to a particular locality. Such is, for instance, the custom of observing no caste in the matter of eating and drinking, in Jagannath, the custom of pre-emption, and such is the custom of polyandry which is confined to Malabar. A custom which, though once general, may latterly become confined only to one locality.[12] The Punjab is full of such local customs.

(1) The term "usage" is so used in S. 23, Bengal Tenancy Act (VIII of 1885); *Sati Prasad (Raja)* v. *Manmatha*, 6 I.C. 291.

(2) *Cf.* Act I of 1872, Ss. 48, 49.

(3) General Intr., Ss. 4-6.

(4) A local custom is called a *Deshachar.*

(5) *Vasudevan* v. *Secretary of State*, 11 Mad. 157; *Padam* v. *Suraj*, 28 A. 458.

(6) Which is then called *Kulachar*; *Urjun Singh* v. *Ghunsiam*, 5 M.I.A. 169; *Gunesh* v. *Moheshur*, 6 M. I. A. 164; *Soorendra Nath* v. *Herramonee*, 12 M.I.A. 81 (92); *Chintamun* v. *Nowlukho*, 1. C. 153 P.C.; *Nanji* v. *Sundrabai*, 11 B. H. C. R. 249 (269, 270).

(7) *Cf.* Act I of 1872, S. 48, Expl.

(8) S. 7, *ante.*

(9) Co. Litt. 110-*b.*

(10) Act I of 1872, S. 48.

(11) *Ib.*, Expl.

(12) *Padam Kumari* v. *Suraj Kumari*, 28 A. 458 (461).

Tribal custom.

273. A tribal custom is a custom confined to a particular tribe, caste or community. Such was the custom proved in the case of an Agarwal Bania of Zira in the Ferozpur District, amongst whom an unequivocal declaration of adoption followed by subsequent treatment of the adoptee as a son was held to constitute a valid adoption.[1] So while adoption is not recognized by the Mahomedan Law, it is customary amongst the village community of Ramsar.[2] So amongst the Bajwa Jats of the Sialkot District a person adopted into another family does not thereby forfeit his right to succeed in his natural family as against collaterals.[3] So as regards marriage, intercaste marriages are customary in the Punjab.

Family custom.

274. A Kulachar, or family custom, is a custom the existence of which is confined to a single family. Such a custom may relate to impartibility[4] or inalienability[5] of its property or succession to it by a special mode of devolution, *e.g.*, by primogeniture[6] or other special mode of descent.[7] The Privy Council have upheld such customs in several cases, but like all customs and even more than all customs, they must be strictly and sufficiently proved.[8] The fact that they are recorded in the *Wajib-ul-arz* is not a sufficient, since it often connotes merely the personal views of those who would like to see the practice prevailing, rather than the ascertained fact of a well established custom[9] as distinct from a mere arrangement for peace or convenience, made or acquiesced in by the family.[10] Custom proved to exist in a family may be presumed ta exist in every branch of it.[11] (§ 6.)

Custom cannot override express law.

9. (1) Custom has the effect of modifying the general personal law, but it does not override the statute law, unless it is expressly saved by it.[12]

(2) Such custom must be ancient, uniform, certain, peaceable, continuous and compulsory.

275. **Analogous Law.**—The reason which entitles the Hindu to preserve his personal law is the reason for allowing him to retain his customs which, by their very nature, are a part of his personal law. As such, both of them are subject to the commands of the Legislature.[13]

(1) *Chiman Lal* v. *Hari Chand*, 40 C. 879 P.C.

(2) *Abdulla* v. *Sunda*, 11 I.C. 670; *Niamai* v. *Nira*, (1911) P.W.R. 95 : 10 I.C. 338.

(3) *Jiwan* v. *Dit*, (1912) P.R. 49.

(4) *Chintaman* v. *Nowlukho*, I.C. 153 P.C.; *Ramrao* v. *Yeshwant*, 10 B. 327.

(5) *Sivasubramania* v. *Krishnammal*, 18 M. 287.

(6) *Shidhojirao* v. *Nikojirao*, 10 B. H.C.R. 228; *Adrishappa* v. *Gurushiappa*, 4 B. 491 P.C.; *Gopalrao* v. *Trimbakrav*, 10 B. 598; *Nitrapal Singh* v. *Jaipal Singh*, 9 A. 1 P.C.; *Rup Singh* v. *Pirbhu*, 20 A. 537.

(7) *Beerchunder* v. *Neelkissen*, 1 W. R. 177; *Mahender* v. *Jokha Singh*, 19 W. R. 211; *Burjare* v. *Bha Gana*, 10 C. 557 P.C.; *Antamma* v. *Kaveri*, 7 M. 575; *Narayan* v. *Nana*, 7 B.H.C.R. (A.C.) 153; *Bhau* v. *Sundarbai*, 11 B.H.C.R. 249; *Atmaram* v. *Bholagir*, 1 C.P.L.R. 54.

(8) *Suriya Rao* v. *Raja of Pithapur*, 9 M. 499; *Basava* v. *Lingangauda*, 19 B. 428 (458); *Garurudhwaj* v. *Suparandhwaj*, 23 A. 37 P.C.; *Chandika Baksh* v. *Mana Kunwar*, 24 A. 273 (281) P.C.; *Anant Singh* v. *Durga Singh*, 32 A. 363 P.C.

(9) *Anant Singh* v. *Durga Singh*, 32 A. 363 (373) P.C. following *Muhammad Imam Ali* v. *Hussain Khan*, 26 C. 81 (92) P.C.; *Parbati* v. *Chandrapal*, 31 A. 457 P.C.

(10) *Bhaw Nanji* v. *Sundarbai*, 11 B. H.C.R. 249 where the law is discussed in detail per West, J.

(11) *Lal Gajendra* v. *Lal Matharnath*, 20 C.W.N. 876: 1 Pat.L.J. 109 : 35 I.C. 383.

(12) *Mohanlal* v. *Amratlal*, 3 B. 174 (177).

(13) *Mohanlal* v. *Amratlal*, 3 B. 174 (177)

So it has been held that custom cannot override the provisions of the Limitation Act,[1] and generally, no evidence of custom can be admitted in regard to matters upon which the legislative enactments have superseded the personal law. Again, as has been already pointed out, while custom has the effect of modifying the general personal law, it can do so only to the extent it is proved; over and beyond it the general law remains.[2]

Essentials of a Custom.

276. The various attributes of a custom are thus described. It must, it is said, be ancient, immemorial, uniform, unaltered, uninterrupted, invariable, constant and continuous, certain, definite and notorious, peaceable, consistent and compulsory. In a sense, a custom must possess all these elements—nay many more, it must not be unreasonable, illegal, immoral or opposed to public policy.

277. Of these a custom must certainly be ancient or immemorial. It must also be uniform, which implies that it must be unaltered, uninterrupted, invariable, constant and continuous all of which are merely attributes of its uniformity. So again, if it is certain, it must necessarily be definite and consistent. No custom can fail to be notorious and peaceable if it is ancient, uniform and certain, from which it follows that it must be necessarily compulsory, for if one is free to follow or disregard a custom according to his whim or convenience, it must necessarily cease to be uniform and certain. All these elements of custom are, therefore, reducible to the three main heads, *viz.*, it must be ancient, uniform and certain, but it is well to know what these terms imply. For though they are verbal variations to convey the same idea, they enlarge its meaning and tend to emphasize the nature and extent of the uniformity and certainty which is of the essence of custom.

As for the provision that custom must not be unreasonable, illegal and immoral or opposed to public policy—it rather affects its validity but is not of the essence of its constituent elements. They have, therefore, been made the subject of a separate section.

278. Clause (2) sets out the necessary elements of a valid custom. A custom possessing these elements is *prima facie* valid though it may be unenforceable owing to reasons set out in the next section. Assuming, however, that the custom is not open to that objection, it must still possess all that this section requires. These requirements may be now considered seriatim.

(1) It must be Ancient.

279. Elements of a valid Custom.—The first essential of a valid custom is that it shall be ancient. This is necessary, otherwise any person could defy the general law by setting up a special custom of his own.[3] The custom must, in theory, at least, be of an origin as ancient as the law itself to which it constitutes an exception. The courts will, from uniform modern usage, presume an indefinitely ancient usage of the like kind, in the absence of circumstances leading to a contrary inference.[4]

(1) *Mohanlal* v. *Amratlal*, 3 B. 174 (177); *Tuni Orain* v. *Leda Orain*, 1 Pat.L.J. 225 : 20 C.W.N. 1082: 36 I.C. 206.

(2) *Neel Kisto* v. *Beerchunder*, 12 M. I. A. 523 (542); *Sartaj Kuari* v. *Deoraj Kuari*, 10 A. 272 (285) P.C.

(3) *Basantrav* v. *Mantappa*, 1 B.H.C. R. Appx. 42 (47); *Rowther* v. *Rowther*, 30 M.L.T. 85 P.C.

(4) *Basant Singh* v. *Brij Raj Saran*, 57 A. 494 (508) P.C. Antiquity presumed from proof of custom of impartibility

280. The rule that a custom must be ancient is equally the rule of English Law, but with this difference, that while under English Law that word has an artificial meaning as dating back from 1189 A.D., *i.e.*, the commencement of the reign of Richard I, which is regarded as the measure of legal memory,[1] there is no such fixed date to determine its antiquity in this country[2] Even in England, though the rule remains, it is in effect circumvented by a legal presumption created in its favour by a mere proof of the existence of custom as far back as living memory can go,[3] which is all that is equally necessary in this country to establish its antiquity.[4] All that the law requires is that the custom must have been in existence for a time immemorial, that is to say, for a time as far back as one can remember, which again, in England, has been held to be as short as 20 years[5]—a period which the Privy Council regard as sufficient even for this country upon which the Jury would, and indeed, should presume its immemorial existence,[6] provided there is no evidence to the contrary. Such would be the case where the family is one of comparatively modern origin or where the practice can be traced to a recent agreement.[7] In other words, the existence of a custom for twenty years or more creates only a presumption in favour of its antiquity,[8] which may be rebutted by tracing it to its recent origin.[9]

(2) It must be Uniform, and (5) continuous.

281. From the fact that the custom is ancient, it follows that it must be uniform (and not variable), definite and continuous, for these are the elements to establish its immemorial user.[10] If there is a discontinuance, such discontinuance destroys its stability, it being immaterial whether the discontinuance was accidental or intentional.[11]

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for 30 years. *Per* West, J., in *Bhau Nanaji* v. *Sundra Bai*, 11 B.H.C.R. 249 (271).

(1) *Chapman* v. *Smith*, 1 (1754) 2 Ves. S. 505; as to how this date became fixed, see *Dalton* v. *Angus*, 6 A.C. 740 (810, 811).

(2) *Kuar Sen* v. *Mamman*, 17 A. 87; *Mohidin* v. *Shiv Lingappa*, 23 B. 666 (669, 670); *Gopal* v. *Maheshri*, 2 A.L. J. 795.

(3) *Per* Cockburn, C.J., in *Angus* v. *Dalton*, 3 Q.B.D. 85 (104); *Trura Corporation* v. *Rowe*, (1901) 2 K.B. 870 (877); *Bastard* v. *Smith*, 2 Moo. & R. 129.

(4) *Ramasami* v. *Sundaralingasami*, 17 M. 422 (443); *Doed. Juggomohun* v. *Nemoo Dossee*, (1831) Clarke's R. 101 (113, 114) : 1 I.D. (O.S.) 358 (364).

(5) *Maharaja Mahtab* v. *Government*, 4 M.I.A. 466 (499); *R.* v. *Joliffe*, 2 B. & C. 54; *Brocklebank* v. *Thompson*, (1903) 2 Ch. 344 (350). The period of 20 years is in England fixed by the Statute known as Lord Tenterden's Act as a rule of prescription which inspired a similar period in S. 15 of the Easements Act.—*Per* Garth, C.J., in *Parmeshri* v. *Mhd. Syed*, 6 C. 608 (615).

(6) *Dheeraj* v. *Government of Bengal*, 4 M.I.A. 466 (499); *Bhau Nanaji* v. *Sundarbai*, 11 B.H.C.R. 249 (271); *Trenibak Das* v. *Nagindas*, 27 N. 75. *Contra* in *Deod. Juggomohun* v. *Nemoo Dossee*, (1831) Clarke's R. 101 (113, 114) : 1 I.D. (O.S.) 358 (364) is no longer law; but see *Martand Rao* v. *Malhar Rao*, 55 C. 403 (413), (sixty years not sufficient to establish an *ancient* custom), *Martand Rao* v. *Malhar Rao*, 47 C.L.J. 150 P.C.: (1928) P.C. 10.

(7) *Umrithnath* v. *Goureenath*, 13 M. I.A. 542 (549, 550); *Bhau Nanoji* v. *Sundar Bai*, 11 B.H.C.R. 249; *Durga Charan* v. *Raghunath*, 18 C.L.J. 559 (561); *Rajalakshmi* v. *Suryanarayana*, 3 M.L.J. 100 (106).

(8) *Gopal* v. *Hanmant*, 6 B. 107 (109); *Vythilinga* v. *Vijayathammal*, 6 M. 43 (48); *Mills* v. *Colchester Corporation*, L.R. 2 C.P. 476; *Mercer* v. *Denne*, (1904) 2 Ch. 534 (555).

(9) *Mahamaya* v. *Haridas*, 42 C. 455; *Mills* v. *Colchester Corporation*, L. R. 2 C. P. 476; *Lockwood* v. *Wood*, 6 Q.B. 50 (68), 10 Hals. L.E. § 425, p. 223.

(10) *Saperandhwaj* v. *Garuradhwaj*, 15 A. 147 (167); *Basava* v. *Lingangauda*, 19 B. 428 (483).

(11) *Rajkishen* (*Raja*) v. *Ramjog*, 1 C. 186 (195, 196) P.C.

In its effect it amounts to an abandonment of the custom.[1] When it is said that the custom must be uniform, what is implied is that, within its circle of authority, it must have been given effect to as often as there was occasion to have recourse to it. If it was followed only on occasions of convenience and ignored on other occasions, then it ceases to be both a continuous and uniform custom such as the courts will give effect to. A custom is not either uniform or continuous if its authority was challenged each time that the occasion arose for its enforcement; and it does not become uniform if, as the result of compromise, a right was conceded.[2]

282. This essential element of a valid custom is variously expressed. It is said that the custom should have continued as an invariable, unaltered, uninterrupted and a continuous custom.[3] All these adjectives are sometimes used to emphasise the same fact that the identity of the custom should not suffer in its passage through time. Take an example: The history of the law of primogeniture shows how the right owes its origin to the establishment of feudalism. Now, in the development of that custom the stages were (*i*) the grant was a personal grant which lapsed with the grantee, (*ii*) it was extended to and shared by the grantee's sons, (*iii*) and then it descended only to his eldest son. If in this process the order were ever reversed and the grant were at times heritable by all the sons, and then, say, in times of rebellion by only the eldest son, the custom which impresses upon the tenure is the incident of peculiar succession which, though ancient, would not be uniform or invariable. So it is usual, both in England and in this country, to close all private thoroughfares once a year to prevent the public from acquiring a customary right of way. But a single discontinuance is not necessarily fatal to the establishment of custom.[4] The right of procession is a common law right, but the right to carry it along a certain route or past a certain mosque or temple is a customary right, and its existence depends upon its uninterrupted continuance, and its validity is frequently put to the test by interrupting its enjoyment.

283. A caste custom was pleaded for the Kadwa Kunbis of Ahmedabad denying the right of widows to adopt. It appeared that, on two occasions, widows had adopted without any protest from the caste people, and generally, the custom was in a state of flux, there being no evidence that the caste people forbade such adoptions or treated them as invalid, whereupon the court refused to uphold the custom holding that a uniform and persistent usage had not moulded the life of the caste.[5]

284. A custom is not uniform if it is intermittent and not continuous. But law distinguishes the interruption of a right[6] from the interruption of its enjoyment.[7] If there is an interruption of the right, no matter for how short a period the right is extinguished, and if the right is revived it may become the starting point of a new custom, but it ceases to be the continuance of the old custom, and if the new right arose within the time of legal memory so that its commencement is known, it ceases to be

(1) *Rajkishen (Raja) Ramjog*, 1 C. 186 P.C.
(2) *Ramakanta* v. *Shamanand*, 36 C. 590 (603) P.C.
(3) *Jamelah* v. *Paqul Ram*, 1 W.R. 251; *Ramalakshmi* v. *Sivanatha*, 14 M. I. A. 570.
(4) *Sarabjit* v. *Indarjit*, 27 A. 203.
(5) *Patel Vandravan* v. *Patel Manilal*, 16 B. 470.
(6) *Mercer* v. *Denne*, (1905) 2 Ch. 538.
(7) *Scales* v. *Key*, 11 Ad. & E. 819 (825).

an ancient custom. From the fact that custom must be uniform it follows that it must be consistent. Two contradictory customs cannot exist in the same place with reference to the same people. But the customs of the various tribes, castes and sects may otherwise be, in fact they sometimes are, divergent and often contradictory.

(3) It must be Certain.

285. The third ingredient of a custom is that it shall be certain, a term which is varied in its expression by the statement that it shall be definite and constant. When it is said that a custom must be certain, what is meant is that it should be certain (*i*) in respect of its nature; (*ii*) in respect of its locality; and (*iii*) in respect of the persons whom it is alleged to affect.[1] In one sense a custom proved to be ancient must be necessarily certain, for, as Willes, C.J., observed in a case: "how can anything be said to have been time out of mind when it is not certain what it is."[2]

(i) Must be certain as to its nature.

286. In the first place, the right asserted as a customary right, must be clearly defined and definitely certain. For if the right is uncertain the custom itself cannot be proved. So where a person claims the customary right to fell timber or quarry stones, earth or other minerals from the land of another, the nature of the right claimed must be first defined. Every tenant has the right to graze his agricultural cattle on the village common. If, therefore, he establishes a cattle breding farm, or maintains milch cows or buffaloes, he has no right to turn them on to the common for the purpose of grazing. So again, the right to quarry stones means a right limited to personal use, and does not imply a right to remove them in unreasonable quantities for the purpose of sale.[3] So a right to stack coals *near* to certain pits was held to be too indefinite to support a customary right.[4] On the same ground, the court disallowed a custom to play "any rural sport" as too general and uncertain.[5] So in a case where the plaintiff claimed by the ordinary Hindu Law property against the defendant, who claimed by the rule of primogeniture, the Privy Council found that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the courts, and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance, to which, had the custom existed, they would have been entitled. In their Lordships' opinion, this rendered the custom uncertain and consequently invalid.[6] It is, however, submitted that the case was rather one where the custom was not peaceably enjoyed.

(ii) Certain as the Locality.

287. Secondly, the custom must be certain as regards the locality where it is alleged to exist, for a custom which is universal in extent is no custom at all, for it then becomes the common law.[7] Its local

(1) *Per* Tindal, C.J., in *Tyson* v. *Smith*, 9 Ad. & El. 406 (421); *Mercer* v. *Denne*, (1904) 2 Ch. 534 (551), C. A. (1905) 2 Ch. 538.

(2) *Broadbent* v. *Wilks*, (1742) Wiles 360; *Rowther* v. *Rowther*, 30 M. L. T. 85 P.C.

(3) *Blewett* v. *Tregonning*, (1835) 3 Ad. & El. 554 (574).

(4) *Broadbent* v. *Wilks*, (1742) 360 (363), but see *Carly* v. *Lovering*, (1857) 1 H. & N. 784 (800).

(5) *Millechamp* v. *Johnson*, (1746) Willes 205 N.

(6) *Ramakanta* v. *Shamanand*, 36 C. 590 (603) P.C. reversing, *Shijamanand* v. *Ramakanta*, 32 C. 6.

(7) Co. Litt. 110*b*.

extent must then be defined with reference to the geographical division of land, such as a province, district, town, tahsil or village, zemindari family or the like. The area affected by the custom may, however, consist of any defined space, and its boundaries may vary from time to time, provided the area is sufficiently and clearly defined at any particular moment.[1] Where a custom is proved to exist in a district it will be deemed to exist in a village comprised in the district, but not *vice versa*.

(iii) Certain as to the People.

288. Thirdly, the custom must be certain in respect of the person or classes of persons to whom it is made applicable. A custom which binds an uncertain or undefined class of men or the public at large is neither certain nor enforceable, and it, therefore, ceases to count as a custom. So where a custom was alleged that the "poor householders" of a town had the right to free wood from a close, the court refused to enforce it on the ground that the term "poor householders" was too vague and uncertain.[2] But in another case, the Court upheld the right of the inhabitants of a parish to enter upon the land of another at any time in the year, to erect a maypole thereon and dance round and about it on the ground of preponderance of authorities.[3] A class is certain though its number may fluctuate; *e.g.*, travellers, worshippers and the like. So again, it is no blot on the validity of a custom if the class of persons to whom it applies is definite, though no such class exists for the time being.[4]

(4) It must be Peaceable.

289. Another requirement of a valid custom is that its continuance must be uninterruptedly peaceable. In fact, the binding force of custom lies in the fact that for a time out of memory all affected by it have unquestionably accepted it as a binding custom. Where, therefore, on a question of primogeniture it was found that upon each succession the right was challenged and only compromised upon terms the enjoyment was not peaceable.[5]

(6) It must be Compulsory.

287. So, again, its enjoyment must be "as of right, and therefore, neither by violence nor by stealth, nor by leave asked from time to time."[6] It is not necessary that the enjoyment should be free, for a reasonable customary fee may be claimed by grant, or by prescription; but what is necessary is that the enjoyment should be because of the right and not because of the fee, which is merely incidental to the custom and need not have been fixed before legal memory.[7] Where, however, enjoyment of a right is dependent upon the payment of a fee, the court has to find whether the payment is the price of the enjoyment or is merely paid as a customary fee. If it is the former, then there can be no custom, since the enjoyment was precarious and not as of right, and the several acts of enjoyment were consequently not an uninterrupted

(1) 10 Hals. L.E., Tit. "Custom and Usage," § 434, p. 230.

(2) *Selby* v. *Robinson*, 2 Term. R. 758.

(3) *Abbot* v. *Weekly*, (1665) 1 Lev. 176: 83 E. R. 357; *Fitch* v. *Rawling*, 2 H.B.L. 393; *Hall* v. *Nottingham*, 1 Ex. D. 1 (3); *contra* in *Bell* v. *Wardell*, Willes 202.

(4) 10 Hals. L.E. § 436, p. 231; but the cases cited do not support the text.

(5) *Ramakanta* v. *Shamanand*, 36 C. 590 (603) P.C.

(6) *Per* Willes, J., in *Mills* v. *Mayor of Colchester*, L.R. 2 C.P. 479 (486).

(7) *Ib.*, pp. 484, 485; *Tyson* v. *Smith*, 9 Ad. and E. 406.

exercise of the same right but were in the nature of independent acts lacking in continuity which is of the essence of custom.[1]

291. An act which a person may have done but which he is at liberty to stop does not support custom. So where a custom was alleged restraining widows of a certain caste from adopting, but the evidence showed that there was no caste decision to that effect, and that widows had adopted on two occasions without incurring any caste penalty, the court threw out the suit refusing to uphold the custom, holding that a uniform and persistent usage had not moulded the life of the caste.[2]

10. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy.[3]

Invalid Custom.

292. **Analogous Law.**—The Legislature has elsewhere recognised the general principle underlying this rule.[4] A custom is not illegal merely because it contravenes the express tests or the general principles of Hindu Law, since all Hindu Law is declaredly subject to custom (§ 157). For the same reason custom does not necessarily become illegal because of the existence of a statute on the subject, unless the latter contains provisions which make the continuance of the custom necessarily illegal. Of course, the court cannot enforce an immoral custom any more than it will enforce an immoral contract inasmuch as both are destructive of society.

293. The provisions that the custom must not be unreasonable or opposed to public policy also control an English custom.[5] The reasonableness of a custom is a question of fact dependent upon its nature and the society to which it is made to apply. So Tindal, C. J., in one case observed: "Several customs which have been adjudged void in our books as unreasonable against common right, or purely against law, if their nature and liability be considered, will be found injurious to the multitude and prejudicial to the commonwealth, and to have their commencement (for the most part) by oppression and extortion of lords and great men."[6]

294. It has been held that public policy has little force now in invalidating contracts, the question of public policy being regarded as one for the legislature rather than for the courts. But the question of custom stands on a different footing. It makes law and public policy control all laws.

295. **Principle.**—The invalidating ingredients set out in this section are sometimes treated as part of the elements constituting custom. But they affect its operation rather than its formation and have, consequently, been relegated to a section of its own.

296. **Invalid Customs.**—A custom may answer all the tests mentioned in the last section; and yet it may be invalid because it is obnoxious to the provisions of this section, the operation of which may now be considered.

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(1) *Elwood* v. *Bulluk*, (1844) 6 Q.B. 383.

(2) *Patel Vandravan* v. *Patel Manilal*, 16 B. 470 (476).

(3) S. 23, Contract Act (IX of 1872).

(4) *Ib.*

(5) Co. Lit. 62-*a*.

(6) *Tyson* v. *Smith*, 9 Ad. & El. 406 (422).

(1) Illegal Custom.

297. It is a well established principle that though a custom has the effect of overriding law which is purely personal, it cannot prevail against a statutory law, unless it is thereby saved expressly or by necessary implication.[1]

298. So law has swept away many customs, *e.g.*, the practice of *Sati*[2] infanticide,[3] slavery,[4] *begar* or forced labour,[5] human sacrifice;[6] while it has attempted to strengthen the law against the dedication of minors as dancing girls to a pagoda, it being notorious that these girls are consigned to lifelong prostitution.[7] On a similar ground the court refused to recognize the adoption of a girl by a woman of the prostitute class as legal.[8]

299. A customary cess levied on all purchases and export of cotton was held to have become illegal by reason of an Act which abolished "cesses on trades and professions of every kind" under whatever name levied.[9] So the custom that a tenancy lapsed on submersion of the land and on the tenants' failure to pay rent and that, on its reappearance, the landlord became entitled to possession was held to be of no avail against the express provisions of the N.W.P. Rent Act.[10] So no custom can override the provisions of the Limitation Act.[11]

(2) Immoral Custom.

300. A custom like a contract is void for immorality. The question what customs are "immoral" must be left to the conscience of the court. Morality is a necessary social convention as to which all agree up to a certain extent; but beyond it, it is a matter of opinion. This is specially so as regards the relation of the sexes. A European would regard both polygamy and polyandry as highly immoral, but both these institutions are deep-rooted in the soil and though polyandry is now fast dying out, polygamy is a popular oriental custom not solely confined to the Hindus. But in judging of the validity of such customs, the court adapts itself as far as possible, to the standard of morality of the sect, tribe or caste to which the custom is sought to apply, remembering always that it has not only to pay due regard to the sentiments of the community but also to the general welfare of society. Such is the custom of remarriage of a married woman without the permission of her husband on payment of a fine to the castes,[12] or the custom of selling daughters,[13] or of the succession of an illegitimate son by an adulterous,[14] or incestuous

(1) *The Magistrates of Dunber* v. *The Duchess of Roxburghe*, 3 Cl. & Fin. 335: 6 E.R. 1462; *Noble* v. *Durell*, 3 T. R. 271: 100 E.R. 569.

(2) S. 306, Indian Penal Code.

(3) *Ib.*, S. 304-A.

(4) *Ib.*, Ss. 367, 370, 371.

(5) *Ib.*, S. 374.

(6) *Ib.*, S. 302.

(7) *Ib.*, Ss. 372, 373; *Sanjivi* v. *Jalajakshi*, 21 M. 229; but see *Tara Naikin* v. *Nana Lakshman*, 14 B. 90 (92, 93).

(8) *Guddati* v. *Ganpati*, (1912) 23 M. L. J. 493 (494); *Public Prosecutor* v. *Kannammal*, (1913) 13 M.L.T. 131 (134 137, 139), *contra* in *Venku* v. *Mahalinga*, 11 M. 393.

(9) *Kalyanraiji* v. *Mofussil Co., Ltd.*, 15 B. 526 (531) P.C.

(10) Act XII of 1881, Ss. 18, 31, 34 (*b*), 95 (*n*); *Kupil Rai* v. *Radha Prasad*, 5 A. 260; as to Punjab, *Puran* v. *Beja*, (1870) P.R. 73.

(11) *Mohan Lal* v. *Amrat Lal*, 3 B. 174.

(12) *R.* v. *Karson*, 2 B.H.C.R. 117; *Uji* v. *Hathi*, 7 B. H. C. R. (A. C.) 133; *Narayan* v. *Laving*, 2 B. 140; *Indar* v. *Jewa*, (1890) P.R. 49. But such marriage contracted after consent and divorce would be good; *Sankaralingam* v. *Subhan*, 17 M. 479; *Vancatachella* v. *Parvatham*, 8 M. H. C. R. 134; *Dalip* v. *Ganpat*, 8 A. 387.

(13) *Kalavagunta* v. *Kalavagunta*, 32 M. 185.

(14) *Rahi* v. *Gobinda*, 1 B. 97.

intercourse,[1] or of an association of women to enjoy a monopoly of the gains of prostitution.[2] The plaintiffs who were *Dev Dasis* attached to a temple sued the manager restraining him from admitting two other *Dev Dasis* into the temple without their consent. In short, they claimed a monopoly of the right which the court refused to grant them on the ground that it was immoral.[3]

A custom which attributes to mere co-habitation all the legal effects of a marriage is invalid as it tends to confound concubinage with marriage.[4]

Not Immoral.

301. But a custom in favour of remarriage upon desertion,[5] or divorce by mutual agreement, is neither immoral nor opposed to public policy.[6] So the exchange of children in marriage is neither immoral nor opposed to public policy.[7]

(3) Unreasonable.

302. A custom may not be illegal or immoral; but it may, nevertheless, be invalid on the ground of its unreasonableness. A custom which any honest or right-minded man would deem to be unrighteous is bad as unreasonable.[8] One ground for holding a custom unreasonable is that it is injurious to the multitude and prejudicial to the commonwealth.[9] A custom for the inhabitants of several adjoining or contiguous parishes to exercise the right of recreation over land situate in one of such parishes is bad as placing an unreasonable burden upon one parish.[10] On the same principle, the court refused to give effect to a custom by virtue of which all the inhabitants of a zemindari were alleged to have a prescriptive right to fish in certain jhils of the plaintiffs.[11] So the agent cannot be heard to justify his departure from the instructions received by him from his principal on the ground of custom. Such was held to be the case of the principal who ordered his agent in Mauritius to ship to him a cargo of 500 tons of sugar. Instead of shipping it in a single vessel, he shipped 400 tons in different vessels when the principal cancelled the order due to a falling market. He, however, justified it on the ground that his instructions had been contravened. The shipper appealed to custom but the court held that it could not override the express instructions of the principal.[12] A custom upheld by the courts cannot be attacked on the ground of its unreasonableness.[13]

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(1) *Datti* v. *Datti*, 4 M.H.C.R. 204; *Soundararajan* v. *Arunachalam*, 39 M. 136.

(2) *Chinna* v. *Tegarai*, 1 Mad. 168.

(3) *Pirthi Singh* v. *Bhola*, (1883) P. R. 29; *Hakim* v. *Jagat Singh*, (1898) P. R. 87; *Dina* v. *Karamchand*, (1899) P. R. 52; *Lalchand* v. *Mt. Thakur Devi*, (1903) P.R. 49; but see *Chanda Singh* v. *Mela*, (1897) P.R. 73.

(4) *Chinna* v. *Tegari*, 1 M. 168 (170 171).

(5) *Virasangappa* v. *Rudrappa*, 8 M. 440.

(6) *Sankaralingam* v. *Subhan*, 17 M. 479; *Sinammal* v. *Administrator-General*, 8 M. 169.

(7) *Amirchand* v. *Ram*, (1903) P.R. 50.

(8) *Paxton* v. *Courtenay*, 2 F. & F. 131.

(9) *Tanistry Case*, (1608) Davis 29 (33); *Mahamaya* v. *Haridas*, 42 C. 455 (475).

(10) *Edwards* v. *Jenkins*, (1896) 1 Ch. 308.

(11) *Luhchmeeput Singh* v. *Sadaulla*, 9 C. 698 (704), following *Lord Rivers* v. *Adams*, L.R. 3 Ex. D. 361, distgd. *Parbutty* v. *Mudho*, 3 C. 276, on the ground that the persons there were ascertained.

(12) *Ireland* v. *Livingstone*, L. R. 5 Q. B. 516; *Arlapa* v. *Narsi*, 8 B.H.C. R. (A. C.) 19.

(13) 10 Hals. L.E. § 429, p. 228; S. 42, Ev. A.; *Shimbu* v. *Gayachand*, 16 A. 379.

303. A custom, otherwise good, may be void on the ground of public policy.[1] Such is the custom recognizing the right of a person who had murdered,[2] or abetted the murder of his ancestor to succeed to his estate.[3] So it is against public policy to permit trafficking in public or religious offices,[4] and a custom which permitted it, would be obnoxious to this rule.[5] But this does not mean that a religious office may not be transferred to a qualified person standing in the line of succession.[6] A custom is arbitrary and, therefore, unreasonable which sanctions expulsion of a man from caste without hearing him. The maxim *audi alteram partem*[7] is a rule of elementary justice and applies as much to custom as it does to judicial procedure. Since law favours marriages as necessary to perpetuate the human species, any custom tending to restrain it is invalid as one opposed to public policy. Such was held to be the custom which sanctioned the levy of a marriage cess on the remarriage of widows.[8] But there can be no objection to a customary offering to a temple on marriages performed in a particular locality, or a customary fee to which the village Joshi is entitled on all marriages within his jurisdiction, whether his services are requisitioned or not;[9] the distinction between the two being that the one is a tax while the other is a customary offering for the maintenance of the temple from which all worshippers derive benefit.[10]

(4) Opposed to Public Policy.

11. Pleading and proof of Custom. **(1) He who relies upon custom varying the general law, must plead and prove it.[11]**

(2) Custom must be established by clear and unambiguous evidence[12]

304. Analogous Law.—The first clause of this section is abundantly supported by authority, and so is the second clause, while the section as a whole is supported by the authority of the Privy Council.[13] Custom,

(1) As to the very narrow application of this rule, *see* the Author's 1 Law of Transfer, (6th Ed.), p. 196 §§ 285-288.

(2) *Shah Khanam* v. *Kaladhar*, (1900) P.R. 74; *Muhammed Khan* v. *Sis Bano*, (1906) P.R. 41.

(3) *Vedanayaga* v. *Vedammal*, 27 M. 591; but the disqualification is personal; *Gangu* v. *Chandrabhagabai*, 32 B. 275.

(4) *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235 P.C.; *Kuppa Gurukal* v. *Dorasami*, 6 M. 76; *Narayana* v. *Ranga*, 15 M. 183; *Mahamaya* v. *Haridas*, 42 C. 455, and cases cited at pp. 470, 471.

(5) *Mahamaya* v. *Haridas*, 42 C. 455.

(6) *Sitaram Bhat* v. *Sitaram*, 6 B.H.C.R. 250; *Mancharam* v. *Pranshunk*, 6 B. 298; *Annasami* v. *Ramkrishna*, 24 M. 219; *Nirad* v. *Shibdas*, 36 C. 975; *Mahamaya* v. *Haridas*, 42 C. 455 (471).

(7) Hear the other party.

(8) *Lala* v. *Hirasingh*, 2 A. 49; *Madan* v. *Erlandi*, 5 M. H. C. R. 147; *Ganela* v. *Khwaja Mohommad*, (1880) P.R. 64.

(9) *Vithal* v. *Aman*, 11 B. H. C. R. 6; *Dina Nath* v. *Sadashiv*, 3 B. 9; *Raja* v. *Krishnabhat*, *ib.*, 232; *Waman* v. *Balaji*, 14 B. 167 (169).

(10) *Madan* v. *Erlandi*, 5 M.H.C.R. 147.

(11) S. 103, Ev. Act; *Girdharee Singh* v. *Koolahul*, 6 W. R. 1 P.C.; *Mahendra* (*Raja*) v. *Jokha Singh*, 19 W. R. 211; *Thankur Titnath* v. *Loknath*, 19 W.R. 239; *Natukhar* v. *Chowdhary Chintamun*, 20 W.R. 247; *Hirbai* v. *Gor Bai* 2 B.H.C.R. 294; *Rahimat Bai* v. *Hir Bai*, 3 B. 34; *Gopal* v. *Hanuman*, 3 B. 273; *Adrishappa* v. *Guru Shidappa*, 4 B. 494; *Gossain Rambharti* v. *Surajbharti* 5 B. 682; *Ahmedbhoy* v. *Cassumbhoy*, 13 B. 534; *Bai Baijee* v. *Bai Santok*, 20 B. 53; *Abdul Hussain* v. *Habibullah*, (1906) P. R. 18; *Garuradwaja* v. *Superundwaja*, 23 A. 37 P.C.

(12) *Shidhojirav* v. *Naikoji*, 10 B.H.C. R. 228; *Rama Lakshmi* v. *Sivanatha*, 14 M. I. A. 570 (585, 586); *Desai Ranchhodass* v. *Rawal Nathu Bhai*, 21 B. 110 (116, 117).

(13) *Rai Manickchand* v. *Madho Ram*, 13 M.I.A. 1; *Rama Lakshmi* v. *Sivanatha*, 14 M.I.A. 570 (585, 586).

being a departure from the ordinary law, must be both pleaded and proved, and proved by evidence which must be both clear and unambiguous.

305. **Plea of Custom.**—It is incumbent upon a party relying upon a custom to plead it as a part of his case. This does not mean that he should set out the evidence upon which he rests his plea. But his plea must be sufficiently specific to give his adversary notice of the custom he was relying on.[1] A party is at liberty to plead custom and the general law in the alternative.[2] But the parties are not at liberty to depart from their pleadings nor is the court at liberty to rest its decision upon facts never pleaded[3] or upon facts only partially pleaded. So where the plaintiff launched his case with the plea that custom excluded both widows and daughters from succession, he was not allowed to hold fast to the custom which proved that daughters only were excluded.[4]

306. **Proof of Custom.**—The standard of proof required to establish custom is higher than what is required to determine an ordinary issue. Custom should not be decided upon a mere balance of probabilities, for, in the language of the Privy Council, it must be supported by "clear and unambiguous" evidence to entitle the court to hold that, in a particular family, community or locality, the customary rule had obtained the force of law in partial modification or complete supersession of the ordinary law.[5] No evidence is clear and unambiguous which does not mean evidence approximating to a certainty that the custom exists and not merely pointing to a probability of its existence. As Farwell, J., observed: "Not only ought the court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period, as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right."[6] The proof must extend to all the points which constitute its necessary ingredients. Of these the most important are that it is (*a*) ancient, (*b*) uniform, (*c*) certain, (*d*) continuous, and (*e*) compulsory.

307. A custom will be presumed to be ancient if it is proved to have existed for a time immemorial, that is to say for at least 20 years and that its origin is unknown (§ **280**). This only raises a presumption in favour of its antiquity which may be rebutted. A custom shown to have had an origin within living memory, even though existing in fact, is void at law, because it lacks its prime attribute.[7] The uniformity of custom should be proved by numerous instances in which it has been invariably followed; a few instances only will not suffice to establish the custom.

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(1) *Serumah* v. *Palathan*, 15 W. R. 47 P.C.; *Basava* v. *Lingangauda*, 19 B. 428.

(2) *Muhammad* v. *Shamsunnissa*, 36 A. 456 (458); distgd. *Muhammed Salim* v. *Sadaruddin*, 7 A.L.J. 660; *Daya Ram* v. *Sohei Singh*, (1906) P.R. 110; *Nihala* v. *Bhuti*, 23 I.C. (P.) 418.

(3) *Eshenchunder* v. *Samachurn*, 11 M.I.A. 7 (22-25).

(4) *Leathes* v. *Newitt*, 4 Price at p. 370, cited in *Desai Ranchhoddas* v. *Rawal Nathubhai*, 21 B. 110 (115).

(5) *Ramalakshmi* v. *Siva Nath*, 14 M.I.A. 570 (585); *Harpershad* v. *Sheo Dayal*, 26 W.R. 55 P.C.; *Rupchand* v. *Jambu*, 22 A. 370 P.C.; *Daya Ram* v. *Sohal Singh*, (1906) P.R. 110; *Abdul* v. *Sona*, 45 C. 450 P.C.; *Rajani* v. *Nitaichandra*, 25 C.W.N. 433 (465, 466) F. B.; *Sitaram* v. *Lachman*, 8 N.L.R. 128: 17 I.C. 133.

(6) *Mercer* v. *Denne*, (1904) 2 Ch. 534, 556.

(7) Bl. Comm. 76; *London Corporation* v. *Cox*, L.R. 2 H.L. 239 (259).

308. These instances must relate to its conscious application.[1] A few instances only will not suffice.[2] But this rule should not be construed too strictly; for the custom may be a local one; it may be confined to a family where numerous instances may, from the very nature of the case, be impossible, or may be difficult to get. Oral evidence as to the existence of custom should be tested by ascertaining the grounds of the witness's opinion,[3] the extent or limits of his knowledge, and how far he is deposing to facts, and how far he is merely voicing his opinion, which apart from facts, is of little value.[4] When a custom is proved as generally applicable to the parties, it is open to proof that certain individual members were exempt from its operation on personal grounds.[5] It has already been pointed out that a custom of origin follows a person upon migration to his new domicile.[6] But where one relies upon the local custom of his domicile, he has to prove that he had adopted it (§ **242**). The question of custom is a mixed question of fact and law, depending as it does, upon the relevancy of evidence and the inference legally deducible therefrom.[7]

309. Proof of uniformity implies proof of the invariable application of custom whenever there was occasion for it. Uniformity implies continuity which does not, however, mean that there should be no interruption at all, provided that the interruption be in possession and not in the right,[8] or that it be only temporary[9] by constant or for the sake of temporary convenience,[10] or from necessity, as where the subject of the right is submerged for a time and is, therefore, incapable of enjoyment.[11] Then again, continued custom would be deemed uniform, if it is traced to a recent date. It is not necessary that it should be proved up to date. As Lord Denman, C.J., said: "The finding of the Jury that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished."[12]

310. The quantum of evidence acceptable to the court depends upon the custom pleaded. Very slender evidence will suffice to establish a

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(1) *Lachman Rai* v. *Akhar Khan*, 1 A. 440; *Sarabjit* v. *Inderjit*, 27 A. 203; *Gopal* v. *Hanmant*, 3 B. 273; *Durgacharan* v. *Regunath*, 18 C.L.J. 559 (562).

(2) *Pancha* v. *Bindeswari*, 37 I. C. (Pat.) 960. Three instances insufficient. *Bhagvandas* v. *Rajmal*, 10 B.H.C.R. 241 (261); *Desai Ranchhoddass* v. *Rawal Nathubhai*, 21 B. 110 (116, 117).

(3) *Lachman Rai* v. *Akhar Khan*, 1 A. 440. *See*, for an example of analysis of such evidence, *Basava* v. *Linganguda*, 19 B. 428.

(4) *Rahimabhai* v. *Hirbai*, 3 B. 34, followed in *Parbati* v. *Chandarpal*, 31 A. 457 P.C.

(5) *Gitabai* v. *Shivbakas*, 5 Bom. L. R. 318.

(6) *See* S. 3, Comm. *Surender Nath* v. *Hiraman*, 12 M.I.A. 81; *Prithee Singh* v. *Sheo Sunduree*, 8 W.R. 261; *Parbati* v. *Jagadis*, 4 Bom.L.R. 365.

(7) S. 584 (*b*), C.P.C. 1882; S. 100 (*b*), C. P. C. 1908; *Palaniappa* v. *Daivasikhamony*, 40 M. 709 P.C.; *Kumarappa* v. *Manavala*, 41 M. 374 F.B., overruling *Kakarla* v. *Venkata*, 29 M. 24; *Hashim Ali* v. *Abdul Rahman*, 28 A. 698: *Ram Bilas* v. *Lal Bahadur*, 30 A. 311 F.B.; *Giraj Singh* v. *Hargobind*, 32 A. 125; *Ram Harakh* v. *Ishar Dat*, 3 I. C. (A.) 558; *contra* in *Hureehur* v. *Judoonath*, 10 W.R. 153; *Syud Ali* v. *Gopal Dass*, 13 W.R. 420; *Burjara* v. *Bha Gana*, 10 C. 557 P.C., is no longer the law.

(8) 1 Bl. Comm. 77.

(9) Co: Lit. 114-*b*: 1 Bl. Comm. 77: "An interruption of the possession for ten or twenty years will not destroy the custom; it only becomes more difficult to prove."

(10) 10 Hals. L.E., § 444, p. 225.

(11) *Mercer* v. *Denne*, (1904) 2 Ch. 534 C.A. (1905) 2 Ch. 538.

(12) *Seals* v. *Key*, 11 Ad. & E. I. 819 (825).

custom which is only a slight departure from the normal law,[1] but very cogent evidence supported by unquestionable and numerous instances would be required to convince the court to make a wide departure from it.[2]

Proof of Kulachar.

311. In this respect the court has special rules for the determination of family customs. As these customs are necessarily personal, the court not only applies the most stringent test to the evidence offered, but it is reluctant to depart from the general law, unless the custom has been proved in all its bearings. The reported cases show how rare it is for the court now to admit as family custom a practice which has not already received its *imprimatur*. The same remarks apply to local customs.

Proof and disproof of custom..

12. A custom may be proved or disproved in any of the following ways:—

(1) Judgments, orders and decrees relating thereto.[3]

(2) Entries in any public document made—

(*a*) by a public servant in the discharge of his official duty,[4] or

(*b*) by any other person in the performance of a duty especially enjoined on him by the law of the country in which the public document is kept,[5]

(3) a published work dealing therewith,[6]

(4) any transaction by which the custom in question was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence,[7]

(5) particular instances in which the custom was claimed, recognized, exercised or in which its existence was asserted, disputed or departed from.[8]

(6) opinions of—

(*a*) persons knowing of its existence or non-existence,[9]

(*b*) persons likely to have known of the custom, given before any controversy as to the custom had arisen, and who are either dead or cannot be called without unreasonable expense or delay,[10]

(*c*) a number of persons,[11]

(*d*) experts,[12]

(7) previous deposition of witnesses examined *inter partes* who cannot be called for reasons stated in clause (6) (*b*),[13]

(8) admissions of persons adversely affected thereby,[14]

(9) acts and conduct which make the existence or non-existence of the custom highly probable or improbable.[15]

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(1) *Johnson* v. *Clark*, (1908) 1 Ch. 303 (309).
(2) *Ib.*
(3) S. 42, Ev. Act.
(4) *Mahammad Imam Ali* v. *Hussain Khan*, 26 C. 81 (92) P.C.
(5) *Ib.*, S. 35.
(6) *Ib.*, S. 87; *Collector of Madura* v. *Motoo Ramalinga*, 12 M.I.A. 397 (411); *Vallabha* v. *Madusudanan*, 12 M. 495 (499, 500).
(7) *Ib.*, S. 13 (*a*).
(8) *Ib.*, S. 13 (*b*).
(9) *Ib.*, S. 48.
(10) *Ib.*, S. 32 (4).
(11) *Ib.*, S. 32 (8).
(12) *Ib.*, S. 49.
(13) *Ib.*, S. 33.
(14) *Ib.*, S. 21.
(15) *Ib.*, S. 11.

312. **Analogous Law.**—This section is consolidated and condensed from certain sections of the Evidence Act dealing with the proof of custom. In order to understand its scope, reference must be made to a work on that subject. It is not proposed to annotate this section with any degree of exhaustiveness, and the following paragraphs are confined to the discussion of cases bearing only on the evidence relating to Hindu customs.

Cl. (1) Effect of Judgments.

313. The section permits custom to be proved by a judgment, decree or order not *inter partes*, in which it was recognized. But the mere production of judgments, however relevant, is never sufficient to prove custom,[1] upon which other evidence is necessary. Even as regards its weight, much must necessarily depend upon the nature of the question, the evidence adduced and the decision given thereupon. A judgment given *ex parte* cannot command the same value as one given after contest, or one suffered on compromise resulting after a contest.[2]

Cl (2) Entry in a Public Record.

314. An entry in a public record may suffice to establish a custom. It all depends upon the record and the entry. For instance, the *Riwaj-i-am* in the Punjab is a record of local tribal customs prepared by an officer deputed for that purpose. It has been consequently held to be of itself sufficient to create a presumption of the custom therein recorded.[3] But the same cannot be predicated of a *wajib-ul-arz* in the United or the Central Provinces. Their value depends upon the information available to, and availed of, by the Settlement Officer.[4] It depends in each case upon the nature of the duty, and the inquiry which preceded the record and the care taken to ascertain the facts and eliminate therefrom pre-conceived ideas and opinions. For instance, records of custom, prepared by officers deputed to make an ethnological survey of a locality, would be necessarily entitled to greater weight than a similar record prepared by a Settlement Officer or a Collector of folk-lore for insertion in a popular Gazetteer. The admissibility of the record prepared under this clause does not depend upon the personal knowledge of the public servant or other person concerned.[5]

Cl. (3) Pubished Works.

315. The courts freely admit into evidence published works of repute on the subject of custom. But, of course, such works must be those compiled to instruct and not merely to entertain readers. Works such as Sherring's Law of Caste, Steele's Law of Caste, and

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(1) S. 42, Ev. A.; *Labh Singh* v. v. *Gurcharan*, (1913) P.R. 54: 19 I.C. 731; *Bai Baiji* v. *Bai Santok*, 20 B. 53 (57, 58); *Sri Ganesh* v. *Keshavrav*, 15 B. 625 (635); *Kali Krishna* v. *Secretary of State*, 16 C. 173; *Sheo Chwrn* v. *Goodur*, (1868) N. W. P. H. C. R. 138; *Lachman* v. *Akbar*, 1 A. 440; *Gurdayal* v. *Jhandu*, 10 A. 585 (586); *Shimbhu* v. *Gayanchand*, 16 A. 379; *Harnath* v. *Mandal Das*, 27 C. 379.

(2) *Durga Devi* v. *Ramyan*, (1911) P. R. 91.

(3) *Beg* v. *Alladitta*, 44 C. 749 P.C.; *Vaishno Ditti* v. *Rameshri*, 10 L. 86 P. C.; *Basant Singh* v. *Brij Raj Saran*, 57 A. 494 (507) P.C.

(4) *Muhamad Imam Ali* v. *Husain Khan*, 26 C. 81 (92) P.C.; *Parbati* v. *Chandarpal*, 31 A. 457 P.C.; *Anant Singh* v. *Durga Singh*, 32 A. 363 (373) P.C.

(5) *Lekraj* v. *Mahpal*, 5 C. 751 (753, 754).

Tupper's Punjab Customary Law fall into the former category and command serious attention. But there are other works, which, though professedly written to portray customs, are ill-disguised epitomes of these works, or of the Census Reports or of the Reports of the Ethnological Survey, so that the Courts would rather prefer going to the originals than to their abridgments.

Cl. (4) Any Transaction.

316. This is a very wide clause,[1] and would include judgments, decrees and orders in civil, criminal,[2] and revenue cases in which a custom was claimed,[3] decreed[4] or disallowed[5] and in fact any business[6] or dealing in which the question of the custom was gone into.

317. Not only judicial and quasi-judicial records, but acts, conduct and proceedings of such bodies, as the caste panchayat, arbitrators and the like, would be admissible under this clause. So any document bearing on the custom may be proved in evidence. For instance, receipts for payment of the customary dues, diaries and private records, account books, and memoranda, and in fact, any other fact or matter which has any bearing on the question of custom. It should be noted that while under clause (1) judgments are relevant *qua* judgments and as embodying judicial opinion on the subject of custom, this clause lets in not only the judgment but the entire litigation or proceedings as such, *i.e.*, not merely the judicial opinion but also the claim made and its subsequent course from its very inception.[7]

Cl. (5) Particular Instances.

318. This is a most important clause and one on which the courts insist compliance. "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts that the custom has been enforced."[8] The acts required for the establishment of custom must be plural, uniform and continuous. Two or three instances will not suffice, where numerous instances were possible.[9] In a general custom, what the court has to find is whether the custom is accepted and used by the people as their private law in preference to their general law. This can best be proved by establishing their obedience to it.

319. In the case of local or tribal custom the best evidence is that of the elders of the village or the sect or tribe. People as old as can be got should be examined to prove such custom, while in the case of

(1) *Dinomoni* v. *Brojomohini*, 29 C. 187 (198) P.C.; *Bhitto Kanwar* v. *Kesho Prasad*, 19 A. 277 P.C.; *Rani Ranjam* v. *Ram Narain*, 22 C. 533 P.C.

(2) *Koondoo Nath* v. *Dheer Chunder*, 20 W.R. 345.

(3) *Dinomoni* v. *Brojo Mohini*, 29 C. 187 P. C.

(4) *Jiamuttlah* v. *Ramonikont*, 15 C. 233; *Ramasami* v. *Appavu*, 12 M. 9.

(5) *Bhaya Dirgui* v. *Pande*, 3 C.L.J. 521; *Parbutty* v. *Purno Chander*, 9 C. 586.

(6) *Sarappalli* v. *Fota*, (1914) M. W. N. 779: 26 I.C. 747.

(7) *Gujju Lal* v. *Feteh Lall*, 6 C. 171 (175, 185) F.B.

(8) *Lachman* v. *Akbar*, I. A. 440; *Rahimat Bai* v. *Hirbai*, 3 B. 34; *Tarchand* v. *Reeb Ram*, 3 M.H.C.R. 57; *Desai Ranchodas* v. *Rawal Nathubhai*, 21 B. 116 (117); *Zunkari* v. *Budhmal*, 57 I.C. (N.) 252; *Ganeshi* v. *Darshan*, 2 L. L.J. 377: 56 I.C. 478.

(9) *Gopal* v. *Hanmant*, 3 B. 273; *Sarabjit* v. *Indarjit*, 27 A. 203; *Chandika Baksh* v. *Muna Kunwar*, 24 A. 273 P.C.; *Durga Charan* v. *Raghunath*, 18 C.L.J. 559 (567).

family customs the evidence must not only tend to show that the custom existed but that it still exists. Since the difference between this and the other customs is that while the latter cannot be materially affected by individual lapses, a family custom, disclosing such lapses, would fail of its effect, either because these lapses would destroy its continuity or prove its abandonment.[1] But where both are otherwise satisfactorily established, the mere fact that it was not enforced in an isolated instance would not affect its validity.[2]

320. To establish a *Kulachar* or family custom of descent, one at least of two things must be shown, either a clear, distinct and positive tradition in the family that the *Kulachar* exists[3] or a long series of instances of anomalous inheritance from which the *Kulachar* may be inferred.[4] (§ 274).

Cl. (6) Opinions.

321. Opinions as a rule are inadmissible in evidence, as a witness is required to depose to facts of which he knows, and not merely of what he thinks. But this clause is an exception, and it must be understood with its necessary safeguards, namely, that while a witness is free to depose to his opinions, it is for the court to appraise their evidentiary value which depends not so much upon what he thinks, but upon the logic of facts upon which he bases his opinion. Opinion then, is valueless, without the grounds upon which it is based.[5] And this is true alike of an expert as of a layman witness. Both must disclose the *data* which the court is free to examine.[6] The opinion must not be merely the repetition of a hearsay but a reasoned conclusion drawn from facts and conduct, tradition, observation, inquiry, research and study upon which a reasonable man forms his judgment. An opinion, after all, is only a judgment of a private person formed on materials available to him. These he must disclose so that, if his judgment be wrong, the court may reject it; if right, the court may follow it. As regards the admissibility of the previous statements of persons who are not called, its admissibility is contingent upon proof of the fact that the statement was made *ante litem motam*[7] and its value must depend upon its credibility and the means of knowledge available to him. It is, in any case, insufficient of itself to prove any custom.

322. The statements of crowd of persons is admissible, even though the latter be alive and available as witnesses, on the ground that it is a statement of their common sentiment.[8]

Cl. (7) Admission and Estoppel.

323. Law attaches considerable value to the admissions of a person made against himself, and in cases where evidence is conflicting, it is decisive of the case.[9]

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(1) *Raja Nugandur* v. *Raghunath*, (1864) W.R. 20; *Nitrapal Singh* v. *Jaipal Singh*, 19 A. 1 P.C.

(2) *Ekradeshwar Singh* v. *Janeshwari*, 42 C. 582 (606) P.C.

(3) *Maharani Hiranath* v. *Baboo Ram-Narayan*, 9 B.L.R. 274 (291).

(4) *Sumurun Singh* v. *Khedun Singh*, 2 Sel. Rep. (N.E.) 147.

(5) S. 51, Ev. A.; *Ekradeshwar Singh* v. *Janeshwari*, 42 C. 582 (604, 665) P.C.

(6) *Ib.*

(7) *Ekradeshwar Singh* v. *Janeshwari*, 42 C. 582 P.C.

(8) *Q.* v. *Ram Dutt*, 23 W.R. (Cr. 35 (38); *Chandra Nath* v. *Nil Madhab*, 26 C. 236.

(9) *Chandra Kunwar* v. *Chaudhiri Narpat Singh*, 19 A. 184 (194, 195) P. C.

Cl. (8) Acts and Conduct.

324. On the same ground stand acts and conduct of a person which are a mere outward manifestation of his inward conviction. But the acts and conduct must be unequivocal, and ordinarily, *ante litem motam.*

Proof of General Custom.

325. This section deals with admissibility of evidence. Closely connected with the question of admissibility is the question of its value, which largely depends upon a variety of considerations: the age and status of the witnesses, their impartiality and disinterestedness, their power of observation and means of knowledge and the nature and grounds of their opinions. These are mainly questions of fact, but, as in the evidence of custom, the question of relevancy is so intimately blended with the question of credibility that it is not often possible to state when the facts end and law begins. Moreover, it is not always possible to prove a custom in all the several ways enumerated in the section and a short discussion on the *quantum* of evidence which the courts have considered sufficient may, therefore, be subjoined.

326. It has been held that general customs which affect a large number of persons and are, therefore, in the nature of public rights may be proved by evidence of common notoriety,[1] or by the production of a judgment,[2] public document,[3] treatises or other record in which the said custom was proved, and the court may even take judicial notice of such a custom[4] if it is well-known[5] to save needless cost to parties.[6] So the court will take judicial notice of a custom which has been held proved in the reported cases,[7] provided they are not contradictory.[8]

At any rate, formal evidence will ordinarily suffice to prove such custom.[9]

Local Custom.

327. Evidence of the existence of the custom in the neighbourhood of the place is admissible if there is reason to believe that like customs prevailed in both.[10]

Communal Custom.

328. The fact that other communities have equally exercised the right claimed by a special custom is admissible to disprove the custom.[11]

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(1) Taylor's Ev., Ss. 609-620; *Weeks* v. *Sparke*, 1 M. & S. 679; *Crease* v. *Barrett*, 1 C.M. & R. 919; *Lord Dunraven* v. *Llewellyn*, 15 Q.B. 811.

(2) *Freeman* v. *Phillips*, 4 M. & S. 486; *Reed* v. *Jackson*, 1 East 335; *Earl De Lawarr* v. *Miles*, 17 Ch. D. 535.

(3) *Sturla* v. *Freccia*, (1880) 5 A. C. 623 (643); *Mercer* v. *Denne*, (1905) 2 Ch. 538.

(4) 10 Hals. L. E. § 448, p. 237; *Rechenoweth*, (1902) 2 Ch. 488.

(5) *Moult* v. *Halliday*, (1898) Q. B. 125 (129); *Goodwin* v. *Roberts*, L.R. 10 D. Ex. 337 O.A. 1 App. Cas. 476; *Nelson* v. *Dahl*, 12 Ch. D. 568; *Postlewaite* v. *Freeland*, 5 App. Cas. 599 (616).

(6) *Per* Mellish L. J. *Re Mathews, ex parte, Powell*, 1 Ch. D. 501 (506); *Edelstein* v. *Schuler & Co.*, (1902) 2 K. B. 144 (155, 156).

(7) *Per* Brett, M.R., *In re Parker, ex parte Turquand*, 14 Q.B.D. 636 (645); *Rama Rau* v. *Raja of Pittapur*, 40 M. 778 P.C.

(8) *Per* Mellish, L.J., *In re Mathews, ex parte Powell*, 1 Ch. D. 501 (507).

(9) *Johnson* v. *Clark*, (1908) 1 Ch. 303 (309).

(10) *Anglesay* v. *Hatherton*, 10 M. & W. 213.

(11) *Earl Dela Earr* v. *Miles*, 17 Ch. D. 535; *Lord Rivers* v. *Adams*, 3 Ex.D. 361.

13. Usage defined. **Usage is a practice at variance with the general law, and differs from custom in that it need not possess the antiquity, uniformity or notoriety of custom, provided it is well known and acquiesced in by the community to whom it is made applicable.**[1]

329. **Analogous Law.**—"Immemorial custom is transcendent law approved in the sacred scripture, and in the codes of divine legislators; let every man, therefore, of the three principal classes, who has a due reverence for the supreme spirit, which dwells in him, diligently and constantly observe immemorial custom."[2] Referring to custom, the Privy Council observed in a case: "A custom is a rule which, in a particular family, or in a particular district, has, from long usage, obtained the force of law."[3] In another case, referring to mercantile usage, they said: "To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which, in respect of all these, becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result, it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."[4]

330. A usage is something more than practice, but something less than custom. It is merely the habit of doing a thing in a particular way without advertence to its propriety or legality.[5] Practice may amount to no more than an individual habit, or it may be the established habit of a particular class or community. Distinguishing these two, it was observed in a case: "To constitute a usage it must apply to a place rather than to a particular bank; it must be the rule of all banks of the place or it cannot consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement."[6]

331. **Proof of Usage.**—Usage is a generic term and has a wider application as implying practice supplementing a mercantile agreement, or contract, usage of the trade and country, and usages forming part of the common course of affairs.

Leaving out of account all usages, not falling within the scope of Hindu Law, the term may be confined to connote a practice of a country, caste, community, sect or tribe which is notorious and acquiesced in by them. But the term is often used to mean no more than custom, from which it is clearly distinguishable, but of which it is an essential element, since user is a test of the continuity of a custom, and its non-user furnishes evidence of its discontinuity or abandonment.[7] Notoriety does not imply knowledge of the party against whom custom is proved. All it implies is that it is generally known.

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(1) *Juggomohun Ghose* v. *Manickchand*, 7 M.I.A. 263, 282; *Dalglish* v. *Guzuffer Hussain*, 23 C. 427 (429); *Sariatullah* v. *Pran Nath*, 26 C. 184 (187).

(2) Manu, Ch. I, S. 138.

(3) *Hurpershad* v. *Sheo Dyal*, 26 W. R. 55 (70) P.C.

(4) *Juggomohun Ghose* v. *Manickchund*, 7 M.I.A. 263 (282).

(5) *Mirabivi* v. *Vellayanna*, 8 M. 464 (466).

(6) *Adams* v. *Otterback*, 15 Howard (U.S.A.) 545 cited *per curiam*, *Mana* v. *Rama*, 20 M. 274.

(7) *Jenkins* v. *Harvey*, 2 C.M. & R. 393.

CHAPTER III

MARRIAGE.

332. Topical Introduction.—The history of Hindu marriage has already been set out (§§ 20-29). It is the history of promiscuity of marriage. In the Mahabharat, the Pandavas tell their wife that at one time, women consorted with men like cattle until Svetaketu, son of the Sage Uddalak, introduced the institution of marriage.[1] But it was not marriage as we now understand it. Polyandry and polygamy was the next stage,[2] and traces of it are to be found in the Rigveda,[3] which, however, was compiled when the institution of marriage had become established, and monogamy had become the rule,[4] though polygamy was still customary.[5] Marriage was then compulsory. Without re-marriage a widower could not perform any sacrifice. The Vedic marriage was with adults, and the wife selected her husband.[6] The sole ceremony enjoined was the grasping of the hand[7] before the sacrificial fire.[8] The position of the wife was that of the chosen friend.[9] The elaborate symbolism which constitutes the Shastric marriage is a later development born of the *Sutra* period.[10] But even then the *Grihya Sutra* took care to add that "the usages of the country should be followed in marriage."[11] This was a concession to the usage which had already overlaid the ritual texts and the traditional law. For instance, Manu regarded polygamy as exception[12] but it has become the rule. Re-marriage of wives and widows was ruthlessly reprobated, but the one has become customary, and the other legalized by legislation. Similarly, the Vedic age was the age of courtship and marriage, but the growth of caste with its intercaste jealousy, aided by the sacredotal puritanism, established the institution of early marriages which tendency became aggravated in later ages, as the doctrine received support from the popular cry—"Give the girl no chance to go wrong."

333. A marriage may be Shastric, Statutory or Customary, the first of which may be presently considered.

Marriage defined.

14. (1) A marriage is an alliance between a man and a woman recognized by law.

(2) A religious marriage is of two kinds; (*a*) Brahma and (*b*) Asur.

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(1) Mahabharat, Adiparva, Ch. I, 122, 147, p. 2.
(2) *Ib.*, V-V-30-35.
(3) Muir's Sanskrit Text, Vol. 5, pp. 234, 243, where the subject is discussed in detail.
(4) Rigveda (Max-Muller's Trans.), Vol. 2, p. 609.
(5) *Ib.*, p. 426.
(6) *Ib.*, Vol. 6, p. 509.
(7) *Ib.*, Vol. 6, p. 520.
(8) *Ib.*, Vol. 6, p. 206.
(9) *Ib.*, Vol. 5, p. 546 ("Sakha," *i.e.*, friend).
(10) There were 27 principal ceremonies.—Mandlik's H. L., p. 401.
(11) *Grihya Sutra* 1-7, I, p. 25.
(12) Manu, IX-77-83.

Brahma.

(3) A Brahma marriage is a sacrament in which the bride is a voluntary gift by her father or guardian to her husband.[1]

Asur.

(4) An Asur marriage is a sacrament in which the bride is given to the husband in payment of a consideration.

Betrothal.

(5) A betrothal is an engagement of two persons with a view to marriage, and is called *Vagdana.*

334. **What is Marriage.**—This section defines "marriage" as an alliance between a man and a woman recognized by law. The first essential of marriage is then an alliance, union or compact between persons of opposite sexes. Such alliance may be formed in a variety of ways, and for a time, limited or unlimited. The various ways in which the alliance is formed in a marriage constitute its ceremonies. They vary from the most complicated as prescribed in the Shastras to the free love which, under the name of *Sambandham,* is taken for a marriage in Malabar. The question of marriage is mainly one of form and intention. If the intention was to treat the woman as wife and the form prescribed by the sect or caste, as the outward expression of that intention, is conformed with, then the union would amount to marriage and recognized as such by law.

335. The question of legal recognition is all in all. Its necessity was perceived by Apastamb who says, "The union of the husband and the wife is effected through the law."[2] It has been thought best to leave the details of this subject to subsequent sections. Legal recognition depends upon the law and custom to which the parties were subject, the ceremonies, if any, performed and the observance of other rules as to consanguinity.

Betrothal.

336. There are two stages in the Hindu, and for that matter, in all marriages, the betrothal and the actual ceremony of marriage. It has already been stated that infant marriages are now customary amongst the Hindus, though amongst the educated and reformed classes there is a tendency in the direction of adult marriages even preceded by courtship. Leaving these out for the moment, the orthodox Hindu first bethinks himself of the marriage of his daughters as soon as they are of marriageable age. Emissaries comprising a Brahmin and a barber accompanied by a friend or relation proceed to view the prospective husband. This is a distinct ceremony in some parts of the country. If the boy is approved, then preliminary negotiations begin with the two fathers through the same intermediaries. Amonst the three higher castes, it is usal for the boy's father to stipulate for a definite sum as the bridegroom's dowry. But on this point, as on all others relating to marriage, local customs widely differ.[3]

337. But apart from custom, the Shastric rule, and one favoured by public opinion, is to take no bride-price and to pay a suitable dowry

(1) *Cf.* Manu, III Ss. 27-34.
(2) *Apastamb* II, 6-13; 2 S. B. E. p. 132.
(3) Census of India, 1911, Vol. I, § 330, p. 257. *Ib.*, (1931) Vol. I, § 97, p. 226, but they have diminished on account of the Child Marriage Restraint Act, 1929 (XIX of 1929).

if possible to the husband. A marriage so contracted is now taken to be a *Brahma* marriage, which is presumed of every marriage till the contrary is shown.[1]

But though the Asur form is not favoured or presumed, the court is constrained to recognize its validity, however indisposed it may be to countenance it.[2]

The question whether the marriage is in one form or the other would have been immaterial, but for its effect upon the devolution of the woman's property, which depends upon whether she was married in the approved Brahma form or the disapproved Asur form.[3]

Contract between Adult Parties.

338. The contract of marriage hitherto considered is the contract between parents on behalf of their minor children. But there may be cases, and such cases are more likely to be fostered by the reforming zeal of the present generation, when the contract of marriage is made directly by the parties immediately interested. In that case, the contract culminating in an engagement could not be distinguished from any other contract, giving rise to similar rights and liabilities; though the age of discretion in such case is not that prescribed by the Indian Majority Act, which, as already stated, does not affect the capacity of any person to act in matters of marriage, dower, divorce and adoption.[4] The effect of this enactment is, that so far as regards these matters, the question of majority must be determined as if the Indian Majority Act had not been passed. Apart from that Act, there is however, no clear provision in the Hindu texts prescribing the age of majority, and what little there is to be found on the subject is limited to males, there being no provision for females whose lifelong dependence upon men is repeatedly insisted on. However, as an age for majority was necessary, the Legislature has now prescribed the age for boys and girls at 18 and 14 years respectively.[5] On the attainment of this age, Hindu boys and girls should be treated as *sui juris* and competent to contract for their own marriage. There is no prohibition in Hindu Law against such contracts. On the other hand, post-puberty marriages were the only marriages known in the Vedic times, and even in the degenerate days of the Smritis, such marriages are expressly contemplated and provided for: "Three years[6] let a damsel wait, though she be marriageable; but after that term, let her choose for herself a bride-

(1) *Jaikisondas* v. *Harkisendas*, 2 B. 9 (14); *Moosee Haji* v. *Haji Abdul Rahim*, 30 B. 197; *Chunilal* v. *Surajram*, 33 B. 433; *Jagannath* v. *Narain*, 34 B. 553; *Jagannath* v. *Runjit Singh*, 25 C. 354; *Athikesavalu* v. *Ramanujam*, 32 M. 512; *Munni* v. *Umrao Singh*, (1909) P. R. 39; *Ramprasad* v. *Sububai*, 4 N.L.R. 31 (36); *Govind* v. *Dawalat*, 6 N.L.R. 3 (5); *Chandrabhaga* v. *Vishwanath*, 9 N. L.R. 102 (108).

(2) *Dholidas* v. *Fulchand*, 22 B. 658 (664); *Vaithinathan* v. *Gangarazu*, 17 M. 9 (10); *Venkatakrishnyya* v. *Lakhminarayan*, 32 M. 185 (190).

(3) *Bhao* v. *Raghunath*, 30 B. 229 (Brahma devolution); *Dwarka* v. *Saratchandra*, 39 C. 319, (Asur devolution); see *post* "Inheritance to Stridhan."

(4) S. 2 (*a*), Indian Majority Act, (IX of 1875).

(5) The Child Marriage Restraint Act (XIX of 1929).

(6) Skt. "Ritu," lit. "season," which Sir W. Jones translates to mean years, but which in the Sacred Books of the East is translated as "Seasons," "monthly periods." If the word "*ritu*" means the revolving year, then 13 being the age of puberty, a girl would attain her years of discretion, like the boy, on completion of her sixteenth year.

groom of equal rank; if not being given in marriage, she chose her bridegroom neither she, nor the youth chosen, commits any offence."[1]

Marriage Brocage.

339. Cases in which match-makers stipulate for a reward for themselves are even more immoral than those in which a price is paid to the guardians of children to bring about their marriages. All agreements to pay them for their services have been, consequently, held to be immoral and opposed to public policy and as such void. And so, of course, are the claims for damages flowing therefrom.[2]

Effect of breach of contract to marry.

15. A contract to marry cannot be enforced by specific performance[3] or an injunction,[4] but a party suffering loss thereby may recover damages for a breach of contract.

340. **Analogous Law.**—No person can be compelled by law to marry another,[5] and it would be against public policy and in restraint of marriages which law disfavours, if the party resiling therefrom were restrained by an injunction from marrying another.[6] The only remedy open to the disappointed party, suffering by the breach, is compensation in money awarded as penalty for a breach of contract to one suffering therefrom. But on this head, any presents of clothes, money and jewels made to the parents of the other party may, it seems, be not recovered, being, as they are, unconditional and in the nature of voluntary offerings.[7] As such, presents made to, and for the benefit of parents, not being in the nature of a settlement on the wife, undoubtedly tend to induce the exercise of parental influence from corrupt motives and encourage the buying and selling of children.[8] As such, they should be held, and have been held to be irrevocable, though there are cases which lay down otherwise,[9] even where the recipients of such gifts were not the guardians of the children whom they had agreed to offer in marriage.[10] But these cases really follow precedents; and none of them was a flagrant instance of the abuse of parental power when alone the rule could have been tested. They, however, stand on firmer ground when they decree return of presents made for the bride, in which case their return on the breaking off the match is a matter of course.[11]

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(1) Manu, IX-90, 91; Vishnu, XXIV 40; 7 S.B.E. 109; Gautam, XVIII 20; Narad, XII-24.

(2) *Atma Ram* v. *Banku Mal*, 11 L. 598.

(3) S. 21 (*b*) last Ill. Specfic Relief Act (I of 1877).

(4) *Gunput* (In re)), 1 C. 74 (76-78).

(5) S. 21 (*b*), last *Illustration* Specific Relief Act, (I of 1877); *Umed* v. *Nagindas*, 7 B. H. C. R. (O. C.) 122 (132); *Nowbat Singh* v. *Lad Kooer*, 5 N.W.P. H.C.R. 102 (105); *Gunput* (In re), 1 C. 74.

(6) *Gunput* (In re), I.C. 74 (76, 77, 78).

(7) Per Markby, J. in *Asgar* v. *Mahabat*, 13 B.L.R. App. 34 (36) followed in *Gunput*, 1 C. 74 (76).

(8) *Buldeo* v. *Mohamaya*, 15 C.W.N. 417: 9 I.C. 652; *Devarayan* v. *Muthuraman*, 37 M. 393; *Venkata* v. *Lakshmi*, 32 M. 185 F.B.; *Girdhari* v. *Needher*, 10 A.L.J. 159; *Buldeo* v. *Jumna*, 23 A. 495; *Dulari* v. *Vallubhdas*, 13 B. 126.

(9) *Jogeswar* v. *Panch Kauri*, 5 B.L.R. 395; *Rambhat* v. *Timmayya*, 16 B. 673 (675).

(10) *Umed* v. *Nagindas*, 7 B. H. C. R. (O. C.) 122; *Mulji* v. *Gomti*, 11 B. 412; *Rambhat* v. *Timmayya*, 16 B. 673 (675).

(11) *Jaikisondas* v. *Harkisondas*, 2 B. 9 (15); *Amratlal* v. *Bapubhai*, (1887) B.H.C.P.J. 207; *Rambhat* v. *Timmayya*, 16 B. 673 (675).

341. So, again, the father or other guardian of the bridegroom may legitimately recover any expense of the marriage of his son or ward which the father or guardian of the bride had agreed to pay,[1] and marriage expenses, being a legitimate charge on the family, they are payable therefrom. So where the defendant improperly neglected to get his niece married, whereupon her mother married her and then sued him for expenses out of the joint estate of her deceased husband, the court decreed the claim overruling the objection that the plaintiff was not legally entitled to marry her daughter.[2]

Where the bride-elect dies, it is but just that the husband-elect should be able to get back the presents and this contingency is expressly provided for in the Mitakshara,[3] which, however, allows deduction therefrom of the expenses incurred by the girl's father. The court does not recognize the *Asur* marriage as valid, and though if it is performed it has to be treated as valid on the ground of *factum* valet, but till it is performed, no contract relating thereto can be enforced whether for the payment of the bride-price stipulated, or for damages for non-performance of the marriage, though if the money is actually paid and the marriage ceremony completed, the money cannot be recovered back.[4]

342. **Parent's Duty.**—There is nothing in the textual law regarding the selection of the bridegroom, and the person by whom he is to be selected. This duty must, therefore, be presumed to arise out of the general rights of guardianship. As such, the father and, in his absence, the mother must make the selection,[5] as it is their duty to see that their children are suitably matched. While the contract is in the course of negotiation neither party is, of course, legally bound by the terms exchanged, but as soon as a definite contract is made that stage is marked by performance of the ceremony of the enagagement or bethothal,[6] between which and the actual marriage the couple are engaged, and the parents held under contract to marry them. Even this period is nowhere covered by textual authority. Consequently, it is held subject to the ordinary civil law of contracts. As such, the parents are at liberty to terminate the engagement for any reason which should justify it in law. Force, fraud, undue influence and misrepresentation are, amongst others, its chief dissolvents.[7] Even if the contract has been illegally broken the only remedy is damages.[8] There cannot be specific enforcement of a contract to marry, and for obvious reasons.[9] Nor for the same reason,

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(1) *Vaikuntam* v. *Kallapiran*, 23 M. 512. Post-nuptial expenses allowed in the same case in 26 M. 497.

(2) *Gulabchand* v. *Fulhar*, 3 I.C. (B.) 748; contra *Hira* v. *Jowala*, (1915) P. L.R. 27: 27 I.C. 1008.

(3) Ch. II, Sect. XI, S. 30.

(4) *Chunilal* v. *Suraj Ram*, 33 B. 433; *Kalavagunta* v. *Kalavagunta*, 32 M. 185 F.B. following *Dholidas* v. *Fulchand*, 22 B. 658; *Ramachand* v. *Audaito*, 10 C. 1054, overruling *Visvanathan* v. *Saminathan*, 13 M. 83; *Vaithinathan* v. *Gangarazu*, 17 M. 9; *Baldeo* v. *Jumna*, 23 A. 495 merely followed *Visvanathan* v. *Saminathan*, 13 M. 83, since overruled.

(5) *Acha Ranganaiki* v. *Acha Ramanuja*, 35 M. 728.

(6) Variously called, *Vagdan*; *Sagai*, etc.

(7) *Asgar Ali* v. *Mahabhat Ali*, 13 B.L.R. (App.) 34.

(8) *Mulji* v. *Gonti*, 11 B. 412; *Rambhat* v. *Timmayya*, 16 B. 673; *Colaquhoun* v. *Smither*, 33 M. 417.

(9) *Shridhar* v. *Hiralal*, 1 C. 74; *Umed* v. *Nagindas*, 7 B.H.C.R. (O.C.) 122; *Purshotam* v. *Purshotam*, 21 B. 23; *Ma Ngme Yin* v. *Maung Po Taw*, 7 Bur. L.R. 14: 23 I.C. 376; *Nowbut* v. *Lad Kooer*, 5 N. W. P. H. C. R. 102. *Contra* Narad, XII-35; 33 S.B.E. p. 172 ordains forcible marriage of the recalcitrant bridegroom but not *vice versa*; but this

can another marriage be restrained by injunction.[1] Nor is there any case for damages consequent on the mere breach of a contract of marriage, as a Hindu father has always the option to put an end to his daughter's engagement should a more suitable match be available.[2] This he is at liberty to do till the very last moment; and where a ceremony is required, as that marriage is completed only with the *Saptapadi* or the taking of seven steps round the marriage pole,[3] then before this last irrevocable step is taken, he may break off the contract though if the seventh step is taken, the marriage is completed and becomes indissoluble.

343. Jurisdiction of the Court.—The jurisdiction of the court on the subject of Hindu marriages is limited mainly to giving effect to the ascertainment of facts and declaring them *inter partes*. But in contracts relating to a marriage, the jurisdiction of the court is unrestricted by any consideration of personal law, as all such contracts are subject to the provisions of the statutory enactments. So the court may award damages for a breach of contract to marry, but since a party cannot compel another to marry him, there can be no decree for specific performance. And where a marriage has in fact taken place, the court will entertain a suit for jactitation of marriage, that is, a suit for the establishment of marriage relationship, such a suit for instance, as seeks a declaration that the defendant is or is not married to the plaintiff,[4] or being married, whether the marriage is or is not valid, because it was procured by fraud or force or celebrated without the consent of the necessary parties or without the formalities necessary to render it a binding marriage according to Hindu Law.[5] Should the court hold a marriage valid, it becomes necessarily entitled to restrain by an injunction the parents from marrying the bride to another person.[6] The question whether the plaintiff has the right to betroth and marry a minor belongs to the domain of personal guardianship on which the courts undoubtedly possess jurisdiction.[7]

A suit for damages for a breach of contract to marry is not cognizable by the court of Small Causes.[8]

Right to marry.

16 (1) Every man has a right to marry, and such right is not affected by infancy or infirmity.

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drastic penalty is opposed alike to law and policy and is not saved by the Specific Relief Act (I of 1877), S. 21 (*b*), the last illustration to which is exactly in point.

(1) *Purshotam Das* v. *Purshotam Das*, 21 B. 23 (34) dissenting from *contra* in *Khooshal* v. *Bhugwan*, 1 Borr. 155.

(2) Mit., II-II, 27; Narad, XII, 30, 38; Yadnavalkya, 165, 166; Vashisth, 2 Dig. 487; Katyayan, *Ib.*, 491; *Umed Kika* v. *Nagindas*, 7 B.H.C.R. 122; *Purshotam Das* v. *Purshotam Das*, 21 B. 23 (30; 31); *Kinji* v. *Narsi*, 39 B. 682 *Nagindas*, 7 B.H.C.R. (O.C.) 122 (134). (714); *per* Westropp, C.J., in *Umed* v.

(3) On this point there are local variations. In some places these steps are taken successively into seven circles, in other places, the pair perambulates seven times round the marriage pole, while in others the parties compile seven steps upon a stone.

(4) *Mir Azmat Ali* v. *Mahmud-ul-Nissa*, 20 A. 96.

(5) *Ramsurn* v. *Rakhal Das*, 1 W.R. 412; *Aunjona Dasi* v. *Prahlad Chandra*, 6 B.L.R. 243, F.B., overruling *contra* in *Ramsaran* v. *Rakhal*, Ib., p. 244-*n*; *Aunjona* v. *Prohladh Chunder*, 14 W.R. 132.

(6) *Venkatacharyulu* v. *Rangacharyulu*, 14 M. 316.

(7) *Purshotam Das* v. *Purshotam Das*, 21 B. 27 (37).

(8) *Kalisunker* v. *Koylash Chunder*, 15 C. 833.

(2) Provided that a marriage between a male below eighteen years of age and a female below fourteen years of age, if contracted on or after 1st day of April, 1930, shall be penalized to the extent provided in the Child Marriage Restraint Act, 1929.[1]

Infant marriage.

344. **Analogous Law.**—Hindu Law which treats marriage as a *Samskar*, and as such a religious rite, naturally regards the male as marrying and the female as merely married to. From her standpoint the *Dharmkars* treat her as being the subject of a gift by her father to the bridegroom called "the *Kanyadan.*"[2]

345. **Who may marry.**—A Hindu marriage being a sacramental ceremony, every twice-born Hindu, desirous of entering the householder's estate is entitled to contract a marriage irrespective of his age, constitution and poverty.

No deformity or disease[3], not even congenital impotency,[4] can stand in the way of marriage, nor leprosy or other loathsome and contagious disease.

But since Hindu Law regards marriage in the nature of a gift by the father of his daughter to the husband, the latter may be an idiot and even a lunatic, so long as his lunacy did not, at the time of his marriage, prevent him from accepting his bride during the marriage ceremony and of understanding what was going on.[5]

There is no age limit. A boy of any age and a man up to any age are both equally competent to marry.[6]

346. The right of Bairagis[6] and Gosavis to marriages, is now recognized,[7] and there seems no reason why a *Nihang* Gosavi should not enter the order of *Grihasth* by contracting a marriage. In doing so, he merely breaks the vow of perpetual celibacy made to himself, but Hindu Law does not tie any one down to lifelong celibacy, and any custom having this effect would be ruled out as obnoxious to the rule restraining marriage.[8] But though a Gosavi can marry, it does not thence follow that he can thereby alter the devolution of property which he held on condition of continued celibacy. The property so held would devolve in accordance with the rules of the order and the nature of the grant.[9]

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(1) Act XIX of 1929 which came into force on the 1st April, 1930.

(2) Lit. "gift of the daughter."

(3) *Monji Lal* v. *Chandrabai*, 38 C. 700 (706) P.C. See *per* Woodroffe, J., at p. 705 affirmed O.A. at p. 706. Under English Law the marriage of a lunatic is absolutely void even if it takes place during a lucid interval. *Turner* v. *Meyers*, 1 Hag. Con. 414 Marriage of Lunatics Act, 1811 (51 Geo. III. C. 37.)

(4) *Purushotam* v. *Das Mani*, 21 B. 610.

(5) *Monji Lal* v. *Chandrabai*, 38 C. 700 P.C.

(6) *Dial Das* v. *Dhianun*, (1914) P. R. 36; 21 I.C. 932.

(7) *Gosain Rambharti* v. *Mahant Swrajbharti*, 5 B. 682 (684); *Gitabai* v. *Shivbakas*, 5 Bom.L.R. 318; *Satiadama* v. *Saranbagi*, 18 M. 266 (270); *Shree Mahant Kishora* v. *The Coimbatore, etc. Co.*, 26 M. 79 (83); *Chhajju Gir* v. *Diwan*, 29 A. 109.

(8) *Balgir* v. *Dhonagir*, 5 Bom.L.R. 114; *Gitabai* v. *Shivbakas, Ib.*, 318; *Hargir* v. *Anand Bharti*, 88 I.C. 343, P.C.; 21 N.L.R. 127; (1925) P.C. 127.

(9) *Ib., contra* assumed *per Piggott, J.*, in *Sespuri* v. *Dwarka*, 10 A.L.J. 181; and *per* Rafiq, J., in *Ramkishore* v. *Jaganath*, 11 A.L.J. 738 (740) is, it is submitted, erroneous.

347. The illegitimate children of a Hindu have equally the right of marriage and may marry in the caste if the caste people recognized them as still in caste.[1] So may the dancing girls or *dasis* attached to temples.[2]

Polygamy: and Polyandry.

17 Polygamy is lawful,[3] but polyandry is unlawful except to the extent permitted by custom.

348. **Polygamy.**—Polygamy is permitted by Hindu Law. Indeed, since the purpose of marriage is the procreation of a son to relieve the father from the torments of Hell[4] it follows that that purpose may not be often served if monogamy were the rule.

Polygamy is sanctioned by the texts and equally by usage.[5] But Brahmos who marry under the Special Marriage Act are limited to monogamy,[6] and in practice, polygamy is otherwise discouraged by the educated public opinion, but it is, nevertheless, legal.

349. A Hindu is unrestricted as to the wives he may marry. The fact that he has already a wife or wives living is no disqualification to his polygamy.[7] Even if he has given an agreement to the father of one of his previous wives not to remarry during his wife's lifetime, such agreement is invalid being opposed to the policy of Hindu Law,[8] and polygamy being legal, it might be attacked even as a restraint on marriage under the general law.[9]

350. **Polyandry.**—There are scarcely any indications in the archaic law of the general practice of polyandry, though it was not unknown, as witness the instance of the Pandavas, who had all conjointly married Draupadi; but the practice, never popular, is now decadent, being confined only to a few localities (§ **28**).

351. Polyandry exists in the Kulu division, the Simla Hill States and to a small extent in the Natan, Mandi, and Suket States (§ **28**). It is confined to the lower castes, though Rajput and other castes do not abjure it. The polyandry generally practised is of the fraternal type, known as Tibetan, all the brothers in a family having usually one joint wife, but distant relations, and even persons belonging to different families, agree to share a wife in partnership.[10] The husband visiting the wife has to leave his shoes or cap at the door which is notice to the other husbands that the wife is "engaged."

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(1) *Inderun* v. *Ramaswamy*, 13 M.I. A. 141 (159); *Ram Kumari* (*In re*), 18 C. 264 (268, 269).

(2) *Kamakshi* v. *Nagarathnam*, **5 M.** 161.

(3) Manu, III-12; Vishnu, XXIV-1; XV-41, XVIII-1; Narad, XII, 19; 33 S. B.E. 169; *cf. ib.*, XII-28 33 S.B.E. 171. Quoted in Hindu Code, (3rd Ed.), p. 284.

(4) Vishnu, XV-44; 7 S.B.E. 65 *See also Ib.*, pp. 106, 111, 112.

(5) *Huree* v. *Mutho*, 1 Borr. 59; *Viraswami* v. *Appaswami*, 1 M.H.C.R. 375; *Arumugam* v. *Tulukanam*, 7 M. 187 (188); *Thapita* v. *Thapita*, 17 M. 235 (239).

(6) *Sonaluxmi* v. *Vishnu Prasad*, 28 B. 597.

(7) *E.* v. *Lasar*, 30 M. 550.

(8) *Sitaram* v. *Aheeree*, 20 W.R. 49 (50); S. 26, Contract Act (Act IX of 1872).

(9) S. 26, Contract Act (IX of 1872).

(10) *Punjab Census*, 1912, Pt. 1, § 378.

18. No prescribed ceremony is necessary to constitute marriage,[1] provided that if any ceremony is customary and regarded by the caste as essential, then it must be performed.[2]

Prescribed ceremonies unnecessary.

Explanation 1.—The ceremony of *Saptapadi*[3] is necessary[4] to complete a marriage performed according to the orthodox rites, and that of *Vivah Hom*[5] is also usually performed, but its non-performance does not invalidate a marriage, if otherwise completed.

Explanation 2.—A marriage celebrated with due ceremony is not rendered invalid by reason of the fact that a party thereto was then an outcast.[6]

Explanation 3.—Cohabitation is not necessary to complete marriage.[7]

352. Analogous Law.—The Shastric ceremonies are very elaborate but most of them are now out of vogue.[9] They were described in detail in the third edition of the present work (§ 482) but are omitted from this edition.

Shastric Marriage Ceremony.

353. Of all the religious ceremonies prescribed for a Hindu marriage, the ceremony of *Saptapadi* or the "Seven Steps" is treated by the *Smritikars* as marriage.[7]

Saptapadi.

354. The ritual, so far as it extends to Saptapadi, may be divided into three parts: (1) the Vagdan or the promise to give; (2) the actual gift of the bride or *kanyadan;* and (3) the marriage rite which commences with taking the wife by the hand (*panigrahanam*) and ends with the seventh step, Saptapadi, taken around the consecrated fire.[9] (4) *Vivah Homa, i.e.,* the sacrifice of fried grain. In the United Provinces, this ceremony involves circumambulation of the bridal pair, with their clothes knotted seven times, round the marriage pole, fixed in the centre of the shed or of the shed itself,[10] which in the Punjab, it means circumambulation round the Granth Sahib.

But this is not the invariable form of taking the seven steps. In another place it is described thus: "The bride is conducted by the bridegroom, and directed by him to step successively into seven circles a text being recited at each step." This is called Saptapadi.[11]

But whatever may be the variation in the mode of taking the seven steps, all agree that with the completion of the seventh step, marriage becomes irrevocably complete.[12] This does not, however, imply that it is

(1) *Authikesavalu v. Ramanujam,* 32 M. 512 (519); *Moosa Haji* v. *Paji Abdul,* 30 B. 197.

(2) Strange, H.L. 42.

(3) Lit. "Seven steps"—Skt. *Saptam,* seven, and *pad, pades, foot.*

(4) *Brindaban* v. *Chundra Kurmokur,* 12 C. 140 (143); *Venkatacharyulu* v. *Rangacharyulu,* 14 M. 316 (318); *Appibai* v. *Khimji,* 60 B. 455; Manu, VII-227; 2 Dig. 487, 488.

(5) Lit. Skt. *vivah,* marriage, *homa,* sacrifice. *Muthuswami* v. *Masilamani,* 20 M.L.J. 94 : 5 I.C. 42.

(6) *Inderun* v. *Ramaswamy,* 13 M.I. A. 141; *Kumari, (In re),* 18 C. 264; *E.* v. *Madan Gopal,* 34 A. 589 (591).

(7) *Anandachari, (In re),* 9 M. 466 (470); *Dadaji* v. *Ruckmabai,* 10 B. 301 (311).

(8) Mandlik, Hindu Law, pp. 401, 402; *Muthuswami* v. *Masilamani,* 33 M. 342 (345). *See also* Sir T. Strange, H.L., pp. 7-8.

(9) Manu, VII-227. Cited in 2 Dig., p. 488.

(10) *Ib.,* p. 319.

(11) U.P.Census Report, 1912, § 233, p. 222.

(12) *Appibai* v. *Khimji,* 60 B. 455.

a *sine qua non* to a Hindu marriage, and that it may not be otherwise complete. As a matter of fact, Hindu marriage ceremonies have of late become so varied and various that it is impossible to generalize about them. All that the law, therefore, requires is, that whatever the ceremonies may be, they should be performed and not omitted, if their performance is essential to the completion of the marriage.

355. **Present-day Ceremonies.**—It is now universally acknowledged that the Shastric ceremonies have been almost entirely superseded by those which custom and convenience have substituted in their place. So Shankar Nair, J., observed in a case: "Hindu lawyers prescribed various ceremonies to constitute a valid marriage. But those ceremonies in their entirety are seldom, if ever, performed. According to them, the Vivah Hom[1] and Saptapadi[2] are essential. But it is notorious that marriages are performed in many castes without them, and it is now settled that if by caste usage, any other form is considered as constituting a marriage, then the adoption of that form under those conditions prescribed by the caste with the intention of thereby completing the marriage union is sufficient. No other conclusion is possible if due regard is had to conditions in India."[3] It is consequently clear that the essential and binding part of the marriage ceremony must necessarily vary in different localities.

356. **Consumption not necessary.**—Consummation is not necessary even under English Law to complete a marriage, which is complete as soon as the declaration and contracting words[4] are spoken; still less is it necessary under Hindu Law[5] where the marriages are usually contracted before the parties thereto have attained puberty. But though consummation is not necessary under law, it may become so by custom. In that case, the custom must, of course, be strictly proved.

Explanation 3.

According to Vashish, "if a damsel at the death of her husband had been merely wedded (by the recitation of texts) she may be married again."[6] But this precept has no value beyond the fact that it reduces the prejudice against the remarriage of such a widow.

357. **Persons entitled to give in Marriage.**—It has already been stated that the Indian Majority Act,[7] does not "affect the capacity of any person to act in the matter of marriage, dower, divorce and adoption"[8] and as under Hindu Law, the age of majority is attained on completion of the 16th year, persons born below that age cannot be married, except through their guardians whose right rests upon the following text of Yadnavalkya:—

"The father, paternal grandfather, brother, kinsmen, remote relations (Sakulyas) and mother are the persons to give away a damsel—the latter respectively on failure of preceding."

(1) Lit. "Marriage Sacrifice."
(2) Lt. "Seven Steps."
(3) *Muthuswami* v. *Masilamani*, 33 M. 342: 5 I.C. 42 (46). Also *see* Census of India, (1911), Vol. I-314, pp. 257, 258; *Ib.*, (1931) Vol. I, p. 225, § 95.
(4) Marriage Act, 1898, S. 6 (61 and 62 Vic., c. 58).
(5) *Administrator-General* v. *Anandachari*, 9 M. 466; *Arur Singh* v. *Mangal*, (1877) P.R. 85. It is said that consummation was in ancient times essential to complete a marriage; Ghose, H. L. (3rd Ed.,) 789. This view is supported by the fact that a virgin widow could re-marry (Vashishth, XVII-74), and a wife only passed into the *gotra* of her husband on performance of the consummation *Homa* ceremony; Hiranya Keshin, Grih. Sutra, 30 S.B.E. pp. 191, 193, 20.
(6) Vashishth, XVII-74.
(7) Act (IX of 1875).
(8) Act (IX of 1875), S. 2 (*a*).

353. **Parents.**—It has been held that this order merely prescribed for the giving away of the child, and does not confer on them any right of betrothal in the order of succession declared. Though the father has the absolute right of arranging for the marriages of his children, no other paternal kinsman can, in his absence, arrogate to himself the same unqualified authority without the concurrence of the mother.[1] But in a conflict between the father and the mother, the father has doubtless a superior right. This right was put to a somewhat severe test in a case in which the father was convicted of theft and imprisoned for two years after which he deserted his first wife and married another. Three years later, the wife negotiated for the marriage of her daughter to her own cousin, whereupon the father sued her for an injunction, which the court granted, being satisfied that the father had arranged for another more eligible match to the greater advantage of the minor, and that his suit being in the interest of his child and his right to give his daughter in marriage being superior to that of the mother, it could not be defeated by the latter.[2] But, of course, if in such a case the marriage had already been performed, then it would not have been cancelled merely because the mother had married without the father's authority.[3] A father may expressly or impliedly delegate his authority to another. Such was held to be the intention of the father, who, having lost his wife, made over his daughter, two years old, to another person to adopt, who brought her up and at the proper age married her to the plaintiff. The natural father then secured possession of her and married her to one Jadoo whom the plaintiff sued for the custody of his wife, and the Court decreed the suit holding that the father having by his conduct delegated his parental authority to another, could not reassert it to the detriment of the plaintiff to whom the girl had been previously married by her putative father.[4]

359. **Other relations.**—Apart however, from the father and mother, the paternal relations have the preferential right of arranging for the marriage of minors[5] in the following order:—the father, paternal grandfather, brother, kinsman, the Sakulyas—that is other paternal relations up to the tenth degree, and the mother. The right is then said to vest in the maternal grandfather, maternal uncle and other maternal relations in the order of proximity. But the question of priority loses its importance as soon as the marriage is performed. In the absence of force or fraud, the marriage will then be upheld on the ground of *factum valet*, if the consent thereto was given by a legal guardian such as the mother without consulting the father.[6]

360. **Step-mother.**—A step-mother has no right to give in marriage.[7] and indeed, excepting the parents, with whose authority the courts are

(1) *Namasevayam* v. *Annamalai*, 4 M. H.C.R. 339; *Ranganayaki* v. *Ramanuja*, 35 M. 728; *Ramkore* v. *Jamnadas*, 37 B. 18; *Maya Devi* v. *Ramchand*, (1916) P. R. 20 : 31 I.C. 186.

(2) *Nanabhai* v. *Janardhan*, 12 B. 110 (120, 121); *Ram Bansee* v. *Soobh Koonwar*, 7 W.R. 321; *Golamee* v. *Juggessur*, 3 W.R. 193.

(3) *Khusal Chand* v. *Baimani*, 11 B. 247; *Ghazi* v. *Sukru*, 19 A. 515; *Mayadevi* v. *Ramchand*, (1916) P.R. 20; *Gajja* v. *Crown*, 2 L. 288.

(4) *Golamee* v. *Jaggessur*, 3 W.R. 193, contra *Atmaram* v. *Bankumal*, 11 L. 596.

(5) *Kasturi* v. *Ponnalal*, 38 A. 520.

(6) *Ghazi* v. *Sukru*, 19 A. 515.

(7) *Ram Bunsee* v. *Soobh Koonwar*, 7 W.R. 321.

loath to interfere, the authority exercised by more distant relations is subject to the supervision of the court, which, as the supreme guardian of the State, is entitled to intervene whenever it will be in the interest of the minor to do so, and in so doing, it may consider the minor's own wishes if she is sufficiently old to study her own welfare.[1]

361. Customary Marriages.—Custom may influence the form of marriages, or it may legalize the alliance, not in consonance with the normal law. In the one case it reduces, modifies or altogether dispenses with the performance of the prescribed or any ceremonies. In the other case, it sanctions intermarriages between different castes or sub-castes, or permits the remarriage of women already married or of widows. In its solicitude for upholding marriage contracts, law suffers every community to follow its own notion of a valid marriage, and if it is only sure of the *factum* of marriage, it even presumes that it has been performed with the requisite sanction of custom. In this respect it views custom with unwonted indulgence. Such marriages may be grouped under the following heads:—

(*i*) Those in which custom moulds the form (§§ **367-380**).
(*ii*) Inter-caste marriages (§§ **19**).
(*iii*) Marriage between Hindu and non-Hindus (§ **19**).
(*iv*) Remarriage of wives ((§ **20**).
(*v*) Remarriage of widows (§**21**).

Customary forms.

362. It has already been seen that of the eight forms of marriages, enumerated by the *Smritikars*, the *Brahma* is the most favoured. It is still current; so is the Asur form. But since these two forms only differ on a single point, *viz.*, whether the bride is gifted or sold,[2] it is clear that they take no note of the fact that widow re-marriages have since been again legalized and the bonds of caste have again been loosened. Moreover, there remain the ceremonies.

Besides the Brahma and Asur forms, another old form—the *Gandharva*—is said[3] to still survive. "The voluntary union of a maiden and her lover, one must know to be the Ghandarva rite which springs from desire and has sexual intercourse for its purpose."[4] The essence of this form lies in the absence of all ceremonies.

363. But there the marriages which are held to be perfectly valid, though they require no religious ceremonies. Such is the *Karewa* marriage in the Punjab, which is a marriage with the brother or some other male relative of the deceased husband and is contracted without any ceremony at all, but is, nevertheless, held to be valid and to confer upon the parties all the rights of a valid marriage.[5] The *Karao Dhureecha* marriage prevalent amongst the Jats[6] and Lodhis[7] of the United Provinces appears to be quite similar. So a form of Gandharva in a

(1) *Shridhar* v. *Hira Lal*, 12 B. 480 (485, 486).
(2) *Chuni Lal* v. *Surajram*, 33 B. 432 (437); *Kailasnatha* v. *Parasakthi*, 58 M. 488.
(3) *Brindavana* v. *Radhamani*, 12 M. 72; *contra* in *Bhaoni* v. *Maharaj Singh*, 3 A. 738.
(4) Manu, III-32 (3 Cole. Dig., p. 606).
(5) *Authikesavalu* v. *Ramanujam*, 32 M. 512 (514, 515, 518).
(6) Rattigan, Punjab Customary Law (7th Ed.), 75, p. 141 and cases there cited; Tupper, Customary Law, Vol. 2, 95; *Pooran Mul* v. *Toolsi*, 3 Agra, 350.
(7) *Q.* v. *Bahadur Singh*, 4 N.W.P. H.C.R. 128.

Tiperah caste is completed "by the worship of the Goddess Tripoora and taking shanti-water (or water of absolution).[1] The wife so married admittedly possesses an inferior status. Such was the "Dagger wife," that is to say, the wife who is merely married to a dagger of her husband, who, being usually a person possessing a much higher social status, does not stoop to marry in person which the Privy Council have condemned as illegal.[2] The Anand marriage, customary amongst the Sikhs, is completed by the *Kharat* or an offering to the deity coupled with the recitation of a text called Anand.[3] Still greater laxity marks the marriages of Jat Sikhs amongst whom, not only inter-caste marriages but marriages without any ceremony at all are quite common and customary, and as such, recognised as valid by the Courts.[4] So amongst Vaishnavs' marriage by *kanthibadal* (or exchange of garlands) was held to be sufficient.[5] So a mere mutual consent is all that is required to constitute a Buddhist marriage, and such consent may be expressed or implied by conduct or reputation.[6] Even a permanent concubine acquires the status of a wife.[7] The fact that the Privy Council recognised such an alliance as valid marriage shows how elastic is the term "marriage" when applied to persons only subject to their customary law and such examples are not unfamiliar to the Indian courts dealing with cases of even such high caste people as the Gour Rajputs of Cawnpur.[8]

364. The Punjab and Malabar marriage customs reduce marriage to a mere figure of speech. The Punjab customs not only permit of inter-caste marriages but they permit of marriages such as the *Chadar Andazi* and the *Karewa,* which are mere sexual alliances which custom recognizes as lawful marriages.[9] So is the *Sambhandham* of Malabar, in which all that is necessary is the consent of the girl and her guardian followed by cohabitation. There are several varieties of *Sambhandhams,* amongst which the *Podamuri* form is said to hold the pride of place, being one in which the bridegroom makes the ceremonious present of a cloth to a bride.[10] It is said that these marriages have been reprobated by the courts.[11] But this seems to be a mistake, since they are recognized by the Legislature[12] and the reports of cases prove otherwise.[13]. Such mock marriages are equally in vogue amongst the Newars of Nepal.[14]

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(1) *Kesree* v. *Samardhan,* 5 N.W.P. H.C.R. 94.

(2) *Ramsaran Singh* v. *Mahabir Sewak Singh,* 1934 P.C. 74 *Chakrodhuj* v. *Beer Chunder,* 1 W.R. 194; *Rajkumar Nohodip* v. *Birchandra,* 25 W.R. 404 (414), (customary amongst the Kshatreyas but void amongst Shudras) *contra Maharaja of Kolhapur* v. *Sundaram,* 48 M. 1 (39) F.B. no longer good law.

(3) *Ramasami* v. *Sundaralingasami,* 17 M. 422 (430).

(4) *Doed Jaggamohun* v. *Sancoomar,* 2 Mor. Dig. 41 S.C. 3 I.D. (O.S.) 797 (799).

(5) *Benode* v. *Shashi Bushan,* 24 C.W. N. 958.

(6) *Chandsingh* v. *Mela,* (1897) P.R. 73; *Harta* v. *Kanhya,* (1908) P.R. 72; *Azkaur* v. *Savansingh,* (1910) P.R. 79; *Hurdial* v. *Kali Ram,* (1911) P.R. 65.

(7) *Mi Me* v. *Mi Shwa Ma,* 39 C. 492 P.C.; *Ib.,* p. 505 P.C.

(8) *Lachman Kaur* v. *Mardansingh,* 8 A. 143.

(9) *Askar* v. *Sawansingh,* (1910) P. R. 79 : 7 I.C. 1009.

(10) Report of the Malabar Marriage Commission, 1894, pp. 21-24, 98.

(11) Census of India, 1911, Vol. I, § 294, p. 242, foot-note (1). *See* Moore's Malabar Law and Custom, p. 75.

(12) *Cf.* Ss. 2, 3, 11, Malabar Marriage Act, 1886 (Madras Act IV of 1896).

(13) Census of India, 1911, Vol. I, § 294, p. 243.

(14) For Bengal, Bihar, Orissa and Sikkim, *see* Census of India, 1911, Vol. 5, Part I, Ch. VII, Part I,§§ 625-689, pp. 314-343. For Bombay, *Ib.,* Vol. IX,

Common Marriage Customs.

365. But a few leading incidents are common to all customs, whether European or Indian, Hindu, or non-Hindu. The husband selected is invariably a few years older than the bride, and the marriage rites are performed in the parental home of the latter. Amongst the Hindus, marriage is universal, and it is so amongst all other races who affect Hinduism. All Hindus strive to marry off their daughters before the age of puberty, and strange devices are often resorted to in order to comply with the letter of the Shastric law. Failing to secure an eligible husband, the girl is made to go through a mock marriage with an arrow, a flower or a tree,[1] the real marriage being performed later with the husband.[2] Wherever widow re-marriage is sanctioned by the caste, it is invariably treated with disfavour, and accompanied by the ceremony of applying vermilion to the woman's forehead and putting bracelets on her wrists.[3] But the usual ceremony accompanying a virgin marriage is not much more elaborate, the *Sindurdan* or the smearing of vermilion on the bride's forehead or on the parting of the heir, being generally regarded as the essential feature of the marriage ceremony.[4] It is probably a survival of the blood covenant between husband and wife and has a wide vogue even amongst people and races whose connection with the Indo-Aryan civilisation is not readily apparent.

366. Marriage by purchase and marriage by exchange are common throughout India, and in the United Provinces, such marriages are even customary amongst Brahmins.[5] Marriage by capture was at one time common. It could not persist after the Penal Code and the only survival of the custom is now to be found in the fact that the husband goes mounted and armed and captures his bride in a mock battle. This custom is not confined to the Hindus, nor, indeed, to India.

367. **Punjab Marriages.**—The Punjab is a province of customs and there the marriage customs, both the tribal and territorial, widely differ. But the essential features of Hindu customs equally persist there.

Marriage is universal and regarded as a sacrament. Infant marriages are customary, the majority of girls being married between the ages of 10 and 15. Girls are, as a rule, sold, as there is a shortage of women,[6] the price varying according to the maturity of the bride.

Anand Marriage.

368. The ceremonies[7] were originally performed by the Sikhs as well, who used to employ the Brahmins to officiate at their marriages. Later on it became usual to supplement this with the Sikh ceremony, which is now

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Part I, Ch. VIII deals with castes and tribes but no marriage customs.

The Madras Part *Ib.*, Vol. XII similarly deals with the religion and caste (Chs. IV and XI) but not with their marriage customs.

The U.P. and Oudh, Part *Ib.*, Vol. XV devotes a considerable space to the description of marriage customs. Ch. VII, §§ 212-239, pp. 207-229. The Punjab, Part *Ib.*, Vol. XIV is a most illuminating record of castes, religion and marriages of the Hindus—As to the last, *see Ib.*, Vol. XIV, Pt. I, Ch. VII, §§ 334-384, pp. 261-294.

For C.P., *see Ib.*, Vol. X, Pt. I, Ch. VII, §§ 160, 196, pp. 131-151.

(1) Bengal Census Report, 1913, Pt. I, §§ 647, 648.

(2) Tribes and Castes of Bengal, Vol. I, P. 415.

(3) Bengal Census Report, 1913, Pt. I, § 641; widow marriage is very common in Orissa, *Ib.*, § 643.

(4) *Ib.*, § 640.

(5) U.P. Census Report, 1912, § 231.

(6) Punjab Census Report, 1912, Pt. I, Ch. VII, §§ 348, 349, p. 272.

(7) *Ib.*

the sole marriage ceremony performed by them in their marriages. A Sikh marriage may now be performed in the old style, or it may be performed in the new style called the Anand marriage, which is now declared legal by Legislature.[1] The leading binding ceremony is each is, however, the same, *viz.*, the circumlocution of the pair four times round the Granth Sahib accompanied by the reading of hymns by the Sikh priest. These hymns are called the *Lawans*.[2]

Widow Marriage in the Punjab.

369. Widow marriages, though deplored, are none the less more frequent in the Punjab than anywhere else. The ceremony, most prevalent amongst the Hindus and Sikhs, is that called the *Karao* or *Chadar Andazi* in the Eastern Punjab and *Karewa* or *Chadar Pana* in the rest of the province. This marriage is completed with little or no ceremony at all.[3]

370. As to marriage within the prohibited degrees, the orthodox rule is honoured here more in the breach than in its observance. The Punjabi Hindus avoid only two *gotras, viz.*, one's own and that of the mother's father; small groups avoiding only the collaterals, *i.e.*, only the father's *gotra*,[4] and marriages by exchange are common throughout the province.

The Sikh marrying in his own caste, ordinarily, avoids only the collaterals of the father and the mother's father.[5]

371. Polygamy is, as usual, prevalent throughout the Punjab, and the number of wives is regulated by the wealth and *status* of the husband.

Divorce does not appear to be customary amongst the Hindus, Sikhs and Jains. Nor has the Hindu minor the same option of puberty,[6] possessed by her Mahomedan *conferre,* who on attaining puberty may disown an alliance contracted during her infancy by certain relations.

U. P., C.P. and Behar Marriage Customs.

372. The leading features of the marriage customs in the Central Provinces resemble those of its neighbours, the Bihar and the United Provinces. The leading idea of the highest caste is to make a gift of their daughters to husbands, of the lower to exploit them for money. The Kunbis will take Rs. 20 for a daughter before she reaches adolescence, after which she is given away for nothing. Exchanges are common[7] while service is taken in lieu of cash where the husband is too poor to afford it.

373. The binding portion of the marriage ceremony in the Hindi speaking districts is the *Bhanwar* ceremony which consists of the bridal pair walking round the marriage shed called the *Mandwa*. In the Maratha country, this ceremony is not usually performed, and the

(1) Anand Marriage Act (VII of 1909).

(2) Translated in Maculiffe's "Sikh Religion," Vol. 2, Oxford 1909; also in the Punjab Census Report, 1912, § 355, pp. 277, 278.

(3) *Haker* v. *Mathalesingh*, (1879) P. R. 38; *Mula* v. *Chando*, (1880) P.R. 26; *Lachu* v. *Dalsings*, (1896) P.R. 33; *Chandsingh* v. *Mela*, (1897) P.R. 73; *Daliplcuar* v. *Tatti*, (1913) P.R. 99, 18 I.C. 93.

(4) The Mohyal Brahmins marry into the family of one of the collaterals of the mother's father, *Ib.*, § 374.

(5) *Ib.*, § 374.

(6) *Munshi* v. *Bhagwani*, 64 I.C. (L.) 356.

(7) C. P. Census Report, 1912, § 175.

marriage rite is completed when the sheet suspended between the bride and the bridegroom is taken away, and the rice is thrown over them. Amongst the tribes, the *Bhanwar* is usually performed, but the binding ceremony is the affixing of the vermilion mark on the forehead of the bride which concludes the marriage.[1] Marriage by capture is symbolized by the Gond and the Mudia aborigines.[2]

374. Widow re-marriage is customary not only amongst the Shudras but also amongst the Marathas who claim an equal status with the Rajputs.[3] The ceremony which is usually performed at night includes one symbolic of the supersession of the rights of the ex-husband and the changing of clothes and bangles. If a bachelor marries a widow, he usually has to go through the ceremony of a mock-marriage with a tree, an arrow, or a ring. A widow may not marry any one of her own father's *gotra* or within the degree that would be prohibited to her as an unmarried girl. A member of her deceased husband's family has a prior claim.

Divorce is customary, and may be obtained by the husband for adultery of the wife, and by the wife if she is deserted by her husband. But in practice, where women are greatly in demand, they are free to re-marry as often as they desire for a new husband. Such re-marriages are customary even amongst the Jadams of Hoshangabad who claim to be a branch of the Rajput race.[4]

Second Marriage when necessary.

375. Amongst most people, the ceremony of marriage begins and ends with the performance of a single ceremony. This is the real marriage. But where it is performed before puberty, a *Gowna* or *Pathoni*, mis-called a second marriage, usually marks the advent of that event. But this is usually a quiet ceremony, and one which is by no means essential to the completion of marriage. But it might be possible that by custom, before any conjugal rights could be asserted, a second ceremony of marriage was necessary, though the Hindu Law requires no such ceremony. In a case in which this custom was alleged, the plaintiff's suit for possession of his wife was thrown out on the ground that the evidence disclosed that the wife was free to re-marry till the second marriage was performed, and the plaintiff's failure to perform it, disentitled him to the relief which he claimed.[5]

Sub-caste, and Inter-caste-Religious Marriages.

19. (1) A religious marriage may be contracted between persons of the same caste, though of separate sub-castes.[6]

(2) A religious marriage may be validly performed between a male of a higher caste and a female of a caste below his.[7] Such marriage is called an *"Anuloma"* marriage.

(3) But a marriage of a man belonging to a lower caste with a woman of a caste above his is invalid. Such marriage is called *'Pratiloma".*[8]

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(1) C.P. Census Report, 1912. § 176.
(2) *Ib.*, § 177.
(3) *Ib.*, § 178.
(4) *Ib.*, § 179.
(5) *Boolchand* v. *Janokee*, 25 W.R. 386.
(6) *Gopi Krishna* v. *Mt. Jaggo*, 58 A. 397 P.C.
(7) *Bai Gulab* v. *Jiwanlal*, 46 B. 871; *Bai Kashi* v. *Jamnadoss*, 14 Bom.L.R. 547.
(8) *Bai Kashi* v. *Jamnadoss*, 14 Bom. L.R. 547.

Explanation:—**As converts to Hinduism are classed as Shudras,**[1] **they are subject to the rules above stated.**

Illustration.

A European woman became a convert to Hinduism. Her marriage with a Vaishya male is valid.[2]

376. **Customary Inter-caste Marriages.**—The history of the origin and growth of castes and their inter-relations has already been given in the General Introduction, (§§ **42-44**) from which it will be seen that in the Vedic times, when the idea of caste was only taking root, inter-marriages between Aryan males and the Shudra females were not interdicted and were even connived at. But later on, when the caste ascendancy grew and the four castes became more distinctly marked, inter-caste marriages still continued to be customary, though they began to be treated with growing disfavour[3] and so Manu ordains that the *Dwija* should preferably marry in his own caste, at least his first wife,[4] though he may take other wives from the caste next to his own. But this rule does not appear to be inflexible, and Manu anathematizes a Brahmin if he takes a Shudra woman as his first wife.[5] In a later age, this practice was exalted into a moral law and inter-caste marriages increased in disfavour with the increase of caste independence. Sub-castes were formed, the members of which followed the example of the greater castes. But this ferment was mainly confined to the three upper castes. Though the Shudras were technically within the pale of Hindu society, in reality, they continued to remain outside it. Consequently, inter-caste marriages amongst them continued unchecked by the rising tide of popular opinion against them. And their legality is now well established.[6]

Inter-caste customary Marriages.

377. But even amongst the twice-born, both pure and mixed, such marriages have obtained a foothold in the Punjab, where the inter-marriages of a Rajput man with a Khatri woman[7] and of a Kshatriya man with a Vaishya woman[8] have been upheld, and so the Calcutta High Court has upheld the marriage of a Vaishya husband with a Kayastha mother as supported by a local custom prevalent in Tipperah;[9] as also the marriage of a Kayasth with an aborigines *Dom*, the latter being classed as a Shudra,[10] and the Allahabad High Court had to concede both the legality and validity of inter-sub-caste marriages,[11] as also of inter-caste marriages between a Brahmin and a Kshatriya woman as supported by the local custom in Nepal,[12] and such marriages, being *anuloma* are held legal in Bombay under the authority of the Shastras, which cannot be restricted by a Caste Panchayat.[13] Bot both the Courts

(1) *Muthusami* v. *Masilamoni*, 33 M. 342; *Morarji* v. *Administrator-General*, 52 M. 160 (173).

(2) *Morarji* v. *Administrator-General*, *Ib.*

(3) Manu, III-4, 13.

(4) *Ib.*, III-12.

(5) *Ib.*, III-17.

(6) *Inderun* v. *Ramaswamy*, 13 M.I. A. 141; *Faleir Gauda* v. *Ganji*, 22 B. 227; *Mahantava* v. *Gengava*, 11 Bom.L. R. 822, *contra* in *Narain* v. *Rakhal*, 1 C. 1; *Har Bahadur* v. *Chand Raj*, 21 O. C. 298 : 58 I.C. 400 (marriage between Kayasth sub-caste; *Biswanath* v. *Shorashibala*, 48 C. 296.

(7) *Haria* v. *Kanhaya*, (1908) P.R. 72.

(8) *Khairu* v. *Fakhirchand*, (1909) P. R. 57, 2 I.C. 944.

(9) *Ramalal* v. *Akhoycharan*, 7 C.W. N. 619.

(10) *Bhola Nath* v. *Emperor*, 51 C. 488.

(11) *Har Prasad* v. *Kewal*, 47 A. 169.

(12) *Padam Kumari* v. *Suraj Kumari*, 28 A. 458 (461).

(13 *Natha* v. *Chotelal*, (1931) B. 89.; *Gulab* v. *Jiwan Lal*, 46 B. 871 (877).

in Bombay and Allahabad, have held as invalid a marriage of a Brahmin woman with a Rajput man[1] much less with a Shudra man,[2] though in Bombay, the marriage of a Vaishya male with the illegitimate daughter of a Vaishya born of a Shudra woman has been upheld as sanctioned by Hindu Law.[3] But in Allahabad, an inter-marriage of a Vaishya with a Shudra woman has been held to be wholly void.[4]

Inter-marriages between mixed castes are permissible,[5] and since illegitimate children are held to possess no caste, inter-marriages between them are equally unobjectionable.[6] So a marriage between a Bania and the illegitimate daughter of a Brahmin father and Bania mother has been held to be valid, as recognized by the husband's caste fellows.[7]

It has been held in Burma that there could be no valid marriage between a Hindu male and a Burman Buddhist female.[8] (§ 380.)

Inter-marriages between sub-castes.

378. At the present day, all over India, inter-marriages between sub-castes, even when not customary, are generally condoned on payment of a small fine. But nowhere are such marriages considered as void.[9] The present tendency is to eliminate all interdiction against sub-caste marriage,[10] and to make the connubial limit extend as far as the commensal. In fact, this tendency is generally observable in all castes. It will be thus seen that the ban on inter-marriages is the direct result of the growing caste exclusiveness. It is least common where caste-conservatism is least rigid. For instance, in the Punjab, where caste has never taken a strong hold on the people, inter-caste marriages are quite common,[11] and their validity has been upheld by the Privy Council, even in the case of a Vaishya in the United Provinces,[12] while inter sub-caste marriages of even brahmins have been held not unlawful under Hindu Law.[13] But nevertheless, there is no Shastric authority against inter-sub-caste marriages, least of all for territorial interdiction, which forbids a Brahmin of the North to marry into a Brahmin family of the South, and the Kayasths of Bengal to intermarry with the Kayasths of the adjacent Bihar.

379. The four rules deducible from the Shastras which still survive in the customs of the people are then these:—

(1) All Shudras can inter-marry.[14]

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(1) *Lakshmi* v. *Kalian Singh*, 2 Bom. L.R. 128; *Sespuri* v. *Dwarka*, 10 A.L. J. 181.

(2) *Kashi* v. *Jamnadas*, 13 Bom.L.R. 547.

(3) *Gulab* v. *Jivan Lal*, 46 B. 871 (877).

(4) *Munni Lal* v. *Shiama*, 48 A. 670 *contra* in Bombay.

(5) *Daryai Singh* v. *Narpat Singh*, 13 O.C. 375: 9 I.C. 71.

(6) *Sukkho* v. *Ramcharan*, (1892) A. W.N. 27.

(7) *Madan* v. *E.*, 34 A. 589.

(8) *Moung Man* v. *Dermo*, 3 L.B.R. 244.

(9) Census for India, 1911, Vol. I, § 472, p. 368, Inter-marriage between sub-castes of Brahmins upheld; *Har Prasad* v. *Kewal*, 47 A. 169; *Appibai* v. *Khimji*, 60 B. 455.

(10) Bengal Census Report, 1901, p. 356.

(11) *Inderun* v. *Ramaswamy*, 13 M.I. A. 141; *Ramamani* v. *Kulanthai*, 14 M. I.A. 346; *Fakirgaudu* v. *Gangi*, 22 B. 277; *Mahantawa* v. *Gongawa*, 33 B. 693 (697).

(12) *Gopi Krishna* v. *Mt. Jaggo*, 58 A. 397 (P.C.).

(13) *Kshitish Chandra* v. *E.*, (1937) C. 214 F.B.

(14) *Inderun* v. *Ramaswamy*, 13 M.I. A. 141 (158, 159); *Ramamani* v. *Kulanthai*, 14 M.I.A. 346; *Ramaswamy* v. *Sundaralingasami*, 17 M. 422 (430, 431); *Muthisami* v. *Masilamani*, 33 M. 342; *Fakirgauda* v. *Gangi*, 22 B. 227; *Mahan-*

(2) Persons belonging to the same primary caste may intermarry, notwithstanding any practice against such marriages.[1]

(3) Persons belonging to the mixed and new castes may intermarry, if permitted to do so by their own custom.[2]

(4) Where inter-caste marriages are permitted by custom, they only permit hypergamous marriages, *i.e.*, they permit only men of the higher caste marrying women of the next lower caste, but not *vice versa*.[3]

Marriage of converts to Hinduism.

380. As regards the inter-marriage of Hindus with non-Hindus, the question is one, again, of custom. A Hindu may marry a Christian woman reconverted to Hinduism.[4] Even without such re-conversion there is a possibility of a legal marriage, if the *lex loci* permits it. So a Hindu may validly marry a Christian lady in England, as the law of England does not prohibit inter-marriages between Christians and non-Christians,[5] but not a Burman Buddhist in Burmah.[6] (§ 377.) Sikhism is a proselytizing creed and so is latter day Hinduism. A Mahomedan may be converted to Sikhism. Consequently, where a Sikh of position was shown to have cohabited with a Mahomedan woman and there was evidence to show that he was anxious to make her his lawful wife, the court presumed lawful marriage, presuming at the same time, that the woman must have been converted to Sikhism, since there was neither a legal nor a customary bar to such conversion.[7] In case of conflict between persons belonging to different religions, the courts apply the rules of justice, equity and good conscience,[8] presuming the legality of a marriage if it was in fact performed.[9]

381. Factum Valet.—The legal maxim *quod fieri non debuit factum valet*[10] has recognized place in Hindu Law to cases of adoption,[11] and marriage,[12] for curing a mere irregularity in form or an immaterial

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tawa v. *Gangawa*, 33 B. 693; *Upama* v. *Bholaram*, 15 C. 708; *Girish Chandra* v. *Mhd. Shagde*, 25 C.W.N. 634; *Biswanath* v. *Shorashibala*, 48 C. 926 (*Kayasth* and Tanti inter-marriage valid); *Bhola Nath* v. *Emp.*, 51 C. 488 (Bengali Kayasths and Dom can inter-marry); *Har Bahadur* v. *Chand Raj*, 5 O.L.J. 655; 48 I. C. 400 (sub-divisions of Kayasth). *Contra* in *Narain* v. *Rakhal*, 1 C. 1; *Domab Singh* v. *Hirondi Bai*, 54 I.C. (N.) 294 (Ahirs); *Hardyal* v. *Kali Ram*, (1911) P.R. 65 : 10 I.C. 152 (Jhabra Rajput).

(1) *Gopi Krishna* v. *Mt. Jaggo*, 58 A. 397 P.C.

(2) *Ramlal* v. *Akhoy*, 7 C.W.N. 619; *Darayisingh* v. *Nepalsingh*, (1910) 13 O. C. 375: 9 I.C. 71; *Biswanath* v. *Shorashibala*; 48 C. 926 (marriage of a Bengali Kayasth, who is a Shudra, with a *Tanti* or weaver woman legal).

(3) *Tukaram* v. *Babaji*, 1Bom.L.R. 144 (153); *Ramasami* v. *Sundaralingaswami*, 17 M. 422 (430); *Shepuri* v. *Dwarka*, 10 A.L.J. 181 : 16 I.C. 222; *Lakshmi* v. *Kaliansingh*, 2 Bom.L.R. 128; *Bai Kashi* v. *Jamnadas*, 14 Bom.L.R. 547: 16 I.C. 133.

(4) *Muthusami* v. *Masilamani*, 33 M 342.

(5) *Chetty* v. *Chetty*, 1909 P. 67.

(6) *Maung Man* v. *Daramo*, 3 L.B.R. 244.

(7) *Dualip Kuar* v. *Fatti*, 1913 P. R. 99: 18 I.C. 913; *Sodlie* v. *Sleersingh*, (1895) P.R. 50; *Shibditta* v. *Bela*, (1900) P.R. 50; *cf. Lachman* v. *Partap*, 3 L.L.J. 336.

(8) *Badamea* v. *Fatima Bai*, 26 M.L.J. 260 (264).

(9) *Inderun* v. *Ramaswami*, 13 M.I. A. 141 (158); *Lopez* v. *Lopez*, 12 C. 706 (732); *Lucas* v. *Lucas*, 32 C. 187 (191).

(10) "What should not be done, yet being done, shall be valid" is a qualification of the general maxim *quod ab initio non valet in tractu temporis non convalescit*. (That which is bad in its commencement, does not improve by lapse of time).

(11) *Raje Vyankatrav* v. *Jayavantrao*, 4 B.H.C.R. (A.C.) 191; *Gurlinga* v. *Rama*, 1 Bom.L.R. 226 P.C.; *Sukhbasi* v. *Guman Singh*, 2 A. 366 F.B.; *Ganga Sahai* v. *Lekhraj*, 9 A. 253; *Bene Prasad* v. *Hardai*, 14 A. 67 F.B.; *Chinna* v. *Kumara*, 1 M.H.C.R. 54. *See* under "Adoption."

(12)) *Diwali Bai* v. *Moti*, 22 B. 509; *Mulchand* v. *Bhudia*, *Ib.*, 812 (815).

defect, as where the adoption or marriage is irregularly performed or where the rule against the adoption or marriage of a particular person is simply directory, and not obligatory. But the maxim itself is one even of wider application and applies generally to condone formal defects and disobedience of rules which are merely directory, and not imperative.[1] Acting presumably on this principle, the children of a Mahomedan, who had married a Hindu, were held to be legitimate, though the reason given is that such marriage is, according to the Mahomedan Law, merely *fasid* (invalid) and not *batil* (void).[2]

20. The wife may re-marry if her husband is lost or is impotent or has become a religious ascetic or expelled from caste.[3]

Re-marriage of the wife.

(2) Where re-marriage is lawful, the wife may re-marry, if her husband, after leaving her, has not been heard of for seven years by those who would naturally have heard of him if he had been alive.[4]

Presumption of the death of the husband.

382. **Re-marriage of wife.**—Narad sanctions the re-marriage of a wife in the following cases of the marital legal necessity:—

"When her husband is lost or dead, when he has become a religious ascetic, when he is impotent, and when he has become expelled from caste; these are the five causes of legal necessity in which a woman may be justified in marrying another husband."[5]

383. Clause 2 is based upon S. 108 of the Evidence Act[6] which supersedes the varying Hindu rules on the subject. Manu and Narad allow the wife to re-marry after the continued absence of the husband for eight years[7] Gautam after six years[8] and Vashisth after five,[9] while Hindu Law generally prescribed twelve years as the period after which death might be presumed.[10] In all such cases, S. 108 of the Evidence Act now introduces a fixed period of absence after which the court will presume death.[11] The rule is taken from Taylor's work on Evidence.[12] It merely deals with a legal presumption as a matter of evidence, and does not dispense with the proof of the *exact time* of death whenever such question is necessary, as it is, for instance, to start limitation. The rule cannot be controlled by the difference of age, sex and state of health which does not set up any counter legal presumption.[13]

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(1) *Balusu* v. *Balusu*, 22 M. 398 (415) P.C.

(2) *Ihsadin Hasan* v. *Panna Lal*, 7 Pat. 6.

(3) Narad, XII-97; to the same effect Parashara, IV-30; Manu, IX-76; Vashisth, XVII-20; 14 S.B.E. 86.

(4) S. 108, Indian Evidence Act (Act I of 1872).

(5) Narad, XII-97. To the same effect Parasara, IV-30; Manu, IX-76.

(6) I of 1872.

(7) Manu, IX-76; Narad, XII-98; Macnaghten's H.L., p. 9; Vyavastha Darpan (Sircar), pp. 10, 11; *Ganganarayan* v. *Balram*, 2 Mor. D. 152; *Ayaboti* v. *Raj Krishna*, 3 S.D.R. 28; *Janmajay* v. *Keshah Lal*, 2 B.L.R. (A.C.) 134, following *Sarda Sundari* v. *Gobind*, 2 B. L.R. (A.C.) 137-*note*.

(8) *Gautam*, XVIII-15, 17, if a Brahmin, 12 years, *Ib*.

(9) Vashisth, XVII-78; only four years, if she has no issue.

(10) 1 Strange H.L. 117; *Ganesh* v. *Ragho*, (1879) B.P.J. 18; *Dhondo* v. *Ganesh*, 11 B. 433; *Guru Das* v. *Matilal*, 6 B.L.R. (App.) 16.

(11) *Parameshar* v. *Bisheshar*, 1 A. 53 F.B.; *Dharup Nath* v. *Gobind*, 8 A. 614 (619).

(12) *Dharup Nath* v. *Gobind*, 8 A. 614 (619, 620). Taylor's statement is based on the decision of Lord Ellenborough, C.J., in *Doed. George* v. *Jesson*, 6 East 84; *Doed. Lloyd* v. *Deakin*, 4 B. & A. 433; and Stat. 19 Car. II, C. 11, S. 1.

(13) *Underwood* v. *Wing*, 23 L.J. Ch. 982, O.A. 24 L.J. Ch. 293, affirmed in *Wing* v. *Angrav*, 8 H.L.C. 183; Re *Green's Settlement*, L.R. 1 Eq. 289.

384. This clause merely deals with one of the causes dealt with in Narada's text, *viz.*, disappearance of the husband for seven years. As the Hindu Widow's Remarriage Act only legalizes the marriage of all widows, and this section furnishes presumptive evidence of the husband's legal death, it follows that on expiration of this statutory period, the wife is entitled to consider herself a widow and get remarried under the Act. In other cases, the validity of her marriage must depend upon the force of custom. Even in the cases provided for in the section, the husband must not only be absent for seven years, but he must not have been heard of for that period by those who would naturally have heard of him if he had been alive. This does not mean that these people should have heard from him. All that the section requires is that the missing man should have become untraceable, and no one should know where he is or be able to say that he had heard of his existence. This is a question of fact, to be proved in the first instance, to create a *prima facie* presumption upon which the wife is entitled to act. If the husband afterwards reappears he cannot maintain restitution against his wife or claim her as his own, for the law severs the link on the expiry of seven years.

385. **Re-marriages of wives.**—Amongst several custom-ridden castes, wives are permitted to remarry with or without the consent of their husbands. "Where women are greatly in demand, they are correspondingly free to decide with whom they will live, and in a caste of as high a status as the Jadams of Hoshangabad, an endogamous branch of Rajputs, it is said that a woman sometimes has as many as nine or ten husbands in the course of her life.[1] The courts, however, decline to succour run-away wives, holding the consent of the first husband essential to the validity of a second marriage. In many cases, the consent or acquiescence of the husband is considered essential to the dissolution of the first marriage, and till its dissolution the woman is not free to re-marry. In short, in these castes, re-marriage recognizes the custom of divorce; the husband being awarded a solatium in the shape of his marriage expenses, while the new husband celebrates the occasion by a caste dinner, called the *Marti Jiti*[2] feast, that is a feast which symbolizes the death of the wife to her former husband and her becoming alive to the new one. Sometimes, a writing called *Chhod Chithi*[3] is given to the wife to enable her to get re-married, while in some cases, the husband, though not a willing party to his wife's re-marriage, acquiesces in it on terms. Certain castes permit re-marriage of wives upon desertion by their husbands. The courts uphold all such transactions in which re-marriage follows upon a divorce[4] or desertion.[5] Sometimes, the wife re-marries with the permission of the elders of the caste, but in this case if the husband remains recusant, the elders have neither the power to decree a divorce nor permit a re-marriage, and any custom which transfers this power from the husband to his castemen is unreasonable and immoral, legalizing adultery,[6] which, the courts would not enforce.[7] The marriage of wives is quite customary amongst the

(1) Census of India, 1911, Vol. I, § 297, p. 245.

(2) Lit. "dead and alive."

(3) Lit. "Letter of Release."

(4) Steel's Law of Castes, p. 168 *et seq*; *Reg* v. *Karson*, 2 B.H.C.R. 117; *Rahi* v. *Gobind*, 1 B. 97 (114); *Sri Ram* v. *Inchi*, 11 A.L.J. 711 : 21 I.C. 313.

(5) *E.* v. *Umi*, 6 B. 126; *Virasangappa* v. *Rudrappa*, 8 M. 440.

(6) *Bai Ugri* v. *Patel Purushottam*, 17 B. 400 (405, 406).

(7) *Reg.* v. *Karson*, 2 B.H.C.R. 117; *Narayan* v. *Laving*, 2 B. 140; *Uji* v. *Hathi Lalu*, 7 B.H.C.R. (A.C.) 433.

Shudras,[1] but it is not unusual amongst even the twice born castes, *e.g.*, the Sompura Brahmins of Ahmedabad, the Lodhis of the United Provinces,[2] the Lingayat Banias[3] of the Southern Provinces and many castes, high and low of the Punjab, which is the greatest latitudinarian as regards the custom regulating the relation of the sexes.

Widow Re-marriage.

21. A Shudra widow is entitled to re-marry.

(2) The re-marriage of widows amongst Dwijas must be authorised by custom, in the absence of which, it is subject to the provisions of the Hindu Widow's Re-marriage Act, 1856.

386. **Analogous Law.**—It has been already seen that the re-marriage of widows was at one time not only customary but even obligatory. (§§ 16-17). It has also been seen how, in course of time, this practice fell into desuetude till the pendulam of custom having swung to the opposite extreme of enjoining and even ordaining the self-immolation of the newly made widow with the body of her husband. (§ 39). These Vedic and Shastric tenets, it seems, remained confined to the twice-born and amongst them to a few. The British Government abolished the practice of *Sati*, and once more legalized the marriage of widows[4] in quarters in which it had fallen into desuetude.[5]

Re-marriage of Widows.

387. The widow re-marriage was always customary amongst the Shudras. It was customary even amongst some of the higher castes, of which the *Pat* marriages of the *Mahrathas*.[6] And the *Natra* marriages of Guzerat are familiar examples, while the same custom has been traced up to the Gour Rajputs of the United Provinces,[7] and the Sompura Brahmins of Ahmedabad.[8] Of all widow marriages, the marriage of the widow to the deceased husband's younger brother is that most favoured and one which needs least ceremony everywhere. It is the modern relic of an ancient custom which was at one time a feature of Hindu society and still lingers even amongst some of the twice-born, *e.g.*, the Taga Brahmins of Upper India[9] and in the Punjab, where the re-marriage of even a pregnant widow has been held to be customary and not opposed to "equity and good conscience and public morality."[10] (§ 370).

388. Customary marriages of Hindu widows were wholly insufficient to check the growing evil, resulting from the surplus of unmarried widows, which attracted the notice of the Legislature, which in 1856, passed an Act[11] "to remove all legal obstacles to the marriage of Hindu widows." This Act merely supplements the custom, by legalizing the re-marriage of widows in cases when their re-marriage would have

Hindu Widows' Re-marriage Act, 1856.

(1) *Khembar* v. *Umai Shankar*, 10 B. H.C.R. 381.
(2) *Kesaree* v. *Samardhan*, 5 N.W. P.H.C.R. 94.
(3) *Virasangappa* v. *Rudrappa*, 8 M. 440 (451).
(4) Widow Re-marriage Act (XV of 1856); Civil Marriages Act (III of 1872).
(5) *Sri Ram* v. *Inchi*, 11 A.L.J. 711 : 21 I.C. 313 (there can be no re-marriage of a married woman unless sanctioned by custom).
(6) *Sitaram* v. *Laxman*, 8 N.L.R. 128 : 17 I.C. 133.
(7) *Lachman* v. *Mardan Singh*, 8 A. 134.
(8) *Khemkar* v. *Umai Shanker*, 10 B. H.C.R. 381.
(9) *Mula* v. *Partab*, 32 A. 489.
(10) *Bhagat Singh* v. *Santi*, (1919) P.R. 102 : 50 I.C. 654.
(11) Act XV of 1856.

been opposed to custom. The result of this Act, coupled with custom, is to establish the right of all Hindu widows to remarry; though her re-marriage under the Act determines her interest in her late husband's property. In other words, while a widow re-marrying by custom may retain her first husband's estate if so permitted by custom, the one who marries under the Act must of necessity forfeit it because it is so provided therein.[1] The Act was never intended to vary the existing custom in favour of re-marriage or any of its legal incidents. It was merely intended to enable widows of those castes to re-marry who by their custom were prevented from re-marrying, and it is only to those and those alone that the Act extends and applies. If her estate is from its very nature limited and its enjoyments conditioned upon her remaining unremarried then her re-marriage would necessarily determine her estate.[2] It seems that, apart from the Act, custom sanctions the re-marriage of Jat widows subject to the same penalty, namely, that upon her re-marriage she forfits her right to her husband's estate.[3]

22. The marriage expenses of all members of an undivided family are a legitimate charge on its property.[4]

Marriage Expenses.

389. **Analogous Law.**—Marriage being a Samskar and an obligatory religious duty, binding upon all Hindus, whether Dwijias or Shudras, male or female, it follows that the expenses of marriage constitute a family necessity for which its property may be validly alienated or charged.[5] This liability is common to every manager, whether the father or any other coparcener, or whether the estate is in the hands of a qualified owner such as a Hindu female. But of course, this amount must not be out of all proportion to the requirments of the case.[6] Even the expenses of the second marriage of a male co-parcener are so chargeable. The right to such expenses does not rest on contract. The liability is created by Hindu Law and arises out of the moral relation of the members of the Hindu family.

23. Every marriage is subject to the following conditions, namely:—

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(1) *Bhola Umar* v. *Kausilla*, 55 A. 24 F.B.; distg., contra *Matungini* v. *Ram Rutton*, 19 C. 289 F.B.; *Vitta Tayarama* v. *Chatakondu*, 41 M. 1078 F.B.; *Suraj Jore* v. *Attar Kumari*, 1 *Pat.* 706; *Basorey* v. *Ballabidas*, 6 N.L.R. 171; *Sitaram* v. *Laxman*, 8 N.L.R. 128; *see* this subject further discussed in "Woman's Estate", *post*.

(2) *Matunjini* v. *Ram Rattan Ray*, 16 C. 289; *Rasul* v. *Ram Saran*, 22 C. 589 (595); *Gouricharan* v. *Sita*, 14 C. W.N. 346; *Muhammad* v. *Mankuar*, 21 C.W.N. 906; *Murugayi* v. *Viramakali*, 1 M. 226; *Vitta* v. *Chatakandu*, 41 M. 1078 F.B.; *Venkatachalam* v. *Rama*, 12 M.L.W. 322 : 59 I.C. 91 : *Vithu* v. *Govinda*, 22 B. 321. *Tappo* v. E. (1937) S. 42. See *post* under "Inheritance."

(3) *Ram Kishen* v. *Medle Singh*, 1 I.C. 141 (A.) (a case of Karao re-marriage from Meerut).

(4) *Sundrabhai* v. *Shiv Narayana*, 32 B. 81; *Kameswara* v. *Veracharlu*, 34 M. 422; *Arunachellam* v. *Arunachellam*, 10 I.C. (M.) 285; *Marina* v. *Doddisetti*, (1911) 2 M.W.N. 380; *Seeni Ammal* v. *Angamuthu*, 1912 M.W.N. 99; *Gopalakrishna* v. *Venkatanarasa*, 37 M. 273; *Srinivasa* v. *Tiruvengada*, 38 M. 556 (577-579); *Pohumal* v. *Naroomal*, 6 S.L.R. 246 : 19 I.C. 835; *Yellamanchilli* v. *Yellamanchilli*, 19 M.L.J. 666 : 4 I.C. 1069; *Nandan* v. *Ajudhia*, 32 A. 325 F. B., *contra* in *Namasivayam* v. *Annamall*, 4 M.H.C.R. 339; *Seshammall* v. *Munisam*, Mad. unrep., cited in *Sundari* v. *Subramania*, 26 M. 505; *Vaikuntam* v. *Kallapiram*, 23 M. 512; *Govindarasulla* v. *Devarabhotla*, 27 M. 206.

(5) *Ib.*, contra, *Ram Jash* v. *Chand Mandal*, I.L.R. (1937) 2 C. 764.

(6) *Raghunatha* v. *Damodar*, (1910) M.W.N. 195 : 6 I.C. 720; *Nandan* v. *Ajudhia*, 32 A. 325 (332) F.B.

No valid marriage within prohibited degree.

(*a*) That the parties thereto must not be within the prohibited degree of relationship;[1] and

(*b*) That if the parties thereto are Dwijas, they, ordinarily, must be of the same caste.[2]

Explanation 1.—The prohibited degree of relationship for the purpose of marriage is regulated by custom.[3]

Explanation 2.—A person shall be deemed to be within the prohibited degree of relationship whose marriage is opposed to common morality.[4]

Illustrations.

(*a*) The Shastras prescribe that Dwijas' sons who are Sapindas, Gotrajas or who belong to the same Pravar should not intermarry. *A*, a Dwija, wishes to marry *B*, who is related to *A*. The validity of this marriage depends upon the usage of the caste.

(*b*) *A* has married *B*, who is his own sister's daughter. The marriage is valid as it is sanctioned by custom.[5]

(*c*) *A*, a Kshatriya, marries *B*, who is the illegitimate daughter of a Kshatriya father. The caste people recognize it as a valid union. The marriage is valid.

390. Analogous Law.—Numerous texts on the subject of prohibited degrees are to be found in Smritis.[6] They are conflicting, many of them too wide, and none of them of general application. The Shastric law prohibited marriage of persons of the same *Gotra* and *Pravar* or who were inter-related as *Sapindas*. These barriers were too wide to be effective.

So Mandlik observes: "The question of a proper or an improper marriage is, therefore, always one of usage, to be determined according to the people's *achar* (practice) and not by mere texts of greater or less antiquity."[7]

391. Sapindas cannot inter-marry.—Within the prohibited degree, the Shastras interdict all marriage between sapindas.[8] But this restriction disqualifies too widely as it would exclude no less than over 2,000 relations as compared to 30 relations amongst Europeans. Communal and territorial customs have, consequently, greatly narrowed down the circle of prohibited degree.

392. But the sapinda prohibition is not the only one that stands in the way of the orthodox marriage, for the parties must not belong to the same *Gotra* or *Pravar*. These three rules are independent, and the fact that a party is not a sapinda does not make him marriageable, for he may be a *Gotraj*, and failing both, he may still be of the same *Pravar*. It is said that the two latter prohibitions apply only to the Brahmins, since both the Kshatriyas and the Vaishyas have neither a *Gotra* nor a

(1) Manu, III-5, V-60; Vishnu, XXIV-10, 11; S.B.E. 106, 107; Yaj. I-52, 53; Narad, XII-7; Mandlik's H.L., p. 413.
(2) *See* S. 19, *supra*.
(3) Mandalik's H.L., p. 414.
(4) *Ib*.
(5) Mandlik's H.L., p. 425.
(6) Manu, III-5, V-60; Vishnu, XXIV-10, 11; 7 S.B.E., pp. 106, 107; Yad. I-52; Narad, XII-7; Gautam, IV, 2-5 to the same effect Harit; Vashisth, Paithinas, cited in Mit. Note on Yad. I-53 (Panini Ed.) p. 110; Samskar Kaustubh, cited in Mandlik's H.L., p. 413. Quoted in Hindu Code (3rd Ed.), pp. 305, 306 § 531.
(7) Mandlik's H.L., p. 414.
(8) Yadnavalkya, Lit. Mit., Ch. III *See* ch. on "Inheritance."

Pravar, but the Mitakshara lays down that the *Gotra* and *Pravar* of their family priest are theirs, and so they too are subject to these limitations.[1] But the Shudras are stated to be subject only to the sapinda prohibition, as they have neither *Gotra* nor *Pravar*.[2]

393. The three terms "Sapinda," "Gotra" and "Pravar" used by the Smritikars require explanation.

Meaning of Sapinda.

The word "Sapinda" in its etymological sense means one who is of the same "pinda."

The word "Pinda" is a word of uncertain import and may, among other things, mean either a body or a ball. The Mitakshara understands it in the first sense, Raghunandan, the accredited writer the Bengal School, understands it in the other. According to the one it means relations who are related to one another by reason of the fact that they possess particles of the same body, according to Raghunandan the word indicates relations of a person with whom, when deceased, he partakes of the obsequial offering of the rice ball. That this view is forced and far-fetched, will be seen in the sequel when dealing with inheritance.[3]

394. The terms "Sapinda," "Gotra" and Pravar" are explained in the Mitakshara. Referring to the prohibition against sapinda marriage, the author of the Mitakshara observes that that term must be understood as limited to the fifth and seventh degree removed from the mother and father respectively. Without any such limitation all people of the world would be sapindas of one another. "Thus the six ascendants beginning with the son, and one's self counted, in each as the seventh, in each case are sapinda relations."[4] So also beginning from the mother and counting her father and grandfather, etc., till the fifth ancester is reached is the meaning of the words fifth from the mother."[5] But in the case of children of hypergamous marriages (called *Anuloma* births), the sapinda relationship extends only up to the third degree.[6]

Who is a Sapinda.

395. The following table gives the simplest example of this prohibited relationship:—

A

2 S	2 S
3 D	3 D
4 D	4 S
5 S	5 D
6 D	6 S

Here 6 D cannot marry 6 S because 6 D is within seven degrees on her father's side related to 6 S. But in this case if 6 S were a female and 6 D a male could have validly married 6 S, because 6 D would then have been more than five degrees remote from her mother related to 6 S through their common ancestor A. But even in the days of the Mitakshara, this prohibition was held by some to go too far. Paithinasi is quoted by the Mitakshara as laying down that a damsel may be espoused

(1) Mit. Note on Yad. 1-52 (Panini Ed.), p. 106.
(2) Mit. (Panini Ed.), p. 106.
(3) *See* Dayabhag, Ch. XI, S. 33, and discussion on the subject under "Inheritance", *post*.
(4) Mit. (Panini Ed.), p. 110.
(5) *Ib.*, p. 110. To the same effect Vashisth, VIII-2; Gautam, IV-2-25; Vishnu, XXIV-10; Narad, XII-7.
(6) *Ib.*, pp. 110, 111.

who is beyond the third on the mother's and fifth on the father's side.[1] In this view, 4 D could have validly married 4 S. On the other hand, Manu prohibits marriages up to the seventh degree on either side,[2] which he lays down as the last degree of the sapinda relationship.[3]

These relationshps were at one time explained only to refer to the question of marriage. So they do, but they have been held equally to control inheritance.[4]

Special Mode of Counting.

396. In laying down the limit of sapinda relationship, the *Smrithi*kars follow the canonist rule of computation at variance with the civilian rule followed in Sections 25 and 26 of the Succession Act. The former start counting with the *propositus* who counts as one degree, while the latter exclude the *propositus* in their calculation. Consequently, when in the foregoing texts the sapinda relationship is declared to end with the 5th, 6th or 7th degree, it means that it ends with the 4th, 5th and 6th degree, according to the modern method of computation.

Sapindas and Bandhus the same.

397. The sapinda relationship described in the ritual section of the Mitakshara has been held to apply equally to inheritance. But when dealing with that subject, it will be seen that the term *Bandhu* is often used in a sense different to sapindas. For the present it may be noted that the two terms are synonymous and were so intended by Narad who in defining the limits speaks of the *Sapindas* as *Bhandus*.[5]

(2) Gotraj.

398. Secondly, some sacred texts[6] prohibit inter-marriages of *Gotrajas* though custom has in places relaxed the rule.[7] What is then a *Gotraj?* In theory, all the twice-born people, according to some, only the Brahmins, are descendants in the male line from certain *Rishis* or sages who are said to be the accredited progenitors of the race. All the descendants from this common Rishi bear a single family name, in the same way as all the descendants in the male line from Smith and Brown bear those surnames. *Gotrajas* are thus persons entitled to the same surname. According to a text, cited by Raghunandan, there were originally 8 such progenitors, and their names are Agastya, Atri, Bharadwaj, Gautam, Jamdagni, Kashyap, Vasisth and Vishwamitra.[8] But many of their distinguished descendants have founded new families and new Gotras, so that the number of such secondary Gotras runs into millions. Every twice-born owns one of these primeval procreators as the founder of his family, and as several thousands of families make the same claim, it follows that Gotaraj relationship offers a formidable impediment to the establishment of connubial relations. This relationship is, of course, a purely artificial one and its artificiality is acknowledged in the Mitakshara in which it is said that the Kshatriyas and Vaishayas have neither *Gotra*

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(1) Mit. (Panini Ed.), p. 110.
(2) III-§ 5.
(3) V-§ 60.
(4) *Ramachandra* v. *Vinayek*, 42 C. 384 P.C.
(5) XII-7. This sense is lost in its translation in 33 S. B. E. 166.—*See* text in original cited in Sarkar's H.L. (3rd *ed.*,), p. 74.
(6) Gautam and Vashisth do not mention *Gotra* at all.—*See* texts cited *ante*.
(7) *Shah Deo Narain* v. *Kusum*, 5 Pat.L.J. 164.
(8) Balam Bhatt names 18 such Rishis —with several sub-divisions of each—*See* Mit. (Acharkand), Panini Ed., pp. 107, 109.

nor *Pravar* of their own,[1] but that they should follow the *Gotra* and *Pravar* of their family priests.[2] *Persons* belonging to two different castes may possess the same *Gotra*. This is explained away on the ground that castes were a later development of Hindu society, and therefore the arrangement of the people into castes did not affect their *Gotra*. It is equally plausible that two families of different castes having the same family priests would naturally adopt the latter's *Gotra* as enjoined by the Mitakshara, and so Gotraja relationship would in course of time transcend the barriers of caste and the still narrower confines of the sapinda relationship.

(3) **Pravar.**

399. The question of pravar still remains. Its meaning is explained by Baudhayan as follows:—

"Jamdagni, Bharadwaj, Viswamitra, Atri, Gautam, Vashisth, Kashyap, Agastya—these Rishis are the makers of the *Gotras*. Their descendants have founded *Gotras*. These are thousands and hundred millions. Among them forty-nine are *Pravars* or excellent from having attained to the wisdom of Rishis, and they are founders of Pravars. As long as there is one Rishi common to several Pravars, so long there is relationship of the same *Gotra* excepting the children of Bhrigu and Angiras."[3]

A Pravar then is an approved Gotra, and as there are 49 such *Pravars*, some of which have been founded by the same *Rishi* those related through such common Rishi are themselves inter-related and so cannot inter-marry.[4]

(4) **Step-mother.**

400. The step-mother and, at least, some of her relations in the same degree cannot be married, for "the wives of the father are all mothers, their brothers are maternal uncles, their sisters are mother's sisters, their daughters are sisters, and the offspring of those daughters are children of a sister." Opinions differ as to whether the relations named are merely illustrative or exhaustive. The Western lawyers favour the former,[5] the Eastern the latter interpretation.

(5) **Adoption.**

401. Another subject, upon which there is a conflict, is the effect of adoption upon the prohibited degrees. Since a son by adoption has consanguineous relationship with one family and relationship by adoption with the other, the question arises whether such son is debarred from marrying all the sapindas of his natural as well as the adopted family. It is said that if the adoption took place after the boy had had the *Upanayan* ceremony performed, then the prohibition as to marriage in his natural family extends to all sapindas and in his adopted family only to three degrees. If, however, all the *Samskars*, except the *Upanayan* were performed in his natural family, but only the *Upanayan* was performed in the adopter's family, then the prohibition extends in both families to five degrees on

(1) The implication being that they cannot claim the same descent from a saint as the Brahmins.

(2) Ch. III, V-52, Mit., and note thereon, p. 106.

(3) Manu does not mention Pravar, nor does his commentator Kulluk. Like Manu, Brihat Parasar also omits it.—*See* texts cited in Hindu Code (3rd ed.), § 531, pp. 305, 306.

(4) Cited in the Parasar Madhav, and Parijat, p. 137; also by Hardutt in Ujval. Balam Bhatta gives a long disquisition on this subject of Gotra and Pravar, for which *see* her gloss to the Mitakshara *note* to Yad. v. 52 (Panini Ed.), pp. 107-109; *see also* Max Muller's Hist. S. L., pp. 195, 200.

(5) Mandlik's H.L., p. 352.

the father's side and three degrees on the mother's side. But if all the *Samskars* commencing from *Jatkarm* to the *Upanayan* were performed in the adopter's family, then the order of the first case is reversed, the prohibition extending in the adopter's family to all sapindas and in the natural family only to three degrees. The Nirnai Sindhu would, however, extend the prohibition in all the three cases to all sapindas of both the families, while Nagoji Bhatt would make no prohibition against marriage in the natural family on the ground that adoption severs relationship with the natural family altogether.

402. If all the precepts had any value, the number of prohibited relations would exceed 6,000, and since there is the other mandatory prohibition against marriage out of caste, an adopted son with a step-mother must be thrice blessed if he can manage to secure a wife, let alone the ideal damsel of Manu's imagination.

403. As already observed, the Courts regard this[1] and the other questions of prohibited degree as one of custom, and not one of interpretation of the textual law.

(6) Other Prohibitions.

404. It might have been thought these triple prohibitions had sufficiently narrowed down the field of selection. But they are not all. For there are other prohibitions against the marriage of the following non-consanguineous relations, *viz.*, (1) the step-mother's sister, (2) her brother's daughter, (3) his daughter's daughter, (4) the paternal uncles's wife's sister, (5) the wife's sister's daughter[2] and (6) the preceptor's daughter. .....

405. **General Result of the Shastric Rules.**—The net result of the shastric rules as to the prohibited degree of relationship for marriage is to render ineligible no less than 2,100 relations as against the thirty relations with whom marriage is prohibited amongst the Christian nations.[3] It may be doubted whether these restrictions were ever tolerated in practice. From the context it would seem that they were rather in the nature of moral precepts addressed to the adept student, than to the people at large in the market place.

It has already been said that in no case does usage sanction such widespread exclusion, and the fourth degree appears to be the utmost verge of a valid prohibition given effect to in practice. And there are a good many marriages within that limit.

406. These being then the textual rules that are both obsolete and impossible and no other general rules to take their place, the courts leave the question of the prohibited degree to be decided by custom, and no other alternative is possible or suggested even by the stoutest supporters of textual authority.[4]

407. **Marriageable Sapinda Relations.**—It has already been stated that the true test of the prohibited degree is custom, and not the textual law. As such, a person may validly marry his own maternal uncle's

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(1) *Vaithilinga* v. *Vijayathmmal*, 6 M. 43 (48).

(2) Such marriage is valid: *Ragavendra* v. *Jayaram*, 20 M. 283.

(3) *See* English rules of prohibited relations, cited in Hindu Code (3rd Ed.), § 548, p. 312.

(4) *See* Sarkar's H.L. (3rd Ed.), p. 96; Ghose, H.L. (3rd Ed.), pp. 792, 793.

daughter,[1] or his own sister's daughter[2] or his wife's sister's daughter,[3] or his step-mother's sister's and sister's daughter, his paternal uncle's wife's sister, his paternal uncle's wife's sister's daughter, her brother's daughter and his children's daughter[4]—any text to the contrary being explained away on the ground that they are merely hortatory and not imperative.

408. So, again, marriages by exchange are not only customary but common and everywhere regarded as valid, though they are directly opposed to the scriptual text.[5] So Steele mentions cases in which intermarriages with cousins and nieces, though prohibited, do occasionally take place.[6] In a Bombay case, the court however condemned the marriage of a man with his siste's daughter as incestuous,[7] but in basing their decision on the Shastric texts[8] the learned Judges took care to add that there was no allegation or proof of any custom tolerating such a marriage.

409. Some texts prohibit the marriage of certain relations, *e.g.*, the wife's sister's daughter. But this is held to be merely a moral precept.[9] There are other prohibitions, but their saving grace is custom.

Invalid marriages.

24. A marriage may be rendered invalid for any of the following reasons:—

(1) because the parties were related within the prohibited degree,[10]

(2) because they were of different non-inter-marriageable castes,[11]

(3) because they did not observe the essential ceremonies,[12]

(4) because their marriage was brought about by force or fraud.[13]

(1) Within prohibited degree.

410. The question of prohibited degree is a question of fact to be decided upon the evidence in each case. In the absence of such evidence the court will be guided in its decision by the recorded or reputed law, and if it finds such a marriage prohibited, all it can do is to treat it as a nullity. The authorities declare such marriage as wholly null and void, though the woman married is entitled to be maintained as a sister.[14] This was the view taken in a case in which a Brahmin had married his niece.[15]

.. ..

(1) Mandlik's H.L., pp. 418, 424. The Nirnay Sindhu recognizes the custom; *Ib.* So does the Achar Madhav, *Ib.*, p. 418.

(2) *Ib.*, p. 425.

(3) *Ib.*, followed in *Ragavendra* v. *Jayaram*, 20 M. 283 (286, 287).

(4) *Ragavendra* v. *Jayaram*, 20 M. 283 (286); *Ramchandra* v. *Gopal*, 32 B. 619 (630).

(5) Narad, cited by Kaustubh, 1-196, p. 1, verse and translation in Mandlik's H.L., p. 414, F.-N. 3.

(6) Steele's Law of Caste, p. 165.

(7) *Ramangavda* v. *Shivaji*, (1876) B. P.J. 73.

(8) Mandlik shows that even the texts cited do not support the conclusion.—*See* Mandlik's H.L., pp. 438, 439.

(9) *Ramakrishna* v. *Subbanna*, 43 M. 830.

(10) S. 23, *supra*.

(11) S. 19, *supra*.

(12) *Inderun* v. *Ramaswamy*, 13 M. I. A. 141 (158). *See* S. 18, *supra*.

(13) S. 25, *post*.

(14) Manu, III-5; Yadnavalkya, I-52; Mayukh, IV S-5-pt. 29; Macnaghten's H. L. (2nd Ed.) 61; Steele's L.C. (2nd Ed.), pp. 26, 30, 163, 166.

(15) *Ramangavda* v. *Shivaji*, (1876) 3 B.P.J. 73; Reprint, p. 57.

411. Inter-caste marriages stand on a somewhat different footing.

(2) Difference of Castes.

Those contracted in the face of the Shastric prohibitions, *e.g.*, higher caste woman marrying a man belonging to the lower caste, (*i.e., pratiloma* marriages) have been declared to be void in places, such as Bombay and the United Provinces, in cases in which the parties failed to plead or prove any legalizing custom (§§ 376-381.) Such marriages create no legal obligation beyond the one to maintain the wife. Inter-sub-caste marriages are, however, not prohibited by the Shastras, though they are not favoured by custom. They are well protected by the doctrine of *factum valet,* and cannot be avoided. (§§ 376-381).

412. The Shastras regard the Shudra caste as a single caste, as comprising all who are not *Dwijas.* As such, the numerous castes into which the Shudras have become divided have no scriptural sanction, and inter-caste marriages among them are neither prohibited nor unusual. Even where a determined stand is made against them, they are likely to be upheld on the ground of *factum valet.*

413. When a marriage is proved to have been performed in fact,

(3) Non-observance of ceremonies.

it is presumed to be valid in law, since, as observed by the Privy Council, "It would be a most unlikely thing for a person of his caste to go through the ceremony of marriage, if it was known that the marriage was a marriage which was invalid in law.[1] In view of the law, ceremony is but the evidence of marriage, and where its *factum* is proved, its form is to be presumed, and it lies heavily on one to prove the contrary.

Avoidance of marriage.

25. (1) A marriage brought about by force or fraud may be avoided by the party affected thereby.[2]

(2) It may also be avoided on the ground of the husband's impotency, or either party's imbecility, but it cannot be avoided for their infancy or other incapacity which rendered them incapable of understanding the nature of their marital obligations and their consequence upon their individual rights or their own mental or physical incapacity to discharge them.[3]

414. **Analogous Law.**—There is a Shastric authority for this rule. Taking marriage as either the gift or sale of the bride to the bridegroom, the section falls within the general principle enunciated by Manu that force[4] and fraud[5] vitiate all transactions with which Yadnavalkya[6] and Narada[7] agree. So referring to marriage, Manu Says: "A person may abandon a maiden, though taken or accepted in due form of ceremony, if she be blemished, diseased, or deflowered and given fraudulently."[8] But this is explained as relating only to a stage before the *Saptapadi, i.e.,* its completion.[9] This explanation explains away the text which

(1) *Inderun* v. *Ramasawmy,* 13 M. I.A. 141 (158).
(2) Manu, VIII-165, 168; Narad, IV-9, 10; Yaj., II-31, Mandlik, p. 204. *Appibai* v. *Khimji,* 60 B. 455 (467, 468).
(3) Narad, XII-19, 97; 9 S.B.E. 166 *et seq.*
(4) Manu, VIII-168.
(5) VIII-165.
(6) Yad. 11-31, Mandlik, p. 204.
(7) IV-9, 10.
(8) IX-72.
(9) Vashisth, XVII-73; 14 S.B.E. 92; Baudhayan, I-14 A.; II-14; S.B.E. 314.

itself did not go far. However, whatever may have been the view of the *Smritikars*, the court regards the rule as well settled, and though slow to give effect to it, where the mischief cannot be retrieved, it will not hesitate to cancel a marriage if it is brought about by force or fraud of either party, or their guardians.[1]

415. Clause 2 is supported by the following texts:—

Narad.—"19. Women have been created for the sake of propagation, the wife being the field, and the husband the giver of the seed. The field must be given to him who has seed. He who has no seed is unworthy to possess the field.

"97. When her husband is lost or dead, when he has become a religious ascetic, when he is impotent, and when he has been expelled from caste: these are the five cases of legal necessity, in which a woman may be justified in taking another husband."[2]

Force or Fraud.

416. A marriage brought about by force or fraud is not void but voidable by the party wronged.[3] But before it can be avoided, the court must be satisfied of the violation of some substantial right and material prejudice; otherwise, it will condone mere irregularities, omissions and errors of procedure which could not be permitted to affect such solemn obligations as those of a marriage: *quod fieri non debuit factum valet*.[4] So the courts have refused to set aside marriages performed without the consent of the lawful guardian,[5] or where the certificated guardian marries without the consent of the District Judge.[6] But the case would be different where a marriage of a minor is performed with no consent at all. Such was the case of the defendant who forcibly married his minor sister-in-law who had gone on a visit to see his wife.[7] So where a woman was entrapped into a marriage without the consent of her guardian and the match appeared to the court unnecessary and unsuitable, it set aside holding that its invalidity could not be cured by recourse to the doctrine of *factum valet*.[8] So in another case, where a minor widow was alleged to have been married by the *chadar-andazi* ceremony, but it appeared that the marriage was performed without the consent of her parents or any other lawful guardian, and that the minor, though consenting to it, was legally incapable of offering herself in marriage, the court held the marriage void, as consent which was necessary to the nexus of the marriage was wholly wanting.[9] Of course, in such cases, the want of a previous consent might have been made good by a subsequent acquiescence. The one question which exercise the court in cases of cancellation is whether the party suing for that relief will not be the greater sufferer by reason of

(1) In *Mani* v. *Zaboo*, 22 N.L.R. 134; (1926) N. 488, a *pat* marriage was held indissoluble even though the wife concealed her pregnancy by her former husband; because marriage was held to be a sacrament—*Sed quare*.

(2) Narad, XII-19, 97; 9 S.B.E. 166 *et seq*.

(3) *Ankamma* v. *Ramanappa*, (1937) M. 332.

(4) What should not be done, yet being done, shall be valid." *Ankamma* v. *Ramanappa*, (1937) M. 332 (334) (husband an adult sued for the invalidity of his marriage to defendant on the ground of coercion.

(5) *Rulyat* (*Bai*) v. *Jeychand*, (1840-48) Bellasis 43; *Mulchand* v. *Bhudia*, 22 B. 812 (815); *Venkatacharyulu*, v. *Rangacharyulu*, 14 M. 316; *Brindabun* v. *Chandra Kumar*, 140; *Khushalchand* v. *Bai Mani*, 11 B. 247; *Diwali* (*Bai*) v. *Moti*, 22 B. 509; *Gazi* v. *Sukru*, 19 A. 515; *Misri Lalsa* v. *Harlalsa*, 15 C.P.L. R. 46; *Dayal* v. *Narain*, (1884) P.R. 64.

(6) *Diwali* (*Bai*) v. *Moti*, 22 B. 509.

(7) *Lal Chand* v. *Thakur Devi*, (1903) P.R. 49.

(8) *Anjona* v. *Prahlad*, 6 B.L.R. 243; *Dayal* v. *Narain Das*, (1884) P.R. 64; *Lalchand* v. *Thakur Devi*, (1903) P.R. 49.

(9) *Lalchand* v. *Thakur Devi*, (1903) P.R. 49; *Appibai* v. *Khimji*, 60 B. 455; (467, 468); *Ankamma* v. *Ramanappa*, (1937) M. 332.

the relief granted thereby. Where, for instance, the parties, or either of them, is *impubes* and the marriage has not been consummated, cancellation would cause no serious injury, but where marriage has been followed up by consummation, and the wife sues for cancellation, the court may have to consider whether the cancellation would be to her advantage.

417. Though impotency and imbecility are clearly recognised in the texts as a bar to marriage and as good reasons for its dissolution, they do not appear to have actively passed into the custom of the people, other than the Shudras, amongst whom they afford a good ground for divorce. But amongst the twice-born, though the law is as stated, it has been made a dead letter by the practice of the courts, who are held to posses no matrimonial jurisdiction in such cases, beyond awarding a decree declaratory of a fact, which in this case is left to the decision of the caste autonomy.[1] It is true that apart from custom a Hindu marriage is not subject to divorce.[2] But the dissolution of the tie of marriage brought about by the husband's disabilities is akin to, though not quite the same as, divorce.[3] That imbecility is a disqualification to marriage was conceded by the Privy Council in a case in which, however, they affirmed the finding of the courts in India that the husband, though insane, was yet not incapable of knowing what he was doing, adding that "the objection to a marriage on the ground of mental incapacity must depend on a question of degree."[4] In one case, it was conceded that a Hindu marriage may be dissolved on the ground of the bridegroom's impotency,[5] but, in another case, it was said that since marriage was a sacrament,[6] and not a contract, the insanity of the husband did not disqualify him from performing it,[7] but it has been held in Madras, that since marriage creates mutual rights and obligations it does require a consensual mind,[8] and it is obvious that a lunatic is excluded from the performance of any religious rite much less a sacrament. But it has been held in Bombay that the husband's impotency is no ground for refusing him a decree for the restitution of conjugal rights[9] but though such decree can no longer be enforced by imprisonment, it may be upheld on the ground that so long as the marriage tie lasts the marriage obligations remain.

418. The question whether a marriage is rendered void on account of impotency, insanity and incapacity of either party depends upon its true notion and purpose. It has been said that "a Hindu marriage is the performance of a religious duty, not a contract; therefore the consenting mind is not necessary, and its absence, whether from infancy or incapacity, is immaterial."[10] Each one of these propositions has, however, been denied. It is held that a Hindu marriage is a contract,[11] and that imbecility is an impediment to its formation: but the question is one of

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(1) *Chandrabhaga* v. *Vishwanath*, 9 N. L.R. 102 (104): 20 I.C. 557.

(2) *Kudomoee* v. *Joteeram*, 3 C. 305; *Hira* v. *Hansji*, 37 B. 295; *Sankaralingam* v. *Subban*, 17 M. 479.

(3) *Sinnammal* v. *A.G.*, 8 M. 169 (173).

(4) *Monji Lal* v. *Chandrabati*, 38 C. 700 (703, 706, 707) P.C.

(5) *Kanhai Ram* v. *Biddya Ram*, 1 A. 549 (551).

(6) Manu, II-66, 67.

(7) *Deokishen* v. *Budh Prakash*, 5 A. 509 (513) F.B.

(8) *Muthusami* v. *Masilamani*, 33 M. 342 (355).

(9) *Purushotam Das* v. *Mani*, 21 B. 610 (615).

(10) Mayne's Hindu Law (9th Ed.), § 90, p. 110.

(11) Manu, V-152; *per* Sankaran Nair, J., in *Muthusami* v. *Masilamani*, 33 M. 342 (355).

degree.[1] The fact that marriaeg is a religious rite does not prevent it from being a conjugal contract. Indeed, no person can circumscribe another's freedom in the guise of religion, unless it is warranted by law, and the reciprocal rights and obligations created by marriage are no less secular because they find a place in a theocratic system of law. In that system, while marriage is regarded as a sacrament, its sole purpose is emphasized to be the procreation of a son.[2] In the archaic age the purpose was attained by the practice of Niyog; but in later ages, this practice fell into desuetude, but the old texts remained and were repeated by later text writers as if they were still a part of the current law. The abject subordination of woman was yet another feature of ancient law which has only been partially ameliorated by the statute. In the view of Smritikars the wife became, upon her marriage, entirely dependent upon her husband. If he did not like her he was free to discard her, and take unto himself other wives. But if she found him impotent she had no remedy, though he could force her to receive the embraces of other men. A eunuch and an idiot cannot inherit, but, nevertheless, they were competent to marry. It is submitted, that since the discontinuance of Niyogi, impotency is an insuperable obstacle to marriage both under Hindu as well as the general law; under Hindu Law because a eunuch cannot beget a son, and under general law because it fails to serve the primary purpose of marriage, namely, the rising of issue. But the contrary was held in a Bombay case.[3] And since Hindu Law regards marriage in the nature of a gift by the father of his daughter to the husband, the latter is incompetent to receive the gift unless he possessed sufficient intelligence to accept it.[4] But these deductions from analogies do not carry the law of marriage very far, and without legislative interference, the correlative rights and duties of the husband and wife cannot be placed on a satisfactory footing.

26. (1) **On its completion the marriage becomes indissoluble and is not subject to judicial separation or divorce for the adultery, cruelty or other misconduct of either party.**[5]

No Judicial Separation or Divorce permitted.

No Dissolution for apostasy, Degradation, or Loss of Caste.

(2) The tie of marriage is not dissolved by the apostasy, degradation or loss of caste of either party.[6]

419. Analogous Law.—The following text bears on the subject of this section:—

Deval.—"The husband may be forsaken by his wife if he be an abandoned sinner, or an heretical mendicant or impotent or decript or afflicted with pthisis or if he have been long absent in a foreign country."[7]

420. Divorce.—From its very idea of a sacrament a Hindu marriage is held to be indissoluble. The effect of the marriage upon the wife is to

(1) *Monji Lal* v. *Chandrabati*, 38 C. 700 (706) P.C.

(2) Manu, VI-36, 37.

(3) *Purushotam Das* v. *Mani*, 21 B. 610 (613).

(4) *Monji Lal* v. *Chandrabati*, 38 C. 700 P.C. *contra* in Manu, VIII-205; *Deo Kishan* v. *Budh Prakash*, 5 A. 509 (513) F.B.; the father's right is personal and cannot be delegated to another. *Atmaram* v. *Banku Mal*, 11 L. 596. Nor can he exercise before the child is born. *Ib.*, but *see* §§ 357-360, *supra*.

(5) *Kudomee* v. *Joteeram*, 3 C. 305; *Sinammal* v. *Administrator-General*, 8 M. 169 (173). Its indissolubility is due to its being a sacrament.

(6) *Administrator-General* v. *Anandachari*, 9 M. 466; *Government* v. *Ganga*, 4 B. 330; *Ram Kumari, (In re)*, 18 C. 264, and cases cited *post*.

(7) Cited in 2 Coleb., p. 164.

transfer her both bodily and spiritually from her parental family to that of her husband. She adopts the gotra of her husband and becomes united to him in flesh and blood.[1] "During the husband's lifetime he is to be regarded by the wife as a god, and the wife is declared to be half the body of her husband, equally sharing the fruit of pure and impure acts, and no sacrifice or religious rite is allowed to her, apart from the husband's. Hence it is, that, after the husband's death, the widow is regarded as the surviving half of his body; the union is a sacred tie and subsists even after the death of the husband."[2] This view leads to several results. Being the union of the two souls, the death of the husband does not set the wife free to remarry; and during his lifetime, there can be no divorce for whatever reason[3] unless it is permitted by custom.[4] Neither adultery[5] nor even prostitution,[6] degradation by conversion to Mahomedanism[7] or other religion or forfeiture of caste[8] dissolves a Hindu marriage. (§ 425). This is the normal law. Its inflexible rigour has however been to a certain extent modified by legislation[9] and custom.[10] (§§ 421, 422).

In spite of the conception that a Hindu marriage is a sacrament, divorce of a kind was recognised by the early writers. But it was more in the nature of desertion than divorce.[11] But strictly speaking, divorce, as such, was unknown to Hindu Law. "Neither by sale nor desertion can a wife be released from her husband! Thus we fully acknowledge the law enacted of old by the Lord of creatures."[12] But even since the days of Manu, law had to bow to the inevitable, and however indissoluble a marriage tie might be in theory, its dissolubility had to be recognized, though it is now essentially a matter of usage.[13] (§ 421) which generally

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(1) Apastamb, 2 S.B.E. 137; *Tekait* v. *Basanta*, 28 C. 751 (758).

(2) *Per* Ghose, J., in *Tekait* v. *Basanta*, 28 C. 751 (758).

(3) *Kudomee* v. *Joteeram*, 3 C. 305 (308); *Ram Kumari* (*In re*), 18 C. 264 (269); *Tekait* v. *Basanta*, 28 C. 751 (758); *Binda* v. *Kausilia*, 13 A. 126 (153); *Narain* v. *Tirlok*, 29 A. 4 (6) *Sinnammal* v. *Administrator-General*, M. 169 (173); *Administrator-General* v. *Anandachari*, 9 M. 466 (470); *Vasudeva* v. *Secretary of State*, 11 M. 157 (161); *Thapita* v. *Thapita*, 17 M. 235 (242) F.B.; *Subbaraya* v. *Ramasami*, 23 M. 171 (176); *Surampalli* v. *Surampalli*, 31 M. 338 (340).

(4) *E.* v. *Umi*, 6 B. 126 (128); *Bai Vigli* v. *Nansa Nagar*, 10 B. 152 (154); *Kudomee* v. *Joteerama*, 3 C. 304 (306); *Jukni* v. *Q. E.*, 19 C. 627 (628, 629); *Sankaralingam* v. *Subban*, 17 M. 479.

(5) *Subharaya* v. *Ramasami*, 23 M. 171, (176, 178), followed in *Narain Das* v. *Tirlook*, 29 A. 48.

(6) *Subharaya* v. *Ramasami*, 23 M. 171 (178); *contra* in *Komineymoney* (*In re*), 21 C. 697.

(7) *Sundari* v. *Pitambari*, 32 C. 871; *Government of Bombay* v. *Ganga*, 4 B. 330.

(8) *Bisheshur* v. *Mata*, 2 N.W.P.H. C.R. 300.

(9) Act XXI of 1886.

(10) S. 18.

(11) Manu, IX-72 : "Even though a man may have married a young woman in legal form, yet he may abandon her, if he find her blemished afflicted with disease, or previously deflowered and given to him with fraud";

Narad, XII-19, 32 S.B.E. 175; "One who after having left the husband of her youth, and betakes herself to another man, returns into the house of her husband is declared the second (*Punarbhu*) wife." "When a woman, whether she have children or not, goes to live with another man through love, her husband being alive, she is the first *svairnii*," (wanton woman).

(12) Manu, IX-46; (Jone's Tr.) 198; *Kudomee* v. *Joteeram*, 3 C. 305; *R.* v. *Karsam*, 2 B.H.C.R. 124; *Khemkar* v. *Umai Sankar*, 10 B.H.C.R. 381; *Rahi* v. *Gobinda*, 1 B. 97 (114); *R.* v. *Sambhu*, 1 B. 347.

(13) *Sankaralingam* v. *Subban*, 17 M. 479 (*Porter's case*).

sanctions divorce amongst Shudras and other lower castes.[1] Divoce is also now possible upon a conversion to Christianity in accordance with the provisions of the Native Converts' Marriage Dissolution Act, 1866.[2] (§ 425).

421. **Customary Divorce.**—It has been stated before, that though Hindu Law dos not recognise divorce,[3] still amongst Shudras and certain other lower and mixed castes, divorce of the wife or of the husband is sanctioned by custom. Where, however, such custom was said to permit a divorce of one at the sweet will of the other without reason, but only on a payment of a small fine fixed by the caste, the court condemned the custom as opposed to public policy.[4] The remarriage of the wife divorced by custom is not marriage in an unapproved form unless the bridge-price is paid. In the absence of any such payment it is a perfectly good and valid marriage.[5]

422. A marriage is absolute, irrecoverable and unconditional by law.[6] But it may be rendered conditional by custom.[7] Such a custom was proved in a case in which a husband had sued for the restitution of conjugal rights which the wife resisted on the ground that she had not become his married wife for which a second ceremony on her attainment of puberty was required, and this contention was upheld. In another case, the marriage was in the nature of an exchange of children who were married when only a month old on condition that the son's father should provide a girl to be married to the wife's brother. The court upheld this mutual bargain holding it justified by the possible paucity of woman.[8]

But while a marriage may be contracted so as to take effect only upon the fulfilment of a condition precedent, it cannot be cancelled for any breach of condition made for its cancellation.[9] Nor can it be conditioned[10] by an agreement to live apart.

423. **Effect of Unchastity.**—The degradation of a woman consequent upon her unchastity appears to be no exception to the rule,[11] though in some cases it is held to justify the severance of the tie of marriage.[12] But apart from the institution of divorce, supported by custom, as in the case of Shudras and certain other castes, Hindu Law, as such, does not recognize divorce, it sanctions the abandonment of a wife who has taken to the career of unchaste life. This question has been considered in several cases in connection with the husband's heirship to such wife's stridhan, and will have again to be adverted to in that connection.

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(1) Steele's Law of Caste, 169, 170.
(2) Act XXI of 1886. *See* App.
(3) *Abdul Karim* v. *Abdul Rajak*, 2 O.L.J. 101: 28 I.C. 201.
(4) *Kesmay* v. *Gandi*, 39 B. 538.
(5) *Hira* v. *Hanaji*, 37 B. 295.
(6) *Keheram* v. *Gendheree*, 23 W.R. 178.
(7) *Boolechand* v. *Janakee*, 25 W.R. 386; *Balugri* v. *Vatel Purshotam*, 17 B. 400 (406).
(8) *Baiugri* v. *Vatel Purshottam*, 17 B. 400 (406).
(9) *Charitam* v. *Nathi*, (1900) P.L. R. 193.
(10) *Krishna* v. *Balammall*, 43 M. 398.
(11) *Bisheshur* v. *Mata Gholam*, 2 N. W.P.H.C.R. 300; *R.* v. *Marimuttee*, 4 M. 243; *Administrator-General* v. *Anandachari*, 9 M. 466; *Subharaya* v. *Ramasami*, 23 M. 171; *Surnomoyee* v. *Secretary of State*, 25 C. 254.
(12) *Ram Prasad* v. *Subu Bai*, 4 N.L R. 31 (41, 42); *Sivasinga* v. *Minal*, 12 M. 277; *Narasanna* v. *Gangu*, 13 M. 133; *Kamineymoney Bewah*, (*In re*,) 21 C. 697.

424. Effect of Conversion.—Though apostasy has not the effect of dissolving a Hindu marriage, the conversion of a person to Christianity, gives the right of divorce, subject to the provisions of the Native Converts' Marriage Dissolution Act, 1866, to which reference has already been made in the foregoing discussion.

425. Statutory Divorce.—Though a marriage under Hindu Law is indissoluble and apostasy furnishes no ground for its dissolution, still in the case of converts to Christianity, divorce may be secured in accordance with the provisions of the Native Converts' Marriage Dissolution Act, 1866.[1] If in consequence of a party's conversion to Christianity, the other party repudiates or deserts the other for the space of six continuous months,[2] in that case the former may sue the latter for conjugal society,[3] and on the respondent's refusal to co-habit for a period of one year, allowed by the court, the court may dissolve the marriage[4] which may, moreover, be dissolved even without the *locus penetentiae* for a year, if the marriage was not consummated owing to the fact that either party was then *impubes*.[5] This Act has not the effect of widening the door for divorce, but merely prescribes and provides for a dissolution where —(*i*) either party is, after marriage, converted to Christianity, and (*ii*) the desertion or repudiation is solely due to such conversion. If the repudiation or desertion was then due to cruelty or adultery and not to conversion, the court cannot entertain a suit for dissolution under the Act.[6]

A dissolution under the Act does not affect the status of children.[7]

426. A Hindu marriage is a sacrament and, therefore, indissoluble by divorce[8] or otherwise upon the loss of caste by degradation or conversion of either party.[9] Where, therefore the wife sued her husband for divorce under S. 7 of the Indian Divorce Act,[10] and it appeared that the parties who were married as Hindus had afterwards become converted to Christianity, it was held that the Divorce Act only contemplated a monogamous marriage and did not apply to a marriage contracted in accordance with the Hindu rites.[11] In another case, the wife, who had been similarly married to her husband, embraced the Mahomedan religion and then married a Mahomedan. She was convicted of bigamy, it being held that the conversion of the wife to Mahomedanism did not have the effect of dissolving the tie of marriage, which continuing, she could not contract another valid marriage,[12] and her children of such marriage would be illegitimate, and she herself would be treated as an unchaste daughter, and as such, disqualified from inheriting her father's property.[13] In such case, her right cannot be saved by the *Lex*

(1) Act XXI of 1866.
(2) *Ib.*, S. 12.
(3) *Ib.*, Ss. 4, 5.
(4) *Ib.*, S. 16.
(5) *Ib.*, S. 18.
(6) *Ib.*, S. 25.
(7) *Ib.*, S. 27.
(8) S. 26.
(9) *Administrator-General* v. *Anandachari*, 9 M. 466; *Government* v. *Ganga*, 4 B. 330; *Ram Kumari* (*In re*) 18 C. 264; *Dhan Bibi* v. *Lalon Bibi*, 27 C. 801; *Sundari* v. *Pitambari*, 32 C. 871 (873); *Imam Din* v. *Hassan Bibi*, (1906) P.R. 85; *Jamna Devi* v. *Mul Raj*, (1907) P. R. 49.
(10) Act IV of 1869.
(11) *Magania* v. *Prem Singh*, 8 Bom. L.R. 856, following *Thapita* v. *Thapita*, 17 M. 235 F.B.
(12) *Government* v. *Ganga*, 4 B. 330, followed in *Ram Kumari* (*In re*), 18 C. 264, dissenting from *contra* in *Rahmed Bibi* v. *Rokeya Bibi*, 1 Norton's L.C. 12; *Administrator-General* v. *Anandachari*, 9 M. 467; *Millard* (*In re*), 10 M. 218; *Sundari* v. *Pitambari*, 32 C. 871; *Magania* v. *Prem Singh*, 8 Bom.L.R. 856.
(13) *Sundari* v. *Pitambari*, 32 C. 871.

Loci Act,[1] because she had not lost her right by reason of her renouncing or being excluded from the Hindu communion, but by reason of her invalid marriage.

Mutual rights and obligations upon marriage.

27. The following rights and obligations arise upon marriage:—

(*a*) *As to the husband*—

1. He is his wife's natural guardian during her minority;[2]
2. He is entitled to her conjugal society;[3]
3. He is bound to maintain her;[4]
4. He cannot divorce her,[5] unless he is allowed to do so by custom;[6]
5. Should she predecease him, he is entitled to inherit her property.[7]
6. He has no right over her stridhan, which he may, however, use in a time of great distress.[8]

(*b*) *As to the wife*—

1. She is bound to live with her husband, unless he is guilty of cruelty or misconduct;[9]
2. She is entitled to retain her stridhan as her separate property;[10]
3. She is entitled to sue, and is liable to be sued, in respect of her stridhan, as if she were a *feme sole*;[11]
4. She cannot divorce her husband, unless she is allowed to do so by custom;[12]
5. Should her husband predecease her, she is entitled to inherit his separate property; otherwise she has the right of maintenance and residence in the family dwelling-house;[13]
6. She has no right over her husband's property during his lifetime beyond the right of maintenance and residence.[14]

Husband's patria potestas.

427. **Husband's Rights upon Marriage.**—On the conclusion of the essential ceremony of marriage, the wife absolutely passes into the *potestas* of her husband, and her marriage with him becomes absolute and for ever indissoluble.

428. The husband is the lawful guardian of his wife, and is entitled to the enjoyment of her person and society. If she refuses, he can maintain a suit for the restitution of conjugal rights. But against this suit she may defend herself on any of the following grounds, namely: that the husband was suffering from some loathsome disease

(1) XXI of 1850.
(2) Manu, IX-2, 3; *Navantilal* v. *Purushottam*, 50 B. 268, S. 82, *post* and Comm.
(3) *Jogendra Nandini* v. *Hurry Doss*, 5 C. 500; *Dadaji* v. *Rukhmabai*, 9 B. 529; *Binda* v. *Kausila*, 13 A. 126.
(4) Dig. Bk. V. ch. VI, p. 404, cited and followed in *Savitri Bai* v. *Lukmi Bai*, 2 B. 592; *see* S. 93, *post*.
(5) *See* S. 26.
(6) *Ib.*, *E.* v. *Uni*, 6 B. 126 (128); *Bai Vigli* v. *Nansa Nagr*, 10 B. 152 (154); *Kudomi* v. *Jotiram*, 3 C. 304 (306); *Janaki* v. *Q. E.*, 19 C. 627 (628. 629); *Shankaralingam* v. *Subban*, 17 M. 479.
(7) *See* Ch. on "Inheritance", *post*.
(8) Mit. Ch. II-xi, 32, 33.
(9) *See* foot-note (3) above.
(10) *See* "Stridhan", *post*.
(11) *Ib.*
(12) *See* foot-note (6) above.
(13) *See* "Inheritance", *post*.
(14) *See* S. 93, *post*.

such as syphilis or leprosy,[1] or that he was outraging her wifely feelings by keeping a mistress in the house,[2] or was guilty of habitual cruelty towards her, or apart from cruelty, was guilty of a grave matrimonial offence[3] or had become converted to an alien faith,[4] and thereby or otherwise forfeited his caste,[5] though on the latter point the courts have struck a discordant note.[6] Even where the court decrees possession, it may make its decree conditional, imposing upon the husband the security of his wife's safety, health and welfare,[7] though such a condition cannot include one that the husband must provide his wife with a separate house and separate maintenance.[8] He has no right over his wife's *stridhan,* over which his wife has complete mastery, though the husband is allowed to draw upon it in a moment of pressing necessity,[9] but it is apprehended that he can no longer be permitted to do so without her consent; in any case, till he has actually used it, the ownership remains with the wife.[10] (§ **445**).

429. Wife's Right on Marriage.—Upon her marriage, the wife not only leaves her parental home but severs her connection with it as completely as if she had never been born therein. She abandons the gotra of her parents and passes into, and assumes, that of her husband in whose family she is received as a daughter,[11] but in which she has no individuality apart from her husband. She is, however, entitled to separate ownership of her wedding gifts.[12] Apart from custom, she cannot divorce her husband, or be divorced by him for any cause or misconduct. The tie is inseverable and cannot be broken owing to her adultery,[13] prostitution and consequent degradation from the caste,[14] or ex-communication;[15] and even conversion to an alien faith has therefrom not effect.[16] But the husband may desert such a faithless wife,[17]

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(1) *Premkumar* v. *Bhika,* 5 B.H.C. R. (A.C.) 209.

(2) *Lala Gobind* v. *Dowlut,* 14 W. R. 451; *Jagendra Nundini* v. *Hurry Dass,* 5 C. 500; *Dular Koeri* v. *Dwarka Nath,* 32 C. 234; *Dular Koeri* v. *Dwarka Nath,* 34 C. 971.

(3) Manu, IX-79; *Dular Koeri* v. *Dwarka Nath,* 34 C. 971 (980-985), following *Mackenzie* v. *Mackenzie,* (1895) A.C. 384; *Russel* v. *Russell,* (1897) A. C. 397; *Yamna Bai* v. *Narayan,* 1 B. 164; *Binda* v. *Kaunsilia,* 13 A. 126; *Sabadur* v. *Rajwanta,* 27 A. 96.

(4) *Muchoo* v. *Arzoon,* 5 W.R. 235.

(5) *Paigi* v. *Sheonarain,* 8 A. 78; *Bai Jina* v. *Kharwa,* 31 B. 366; *Surjomoni* v. *Kalikanta,* 28 C. 37.

(6) *Binda* v. *Kaunsilia,* 13 A. 126; *Sobadur* v. *Rajwanta,* 27 A. 96; *Jamna* v. *Mulraj,* (1907) P.R. 49.

(7) *Takait* v. *Basanta,* 28 C. 751; *Jamna* v. *Mulraj,* (1907) P.R. 49; *Moonshee, Buzloor Raheem* v. *Shamsoo Nissa,* 11 M.I.A. 607.

(8) *Chimanlal* v. *Narmada,* 4 Bom. L. R. 820.

(9) Mit. Ch II-xi 32, 33; Dayabhag, IV-i-19-25; *Tukaram* v. *Gunaji,* 8 B.H.C.R. (A.C.) 129; *Mohima Chander* v. *Durga Monee,* 23 W.R. 184.

(10) *Nammalwar* v. *Thayarammal,* 50 M. 941.

(11) *Lallubai* v. *Cassibai,* 5 B. 110 (118) P.C.

(12) *See* "Stridhan" *post.*

(13) *Subbaraya* v. *Ramasami,* 23 M. 171 (176, 178); *Narain Das* v. *Tirlok,* 29 A. 4; *Sundari* v. *Nemye,* 6 C.L.J. 872; *Hiralal* v. *Tripura,* 40 C. 650, F.B.

(14) *Hiralal* v. *Tripura,* 40 C. 650 F. B.; *Narumayya* v. *Tiruvangadathan,* 24 M.L.J. 223; *contra* in *Bhutnath* v. *Secretary of State,* 10 C.W.N. 1085.

(15) *Q.* v. *Marimuthu,* 4 M. 243; *Nandi,* 1 L. 440; *Abdul Karim* v. *Abdul Razak,* 2 O.L.J.: 28 I.C. 201.

(16) Manu, IX-46; Vashishth, XXVIII, 2-3; *Bisheshur* v. *Mata Gholam,* 2 N.W. P.H.C.R. 300; *Government* v. *Ganga,* 4 B. 330 (332); *Gobardhan* v. *Jasadamoni,* 18 C. 252; *Ramakumari (In re), Ib.,* 264; *Sundari* v. *Pitambari,* 32 C. 871; *Administrator-General* v. *Anandachari,* 9 M. 466; *Millard (In re),* 10 M. 218; *Thapita* v. *Thapita,* 17 M. 235; *Budensha* v. *Fatmabi,* 26 M.L.J. 260, *contra* in *Sinnammal* v. *Administrator-General,* 8 M. 169, dissented from.

(17) 2 Dig., S. 80.

refusing to provide her with even a starvation allowance, unless she is penitent,[1] though the Smritikars admit her right to a bare sustenance.[2] But this is merely a moral injunction and does not create any legal obligation.

430. The wife may claim separate maintenance for any just cause against her husband, if, for instance, he was guilty of cruelty to her[3] or lived in adultery,[4] with a low caste mistress and thereby affronted her modesty,[5] or was suffering from insanity, incurable or loathsome disease,[6] or became a convert to an alien faith, such as Mahomedanism or Christianity.[7] The wife may defend herself for any libel upon her by her husband.[8] If improperly deserted, she may maintain a suit for the restitution of conjugal rights against her husband.[9]

431. Restitution of Conjugal Rights.—The husband by his *jus connubi* is entitled to the society and service of his wife, and is entitled to the custody of her person. He is not bound by any agreement to the contrary,[10] unless so bound by his tribal custom.[11] Hindu Law does not prescribe for a suit for the restitution of conjugal rights; but it is now settled that such suit is maintainable,[12] and that it is not a condition precedent to its maintainability that there should have been an antecedent demand of delivery of the wife.[13] The courts, however, do not entertain suits for possession of the recalcitrant wife or of the husband, and the only relief available to an aggrieved spouse is that implied in a decree for the restitution of conjugal rights.[14] Even this cannot be decreed to him unless the wife has attained puberty.[15] The wife may resist such a suit by the same defences which entitle her to live apart from her husband.

432. On marriage, the husband becomes entitled to the custody and care of his wife, and he may assert his right by either getting himself

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(1) Mit., XI-49; *Valu* v. *Gangu*, 7 B. 84; *Vishnu* v. *Manjamma*, 9 B. 108; *Subbayya* v. *Bhawani*, 24 I.C. (M.) 390; *contra* in *Honamman* v. *Timannbhat*, 7 B. 84.

(2) Mit., III-297.

(3) *Bhawani* v. *Subhagi*, 12 A.L.J. 995; *Yamuna* v. *Narayan*, 1 B. 164 (173); *Sidlingapa* v. *Sidava*, 2 B. 634; *Matangini* v. *Gogendra*, 19 C. 84; *Sitabai* v. *Ramachandra*, 12 Bom. L. R. 373.

(4) *Gantapalli* v. *Gantapalli*, 20 M. 470.

(5) *Administrator-General* v. *Anandachari*, 9 M. 466 (470); *Dular* v. *Dwarkanath*, 32 C. 284 (289); *Dular* v. *Dwarkanath*, 34 C. 971.

(6) *Bai Premkuar* v. *Bhika*, 5 B. H. C.R. (A.C.) 209.

(7) *Muchoo* v. *Arzoon*, 5 W.R. 235; *Administrator-General* v. *Anandachari*, 9 M. 466 (470); *Paigi* v. *Sheonarain*, 8 A. 78.

(8) S. 499, I.P.C.; *contra* in *Deokoonwar* v. *Umba Ram*, 1 B. 370 which is no longer law.

(9) *Binda* v. *Kaunsillia*, 13 A. 126; *Yamuna Bai* v. *Narayan*, 1 B. 164 (166, 167); *Dadaji* v. *Rukma*, 10 B. 301 (310, 311); *Kaseeram* v. *Gendhenee*, 23 W.R. 178; *Jogendra* v. *Hurry Doss*, 5 C. 500 (505); *Surjyamoni* v. *Kali Kanta*, 28 C. 37 (42, 44).

(10) *Tekait* v. *Basanta*, 28 C. 751; *contra* in *Kawasji* v. *Sirinbai*, 22 B. 279; *Paigi* v. *Sheonarain*, 8 A. 78 (79, 80).

(11) *Lenga* v. *Penguri*, 20 C.W.N. 406 : 30 I.C. 796.

(12) *Jugendro Nundini* v. *Hurry Doss*, 5 C. 500; *Dadaji* v. *Rukhmabai*, 9 B. 529; *Binda* v. *Kaunsillia*, 13 A. 126 (139).

(13) *Binda* v. *Kaunsillia*, 13 A. 126 (145); *contra* in England under the statute R. 175; *Field* v. *Field*, P.D. 26; *Smith* v. *Smith*, 15 P.D. 47.

(14) *Chotun* v. *Ameer Chund*, 6 W.R. 105 (107); *Koobur* v. *Jan Khansama*, 8 W.R. 467; *Metaram* v. *Thanjooram*, 9 W.R. 552; *Gotha Ram* v. *Moobita*, 23 W.R. 179. *See* as to execution O. 21, R. 32, C.P.C.

(15) *Santosh* v. *Gera*, 23 W.R. 22; *Dadaji* v. *Rukmabai*, 10 B. 301 (311); *Arumuga* v. *Viraraghava*, 24 M. 255.

appointed as the certificated guardian of his wife[1] or by maintaining a suit for the restitution of conjugal rights. He cannot sue for possession, for though the husband is entitled to the possession of his wife, he cannot maintain a suit therefor, as the courts do not regard the wife as a chattel but as a human being upon whom no further coercion is justifiable than what the law considers it necessary to exert in execution of a decree for the restitution of conjugal rights, that is, by ordering the wife to return to her husband[2] and if she refuses, then the court could formerly detain her in the civil jail for six weeks,[3] or attach her property, or both,[4] but detention is now no longer possible and the only relief available to the aggrieved husband is the seizure of her property (§ **444**). The court is not bound to decree restitution merely because the husband claims it. It has power to refuse that relief on a case being made out[5] which must, however, amount to some offence of a matrimonial nature such as would support a decree for judicial separation,[6] and it may qualify its decree by imposing terms on the husband[7] as that the husband should provide the wife with a suitable residence away from that in which the husband has kept his mistress,[8] or that the decree is subject to the husband being restored to caste.[9] In a case where the wife had gone wrong, and had in consequence been put out of caste, the plaintiff undertook to get her re-admitted into the caste, but the court considered her re-admission necessary before any decree could be passed for restitution.[10] In such a suit if the validity of the marriage is disputed, it is not enough to find that the marriage took place, leaving it to be presumed that the rites and ceremonies necessary to constitute a legal marriage in the particular case were performed. The court must find specifically what those rites and ceremonies are, and whether they were performed.[11]

433. The minority of the husband is no ground for refusing restitution[12] since minority does not disqualify the husband from being the lawful guardian of his minor wife in preference to her parents,[13] though the court will not decree restitution, unless the wife has attained puberty.[14] If the wife is removed from his custody, the husband may apply to the court under S. 25 of the Guardians and Wards Act for its resumption, and the court will order it if it will be for the welfare of the ward. The husband may obtain an order of the nature of *habeas*

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(1) Guardians and Wards Act (Act VII of 1890), S. 21.

(2) O. XXI, R. 32, C.P.C.

(3) *Ib.*, 58 (*b*).

(4) O. XXI, R. 32 (1), C.P.C.

(5) *Surjyamoni* v. *Kali Kanta*, 28 C. 37 (46, 47). But this must amount to a matrimonial offence upon which the English Courts would refuse relief.—*Ib.*, p. 43; *Binda* v. *Kaunsillia*, 13 A. 126; *Sahadur* v. *Rajwanta*, 27 A. 96. (The fact that husband is out of caste is no ground.) In case of non-attainment of puberty; *Suntosh* v. *Geru*, 23 W.R. 22.

(6) Dissenting from *contra* in *Paigi* v. *Sheonarain*, 8 A. 73.

(7) *Bazloor* v. *Shumsoonissa*, 11 M. I.A. 551 (615); *Paigi* v. *Sheonarain*, 8 A. 78; *Jogendra Nundini* v. *Hurry Dass*, 5 C. 500.

(8) *Jogendra Nundini* v. *Hurry Dass*, 5 C. 500 (508).

(9) *Paigi* v. *Sheonarain*, 8 A. 78.

(10) *Surjyamoni* v. *Kalikanta*, 28 C. 34 (47).

(11) *Surjyamoni* v. *Kalikanta*, 28 C. 34 (47, 50).

(12) Guardians and Wards Act (VIII of 1890), S. 21.

(13) *Ib.*, Ss. 19, 41 (*d*); *Kaseeram* v. *Gendhenee*, 23 W.R. 178; *Dhurnidhur* (*In re*), 17 C. 298; *Surjyamoni* v. *Kalikanta*, 28 C. 37 (45).

(14) *Arumuga* v. *Viraraghava*, 24 M. 255.

corpus if his wife resides anywhere within the original jurisdiction of the presidency towns of Calcutta, Bombay and Madras.[1]

Suit for Damages.

434. The husband can maintain a suit for damages against any one restraining his wife. Every person who receives a married woman into his house, and suffers her to continue there, after he has received notice from the husband not to harbour her, is liable to an action for damages unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has by some insult or ill-treatment compelled her to leave him.[2] As a party wronged, the husband may recover damages against a person committing adultery with his wife.[3]

435. The measure of damages depends on the deprivation suffered by the husband of his wife's society and affection, the loss to him of his wife's services and assistance in domestic affairs, and the social injury which he is likely to incur from the insult and dishonour which the adulterer has inflicted upon him, against which the court has to weigh the conduct of the husband towards his wife and the adulterer, with a view to judging whether or not he has contributed to the mischief of which he complains. The ability of the adulterer to pay damages is not generally to be taken into account.[4]

436. Refusal of Restitution.—The circumstances which justify the court in the refusal of the restitution of conjugal rights are not peculiar to Hindu Law, for they generally follow the general principle which the courts apply to the enforcement of the marital rights.

437. The cases decided so far may be grouped under—

(*i*) cruelty proper, that is where the wife alleges ill-treatment coupled with personal violence;

(*ii*) where apart from personal violence, the husband's conduct disqualifies him for restitution; and

(*iii*) where his suit is not for the *bona fide* purpose of enforcing his marital rights.

(i) Cases of Cruelty.

438. The term "cruelty," justifying the wife's desertion, is the same in this country as in England,[5] where the term "legal cruelty" includes not only personal violence of such a character as to endanger personal health or safety, but also reasonable apprehension of it.[6] Her constant ill-treatment,[7] wrongful confinement and deprivation to her of the ordinary

(1) Cr. P. C., S. 491.

(2) Addison on Torts, 802, cited per Melville, J., in *Yamunabai* v. *Narayan*, 1 B. 164 (174, 175).

(3) *Soodasun* v. *Lakenath*, Mont. 619.

(4) *Per* Phear, J., in *Kelly* v. *Kelly*, 3 B.L.R. (O.C.) 67 (69).

(5) *Buzloor* v. *Shamsoonnissa*, 11 M. I.A. 551 (611), cited and followed in *Dular Koer* v. *Dwarkanath*, 34 C. 971 (976, 977); *Binda* v. *Kaunsilia*, 13 A. 126 (159); *Husaini* v. *Rustam*, 29 A. 222; *Yamunabai* v. *Narayan*, 1 B. 164 (174); *Sitabai* v. *Ramchand Rao*, 12 Bom.L.R. 373 (377).

(6) *Yamuna Bai* v. *Narayan*, 1 B. 164 (174); *Jogendra* v. *Hurry Das*, 5 C. 500; *Sitanath* v. *Haimabutty*, 24 W. R. 377.

(7) *Ib.*, p. 172, citing *Kelly* v. *Kelly*, 39 L.J. 59, Mat. Cas.; to the same effect, *Dular Koer* v. *Dwarka Nath*, 34 C. 971 (978).

necessities of life, such as food and clothing[1] would constitute legal cruelty. The term is now more liberally interpreted as regards the wife, and anything done to prejudice her health is held sufficient to constitute legal cruelty.[2] But such cruelty must amount to a habit since an isolated act of unkindness or cruelty would be insufficient.[3] It is in fact impossible to enumerate all the acts of illtreatment and neglect which, due regard being had to the position of the parties and the circumstances of each case, the court would regard as sufficient to constitute legal cruelty within the meaning of law.

439. The fact that the husband had been guilty of disgraceful conduct wounding her feeling of dignity was held sufficient to amount to such cruelty, which cannot be atoned by justification, since incompatibility of temperament is the originating cause of many such cruelties, though their condonation is taken into account as a defence. But condonation cannot be presumed from the wife's mere continuing to live with her husband in spite of her ill-treatment. The relief given to the suffering wife must be suitable and adequate, and for this purpose the husband may be put upon terms.[4]

(ii) Husband's Misconduct.

440. Apart from physical injury, the courts recognize the force of legal cruelty apprehended from the fact that the husband was suffering from insanity,[5] or any loathsome disease, such as, ulcerous leprosy,[6] or syphilis,[7] but not impotence[8] or given to abominable practices such as sodomy or bestiality.[9] His immorality such as that the husband was living in adultery with a low caste woman has been held to constitute legal cruelty.[10] But the mere keeping of a mistress is held to be insufficient, as the practice of concubinage is common in this country,[11] and concubines have a legal right to maintenance.[12]

(iii) Mala Fide Suit.

441. The court will not decree restitution where the husband with a wife living had married under a misrepresentation that he was a bachelor,[13] or where he

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(1) *Bhawani* v. *Subbagi*, 12 A.L.J. 905.

(2) *Jeaps* v. *Jeaps*, 89 L. J. 74; *Thompson* v. *Thompson*, 85 L.J. 172 (adultery of husband with servants in the house held to amount to legal cruelty). So his conviction for indecent assault was held to amount to legal cruelty by causing a breakdown of her health by reason of the disgrace and shock arising out of his conviction, *Coffey* v. *Coffey*, (1898) p. 169.

(3) *Sitanath* v. *Haimabutty*, 24 W.R. 377.

(4) *Bulzoor* v. *Shumsoonissa*, 11 M. I.A. 551 (611), cited and followed in *Dular Koer* v. *Dwarka Nath*, 34 C. 971 (976, 977); *Binda* v. *Kaunsilia*, 13 A. 126 (159); *Husaini* v. *Rustam*, 29 A. 222.

(5) *Binda* v. *Kaunsillia*, 13 A. 126 (155); *Hall* v. *Hall*, 3 S.W. & Tr. 347.

(6) *Shinappaya* v. *Rajamma*, 45 M. 812.

(7) *Premkuvar* v. *Bhika*, 5 B.H.C. R. (A.C.) 209; *Yamuna Bai* v. *Narayan*, 1 B. 164 (173).

(8) *Purushotam Das* v. *Moni*, 21 B. 610; *contra* Devala, cited 2 Dig. 470; but ancient authorities which recognized Niyog do not regard impotency as a disqualification to the exercise of marital rights.

(9) *Bromley* v. *Bromley*, 2 Add. 158-*n*.

(10) *Paigi* v. *Sheonarain*, 8 A. 78 (81); *Dular Koer* v. *Dwarkanath*, 32 C. 234 (239); *Dular Koer* v. *Dwarka Nath*, 34 C. 971.

(11) *Gantapalli* v. *Gantapalli*, 20 M. 470 (474-*n*).

(12) *Iingareddi* v. *Lakshmanwa*, 26 B. 163; *Ramanarasu* v. *Buchamma*, 23 M. 282 (291).

(13) *Rukmani Ammal* v. *Chari*, (1935) M. 616.

sues for an ulterior purpose, as where, being indebted to the wife, who had obtained a decree against him, he sued for restitution with a view to coerce her into relinquishing her claim,[1] or to deliver to him some of her property.[2] So the court refused restitution where the husband had filed his suit by way of retaliation of the suit filed by the wife against his father in which he falsely accused his wife of immorality.[3]

442. A suit for the restitution of conjugal rights is a suit of the nature of specific performance and the grant of that relief is, therefore, discretionary.[4] The procedure for the enforcement of a decree for restitution of conjugal rights by the imprisonment of the wife was abolished by the Civil Procedure (Amendment) Act, 1923[5] which has amended O. XXI, r. 33 of the Code of Civil Procedure to this extent. Similarly, in England, imprisonment for non-compliance with the decree formerly awarded by the Ecclesiastical Courts[6] was abolished by a Statute of 1884[7] and the only relief available against the recalcitrant party is by a suit for judicial separation.[8] As this relief is inapplicable to a Hindu, the one further step necessary to bring the Indian law into line with that law is to legalise the institution of such suits, without which, however, the wife is free to live apart from her husband, though it might imperil her maintenance, and not even that if she was impelled to adopt that course by his cruelty.

443. Limitation.—A suit for restitution must be instituted within six years from the time when the right to sue accrues.[9] Such right would arise when there was a demand for and a refusal of cohabitation, but this is not necessary for the plaintiff's cause of action,[10] which for the purpose of jurisdiction is deemed to arise at the husband's house.[11]

444. The wife's claim to maintenance may be enforced by a suit under the common law, or it may be enforced by a petition under S. 488 of the Code of Criminal Procedure. The provisions of the two may to a certain extent overlap, but S. 488 provides a summary remedy limited as to the amount awardable, but it does not bar the wife's right of suit, though in decreeing maintenance, the Civil Court will no doubt take into account the amount already payable to the wife under that section.[12]

[For further information on the subject *see* Chapter VII, Maintenance.]

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(1) *Buzloor* v. *Shumsoonissa*, 11 M. I.A. 551.
(2) *Khurshedi* v. *Khurshedi*, 12 A.L. J. 1065 (1072).
(3) *Husain* v. *Rustam*, 29 A. 222.
(4) *Bai Jivi* v. *Narsingh*, 51 B. 329, following *Mackenzie* v. *Mackenzie*, (1895) A.C. 384.
(5) S. 3 (*g*), Act XXIX of 1923.
(6) *Cherry* v. *Cherry*, 29 L.J. Mat. 141.
(7) Ss. 2-4, Matrimonial Clauses Act, 1884 (47 & 48 Vict. c. 68).
(8) *Leslie* v. *Leslie*, (1908) P. 99.
(9) Art. 120, Sch. I to the Limitation Act (IX of 1908); *Krishna* v. *Badamnal*, 34 M. 398; *Chotun* v. *Ameerchand*, 6 W.R. 105.
(10) *Binda* v. *Kaunsillia*, 13 A. 126 (139); *Fakirgauda* v. *Ganji*, 23 B. 307 (310); *Surjamoni* v. *Kalikanta*, 28 C. 46.
(11) *Lilitagar* v. *Suraj Bai*, 18 B. 316.
(12) Cf. *Kuppa* v. *Singaravelu*, 8 M. 325.

445. Husband's Right to Stridhan.—The Mitakshara permits the husband to use his wife's Stridhan in case of necessity:—

Clause (a) (6).

Mitakshara.—"In a famine, for the preservation of the family, or at a time when a religious duty must indispensably be performed, or in illness, or during restraint, or confinement in prison, or under corporal penalties, the husband being destitute of other funds and, therefore, taking his wife's property, is not liable to restore it. But, if he seize it in any other manner (or under other circustances) he must make it good."[1]

But even in case of pressing necessity as above, the husband must take his wife's consent, before he uses her stridhan.[2]

But this right is personal to him and cannot be availed of by his creditor or any other person whatsoever.[3] Nor can it be now enforced against the wife's consent (§ **428**).

28. (1) In a case relating to conjugal rights there must be, except as otherwise expressly provided, proof of the performance of marriage and its validity.[4]

Proof and Presumption of Marriage.

(2) In other cases marriage may be presumed from continuous cohabitation, conduct and repute;[5]

(3) Such presumption of marriage cannot be rebutted by mere proof of its improbability;[6]

(4) When the fact of marriage is proved, it will be presumed that it was performed—

(a) in the approved form,[7]

(b) with due ceremonies, and was otherwise a valid marriage[8] and that,

(c) it continued during the lifetime of either party.[9]

446. Analogous Law.—This is an important section, and all its clauses are amply supported by authorities.

(1) Mit. II-xi-32.

(2) *Nammalwar* v. *Thayarammal*, 50 M. 941.

(3) *Nammalwar* v. *Thayarammal*, 50 M. 941.

(4) S. 50, Ev. Act, *Surjyamoni* v. *Kalikanta*, 28 C. 37; *Smith*, 4 W.R. (Cr.) 3; 4 W.R. Cr. 10; *Arshad Ali*, 13 C.L.R. 125; *Pitambur*, 5 C. 566 F.B.; *Danesh* v. *Tafir*, 7 C.W.N. 143; *Basanta Kumar*, 26 C. 49; *Bhagu*, 17 Bom.L.R. 75; *Kallu*, 5 A. 233; *Dal Singh*, 20 A. 166; *Nasir Khan*, 36 A. 1; *Santok Singh*, (1898) A.W.N. 186; *Syed Munir*, 14 N.L.R. 28; and cases cited in Gour's Penal Law (5th Ed.), §§ 6046, 6047.

(5) S. 50, Ev. Act, ill. (*a*), *Ma Wun Di* v. *Ma Kin*, 35 C. 232 (240) P.C. (caution necessary); *Monji Lal* v. *Chandrabati*, 38 C. 700 (706, 707) P.C.; *Ghazanfer Ali* v. *Kaniz Fatima*, 32 A. 345 (350) P.C.; *Nath* v. *Bhag Singh*, (1910) P.W.R. 54 : 6 I.C. 661; *Ratan* v. *Nathu Singh*, 16 C.P.L.R. 85; *Sastry* v. *Sembecutty*, L.R. 6 A.C. 364; *Sivarama* v. *Veerappa*, 23 I.C. (M.) 828; *Lopez* v. *Lopez*, 12 C. 706 (732); *Lucas* v. *Lucas*, 32 C. 187 (191); *Bepin Behari* v. *Atul Krishna*, 17 C.W.N. 494.

(6) *Piers* v. *Piers*, 2 H.L.C. 331; *Morris* v. *Davies*, 5 Cl. & Fin. 163 (265); 47 P.R. 50; *Lopez* v. *Lopez*, 12 C. 706 (752); *Luchmi Koer* v. *Raghu Nath*, 27 C. 971 (978), P.C.; *Imambundi* v. *Matasuddi*, 15 C.L.J. 621 : 13 I.C. 678 : O. A. 35 M.L.J. 422 : 45 I.A. 73 (P.C.); *Monji Lal* v. *Chandrabati*, 38 C. 701 (706, 707) P.C.; *Bipin Behari* v. *Autul Krishna*, 15 I.C. 328.

(7) *Thakur Deyhee* v. *Rai Baluk Ram*, 11 M.I.A. 139 (175); *Gangaram* v. *Ballia*, (1876) B.P.J. 26 (29); *Kaser Bai* v. *Valab*, 4 B. 188 (197); *Gojaban* v. *Shabajirao*, 17 B. 114 (117); *Chunilal* v. *Surajram*, 33 B. 433 (437); *Jagannath* v. *Narayan*, 35 B. 354 (359); *Jadoonath* v. *Basunt Coomar*, 19 W. R. 264 (266); *Jagannath* v. *Ranjit*, 25 C. 354 (366); *Thayammal* v. *Annamalai*, 19 M. 35; *Authikesavalu* v. *Ramanujam*, 32 M. 512 (515, 516); *Gabriel* v. *Valliammaiammal*, 26 M.L.T. 348 : 53 I.C. 423; in *Jaikisondas* v. *Harkisondas*, 2 B. 9 (14) it is said to be matter of enquiry but this is no longer tenable.

(8) *Inderun* v. *Ramaswamy*, 13 M.I.A. 141 (158); *Brindobun* v. *Chundra Kurmokar*, 12 C. 140.

(9) *Bhima* v. *Dhulapa*, 7 Bom. L. R. 95.

447. **Principle.**—This section embodies an important principle. There is a presumption in favour of morality, and consequently, if it is found that a man and a woman have cohabited and passed as a married couple, law presumes marriage, if marriage between them was at all possible. For this purpose it will presume compliance with every detail necessary to legalize a marriage. The law is jealous of the honour and reputation of the home and the family, and it presumes in favour of marriage and against concubinage when a man and a woman have cohabited continuously.[1] The presumption of marriage is a presumption of a very special kind, much stronger than most presumptions. "The presumption of law is not lightly to be repelled. It is not to be lightly broken in upon or shaken by a mere balance of probability. The evidence for the purpose of shaking it must be strong, distinct, satisfactory and conclusive."[2]

448. A presumption in favour of marriage arises from mere cohabitation, conduct or repute. Marriage, being so presumed, it warrants another presumption in favour of the legitimacy of all children born in wedlock and within 280 days of the death of the husband or the dissolution of the marriage. This is proof by presumption; but legitimacy may be proved *aliunde* as where a child was born after 357 days of the husband's death, and at least 365 days from the last coitus, the court considered the prolonged period of gestation as unique, though not impossible, and decided against its legitimacy on the improbability supported as it was by other evidence.[3] (§ 469).

The other presumptions specified in clause (3) are consequential, and justified by the fact that a person going through the form of marriage is most unlikely to omit its ceremony.[4]

449. **Proof of Marriage and its Validity.**—In cases between the husband and wife, created by or in respect of rights arising out of the marriage relation, such as divorce, the restitution of conjugal rights and offences and wrongs committed in violation of the marriage vow, if the marriage is denied, it is incumbent on the party relying upon any right consequent thereon, to prove both the *factum* of marriage as also its validity by proof of the nature of the ceremonies performed and their legal or customary sufficiency.[5] This strictness of proof is justified by the nature of the rights involved and their dependence upon the legality of marriage; while in criminal cases, the sanctity which law attaches to the person of its subject requires that no one shall be condemned for violating any person's marital rights unless there was clear proof that he possessed those rights. The higher standard of proof required in such cases justifies the necessity for positive evidence, which as to the *factum*, may be furnished by the witnesses who were present at the marriage, or by the production of the register, or a certified copy, or of such other

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(1) *Per* Lord Lyndhurst in *Morris* v. *Davies*, 5 Cl. and F. 163 cited by Sir Barnes Peacock in *Sastry* v. *Sembecutty*, 6 A.C. 334 (372).

(2) *Sastry* v. *Sembucutty*, L.R. 6 A. C. 364.

(3) *Tikam Singh* v. *Dhan Kunwar*, 24 A. 433; *Palani* v. *Kuppuswami*, 13 M.L.W. 511.

(4) *Inderun* v. *Ramaswamy*, 13 M.I. A. 141 (158).

(5) S. 50, Evidence Act.

record as the law of a country or custom of a class may provide,[1] while its validity may be established by the examination of the caste punchas or of those whose evidence is otherwise relevant. The court will make no presumption when law requires proof of the fact by positive evidence. In cases affecting the liberty of third parties, law requires not only positive but also independent evidence and the evidence of the husband or of the wife that they were married is insufficient.[2]

450. But the presumption of marriage, though arising, is not so strong in an oriental country where open concubinage is not treated with the same degree of disfavour, as in Western countries.[3] But nonetheless, the presumption exists and cannot be rebutted by the mere proof of improbability. As Sir Barnes Peacock, delivering judgment of the Privy Council, observed: "The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive."[4] This was the case of one of the Tamil settlers in Ceylon, in which the Supreme Court had dismissed the suit of a woman who had claimed a share of her husband's estate as his widow. She had proved continuous cohabitation, but had failed to prove her marriage and given evidence of it, which showed that the witnesses had no fixed idea of the ceremonies of marriage, and it was proved that owing to disturbance some of the ceremonies had not been performed. It was contended that in the circumstances there could be no presumption of marriage, but the Privy Council held that the presumption was there, and that it could only be rebutted by the clearest and most satisfactory evidence which, in the case before them, was lacking.[5] In another case, their Lordships started with that presumption but held it rebutted by the description of the wife by the husband in his will in terms which precluded her marriage to him.[6] Except in cases previously mentioned, law presumes and presumes strongly in favour of marriage from the fact of continuous cohabitation, conduct and repute.[7] In cases affecting the legitimacy of children, this presumption is very strong indeed, though where there are no children and the validity of the marriage is alleged, the presumption is yet strong, though not as strong as in the other case.[8] The court will make every possible presumption against bastardy, presuming not only the marriage but due compliance with all the forms and ceremonies of marriage, and the removal of all impediments, if any, existing in the way of marriage.

Cl. (2). Legal Presumption of Marriage when made.

451. The presumption that a Hindu marriage is in a Brahma form is made upon similar considerations, the presumption being founded upon what ought to be and is, ordinarily, done. It has already been seen that of the eight recognised forms

Cl. (4) (a). Presumption of Brahma Marriage.

(1) *Pitambar*, 5 C. 566 F.B.; *Kallu* 5 A. 233.

(2) *See* Gour's Penal Law (5th Ed.), §§ 6046-6047.

(3) *Ma Wun Di* v. *Ma Kie*, 35 C. 232 (240, 241) P.C.

(4) *Sastry* v. *Sembecutty*, L.R. 6 A. C. 364 (371).

(5) *Sastry* v. *Sembecutty*, L.R. 6 A. C. 364 (370-372) following *Piers* v. *Piers*, 2 H.L.C. 331; *Morris* v. *Davies*, 5 Cl. and F. 163 : 7 E.R. 365 (383); *De Thoren* v. *Attorney-General*, App. Cas. 686.

(6) *Luchmi Koer* v. *Raghu Nath*, 27 C. 971 (977-979) P.C.

(7) *Per* Sir Barnes Peacock in *Sastry* v. *Sembecutty*, L.R. 6 A.C. 364 (371); *Bipin Bihari* v. *Atul Krishna*, 17 C.W.N. 494: 15 I. C. 329; *Inder Singh* v. *Thakur Singh*, 2 L. 207 (216).

(8) Re *Monghlik's Estate*, (1878) Ir. L.R. 421.

of marriages, the two forms now extant are the *Brahma* and the *Asur* marriages, which are open to all Hindus, the Shudra being equally free to contract a Brahma marriage,[1] and a twice-born being equally free to contract an *Asur*.[2] In fact the form of marriage nowadays is not so much determined by the caste of the contracting parties as by the natural law of supply and demand. And the courts accordingly view the question from the standpoint of the caste. Even the payment of some consideration by the bridegroom does not necessarily have the effect of converting the presumed *Brahm* marriage into an *Asur* marriage, unless the payment was a bride-price and the parties to the marriage and their community viewed it in that light.[3]

Cl. (4) (b). Presumption of due ceremonies.

452. The presumption of marriage necessarily raises the presumption of the due performance of all its essential ceremonies. This presumption is justified by the fact that no one intending to marry would go through the form without its ceremonies, if he knew that their non-observance would invalidate the marriage.[4] It is a strong legal presumption and one which cannot be rebutted by any evidence which merely raises a counter-presumption, that is, evidence which is merely inferential and does not directly attack the marriage on any of its essential ceremonies. To be of any value, such evidence must be clear, cogent and conclusive.[5] In the Breadalbane Peerage case, the House of Lords went so far as to hold that the presumption was one which not only might, but ought to be drawn from cohabitation with habit and repute, although the cohabitation commenced with a ceremony which was not only invalid by reason of the real husband of the woman being alive at the time, but was known by both parties to be so.[6] Such presumption of marriage was made even between a Pariah and Burmese woman.[7]

Cl. (4) (c). Continuance Presumed.

453. Since it is not usual for married persons to divorce each other, there is naturally a presumption in favour of the continuance of a marriage. Such presumption is all the greater in the case of a Hindu whose marriage is normally indissoluble. In monogamist countries, the fact that a person was re-married would necessarily carry with it the presumption of dissolution of the previous marriage by death or divorce. But there is no room for any such presumption in the case of Hindus.

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(1) *Sivarama* v. *Bagawan*, (1859) M. S.D. 44; *Jaikissondas* v. *Harkisondas*, 2 B. 9 (13, 14).

(2) *Nundalal* v. *Tapeedas*, 1 Borr. 14; *Keshow* v. *Naor*, 2 Borr. 194; *Vijiarangam* v. *Lakshuman*, 8 B.H.C.R (O.C.) 244; *Visvanathan* v. *Saminathan*, 13 M. 83.

(3) *Gabriel* v. *Valliammaiammal*, 26 M.L.T. 348 : 53 I.C. 423; *Kailasnatha* v. *Parasakthi*, 58 M. 488.

(4) *Inderun* v. *Ramaswamy*, 13 M.I. A. 141 (158).

(5) *Henries Peerage Claim*, L. R. 2 H.L. (Sc.) 258 (268).

(6) *Piers* v. *Piers*, 2 H.L.C. 331; *Morris* v. *Davies*, 25 Cl. and F. 365 (383).

(7) *Breadalbane's Case*, L.R. 2 H.L. (Sc.) 269, cited in *Sastry* v. *Sembucutty*, 6 A.C. 364 (372). (The report of the case cited, however, does not contain the passage quoted by their Lordships who must have taken it from the Journal of the House of Lords.)

Statutory Civil Marriage.

29. It is lawful for a Hindu to marry a person who professes any of the following religions, that is to say, the Hindu, Buddhist, Sikh, Jain[1] or Christian[2] religion.

Statutory Civil Marriage when valid.

454. **Analogous Law.**—The Indian Christian Marriage Act permits the marriage of a Christian with a non-Christian,[3] and the Special Marriage (Amendment) Act legalizes inter-marriages between Hindus, Buddhists, Sikhs and Jains irrespective of caste.[4] It is also possible for a Hindu to contract a marriage under the unamended provisions of the Special Marriage Act,[5] in which case, however, the parties have to subscribe to a declaration that neither of them professes the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or the Jain religion. It has been held in Calcutta[6] that a Hindu married under the Act, even after this declaration, does not cease to be a Hindu, and a large number of persons belonging to the reformed sects of Hinduism, such as Sikhism, Brahmoism or the Arya Samaj have availed themselves of its provisions. Those so married retain all the rights and are subject to all the disabilities of Hindu Law.

455. Over and beyond such marriages it is possible for a Hindu to contract a purely civil marriage, but at present he can do so only outside the territorial waters of India, since no provision exists in the Indian Law for contracting civil marriages as such, within the ambit of its jurisdiction, where the only marriages possible are those already described.

456. The rights and disabilities arising out of the locally permissible marriages are follows:—

I. *Under the Special Marriage (Unamended) Act.*—

(1) The parties, if previously Hindus, continue to be so in spite of the declaration made that they are non-Hindus.

(2) Their personal law continues to govern them with the result that females suffer from the special disabilities placed upon them by that law.

II. *Under the Special Marriage (Amendment) Act.*—

(1) The parties have not to subscribe to a declaration that they do not profess the Hindu, Buddhist, Sikh or Jaina religion.

(2) Upon their marriage they become at once vested with the following rights:—

(*a*) Their previous rights are unaffected to the extent provided in the Caste Disabilities Removal Act.[7]

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(1) Special Marriage (Amendment) Act (XXX of 1923), S. 3 and other Acts cited *post comm.*

(2) Indian Christian Marriage Act (XV of 1872), S. 4.

(3) S. 4, Indian Christian Marriage Act (XV of 1872).

(4) S. 3, Act XXX of 1923.

(5) Act III of 1872.

(6) *Jnanendra Nath Roy (In re)*, 49 C. 1069; *Vidyagavri* v. *Narandas*, 30 Bom.L.R. 139; (1929) B. 74.

(7) Act XXI of 1850.

(*b*) They no longer possess the right of adoption. And if the person so marrying is an adopted son, his adoptive father may, if he so chooses, make another adoption.

(*c*) Such marriage has the effect of dissolving the joint family.

(*d*) Succession to their property and to the property of their issue is regulated by the Indian Succession Act.[1]

III. *Under the Indian Christian Marriage Act.*—

(1) Persons so marrying may have their marriages solemnized by a clergyman, or in the presence of a Marriage Registrar.[2]

(2) The rights and disabilities therefrom are not statutorily defined, but he would presumably continue to be subject to his personal law.

IV. *Under the Civil Marriage Law.*—

(1) Such marriages can only take place outside the territorial waters of India.

(2) The rights and disabilities therefrom are not statutorily defined, but so far as marital rights and obligations are concerned, parties remain subject to English Law.

457. It will thus be seen that the Special Marriage Amending Act has created a paradox. If the Hindu declares himself to be a non-Hindu and marries, he remains subject to Hindu Law. If he does not so declare, he ceases to be subject to Hindu Law, giving rise to a conundrum: When is a Hindu a non-Hindu? The answer is: When he marries as a Hindu under the Special Marriage (Amendment) Act.

But the amendment was made to enlarge the rights of persons by giving them the advantage of the English Law of succession, and at the same time removing the incubus of joint family obligations.

Saving of other marriages.

30. Nothing herein affects a marriage otherwise valid under any law or custom then in force.

Illustrations.

(*a*) *A*, a Brahmin, marries a Mahomedan lady before the Registrar of Civil Marriages in London. The marriage is valid.

(*b*) *A*, a Kshatriya, marries a Brahmin lady under the Special Marriage Act (as amended by Act XXX of 1923). The marriage is valid.

(*c*) *A*, a Hindu, marries a Christian in British India. The marriage is valid, being permitted by S. 4 of the Indian Christian Marriage Act (XIV of 1872).

(*d*) *A*, a Hindu, marries a Mahomedan in Hyderabad. The marriage is valid, being permitted by local custom.

Customary Inter-marriages.

458. Though the inter-marriages between Hindus and Mahomedans are not statutorily permissible, still they are customary in Hyderabad, while intercaste marriages between Brahmins and Kshatriyas

(1) But this Act is not retrospective. *Vidyagavri* v. *Naran Das*, 30 Bom.L.R. 139: (1929) B. **74.**

(2) S. 5, Indian Christian Marriage Act (XV of 1872).

are customary in Nepal and the Terai. Such marriages, if legal in the lity where they are contracted, hold good everywhere else in India.

459. The customary restrictions against marriage outside one's caste are purely personal and territorial, since a Hindu has the choice of marrying in any of the following ways, namely:—

(1) Marriage limited to the caste, except in the case of Shudras who are free to marry other Shudras irrespective of caste: such marriage is solemnised by the priest, and is the orthodox Hindu marriage.

(2) Marriage between Hindus, Buddhists, Sikhs and Jains subject to the provisions of the Special Marriage (Amendment) Act, 1923.

(3) Non-caste marriage requiring a declaration that the persons intending to marry do not profess any of the following religions, namely, Hinduism, Jainism, Christianity, Jewism, Parsism or Mahomedanism.

(4) Marriages referred to in the three preceding clauses may be performd in India. But outside the territorial waters of India, *e.g.*, a British ship 3 miles off an Indian port, a Hindu is at liberty to contract a purely civil marriage, since a British ship is a floating island subject to British laws on the high seas—the same rule being applicable to the ships of other nations.

(5) All marriages except the first are monogamous marriages subject to he law of judicial separation and divorce.

(6) There remain local customs which legalise intercaste, and intercommunal marriages, and regulate their incidents. As such, it is perfectly competent to a European Christian woman to become a Sikh or join the Arya Samaj and contract a polygamous marriage with a Hindu with a wife living.[1]

460. Civil Marriage Laws.—The Baroda State in 1908, the Indore State in 1916, and other States, including the Kolhapur Darbar, have enacted Civil Marriage Laws legalizing the marriage of persons without reference to their religion or caste. These laws enable all persons whether British subjects or otherwise to contract civil marriages within those territories, and as marriage is an international institution, marriages so contracted hold good everywhere,[2] with the result that the barriers of religion and caste now offer no impediment to the solemnization of civil marriages on the Indian soil. Outside India, such marriages are possible everywhere in European countries, America and in Japan where marriage is treated as a civil contract and may be similarly contracted. And since a ship registered in a foreign country preserves its nationality outside the territorial waters of India, that is within 3 miles of its coast, a civil marriage on board such vessel is equally possible. But in British India, there is yet no civil marriage law, and no person can contract a civil marriage. The disability from which he suffers is purely territorial, and the only Act under which he is able to marry a person outside his own caste is the Special Marriage Act;[3] but in doing so, he has to declare that he does *not profess* Hinduism—a phrase which, though sufficiently elastic, does not convey any assured meaning; though it has been held that

(1) *Sita Devi* v. *Gopal Saran*, (1928) Pat. 375 (381).
(2) *Brinkley* v. *Attorney-General*, (1890) L.R. 15 P.D. 76.
(3) Act II of 1872.

a Brahmo is a Hindu, yet the Act was enacted to enable them to marry under the Act, independently of the ritual of the Hindu marriage. Similarly, the Sikhs can contract Anand marriages legalised under the Anand Marriage Act.[1] And yet both Brahmos and Sikhs have been held to be Hindus. The Law of Hindu Marriages would then appear to sanction a marriage both in the orthodox form as also in a form outside the ritual of orthodoxy. The latter form of marriage might be in any form warranted by law or custom.

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(1) Act VII of 1909.

Allahabad.

CHAPTER IV.

AFFILIATION AND LEGITIMACY.

461. Topical Introduction.—Legitimacy of issue depends upon the legality of marriage. As will be seen from the preceding chapter, the law of Hindu marriage is, in some respects, wider and in other respects narrower, than the English law, in that while the latter opposes polygamy, Hindu Law permits it, but while the former admits of only two forms of marriages, namely, that contracted under secular authority which is non-sectarian, and both in form and substance a civil contract, and that contracted under ecclesiastical authority, which was treated as a sacrament and is still so treated by the Roman Catholic section of the Church, and which, as such, admits of no dissolution or divorce, in which respect, it coincides with the religious law of Hindu marriage, but with this difference that while the sacramental nexus can be released under relief provided by the statute of all modern states, Hindu marriage remains what the Catholic marriage would have remained but for that relief.

462. Further, since Hindu law permits the numerous forms of customary marriages, it follows that the scope of legitimacy is to that extent widened. Again, since the narrower conception of marriage has its repercussion on both affiliation and legitimacy, Hindu Law is to that extent wider, and its scope is further widened by the law of adoption which it still retains as a living institution. The two following facts are a common feature of all primitive societies. *First,* the existence of a patriarchy; and *secondly,* ownership by the patriarch of his wives and children, and disposing of them, as would a present-day farmer dispose of his live-stock. The joint family system which was only an incident of the patriarchal system postulated one undivided head, who was the father, who held sway and exercised complete dominion over all members of his household. The evolution of the modern conception of marriage and sonship is the outcome of ages of culture. The patriarch of primitive society sold and hired out his wives and children exactly in the same way as the keeper of a livery stable to-day sells or hires out his horses. Slavery was recognized and the father freely requisitioned the services of other men to beget children upon his wives whom he sold into slavery as a matter of routine business. But since male children are not only more useful but also necessary for the protection of the family, and of the tribe against hostile aggression, it follows that they would be more prized than mere girls who being helpless could be seized by force or theft. The necessity for male being established, the necessity for begetting or buying sons followed as a matter of course. The civil law conferred special privileges on the father of three or more sons, and it popularized the institution of adoption (§§ 9, 10). The primary motive for adoption was thus entirely secular. The religious halo which came to surround this social necessity is a later development, and

due to priestly laudation of a purely defensive act of which the mainspring was the instinct of self-preservation. The son in archaic society took the same place as a recruit in a modern regiment. And that term did not convey what it has come to mean since.

463. A society in which the sole security lay in the strength of its members, welded into a defensive and offensive alliance for mutual support and self-protection, could not think of the fears of a future purgatory, any more than a herd of deer or a flock of geese. The spiritual element was a fiction introduced later to emphasize a precept when the necessity for it became less obvious. This is even evident in the pages of Manu, who said: "The rule is that women who are devoid of valour and destitute of scriptural learning are useless."[1] Those who added to the physical strength of the social unit counted, the rest were relegated to a position of dependence and lifelong servitude. The blind, the deaf, dumb or lame and those suffering from bodily infirmity, which detracted from the tribal strength, were not fit for inheritance. They contributed nothing to its strength, and they could not, therefore, share in its rights. The patriarchal family was a self-centred State, of which the father was its king. He levied an income-tax on the dependent relatives owned by him. They had no property of their own. All that they had earned belonged to the patriarch. "A wife, a son and a slave are devoid of property; whatever they acquire becomes his whose they are."[2] Being their father's chattel, even his death did not determine their obligation to discharge his debt, even if he had left no assets.[3] But otherwise the *patria potestas* being removed, the sons commenced to enjoy a certain measure of independence. This then is the common genesis of the law of sonship and adoption.

464. The Sanskrit writers commonly enumerate 12 kinds of sons[4] (§56) and some as many as 17, but they have long since disappeared from the category and the only sons now recogniezd are the *auras* and the *dattak* (adopted sons), though the law books will be found loaded with minute details of the other ten vanished sons.

Children defined.

31. (1) Children may be natural or adopted. Of these the former may be legitimate or illegitimate.

(a) A legitimate child is one begotten by a person on his lawfully married wife: A lawfully begotten son is called Auras putra;

(b) An illegitimate children is one begotten by him on one who is not lawfully married to him;

(2) An adopted son is one legally adopted by or to a man as his son: A son taken in adoption is called Dattak putra or the adopted son.

465. Analogous Law.—The only children now possessing any legal *status*, as such, are the natural and adopted children. Natural children

(1) IX-18.
(2) Manu, VIII-416.
(3) Yad., II-50.
(4) Manu, IX-159; Baudhayan, II-2, 3, 31-33; 14 S.B.E. p. 228; Gautam, Ch. XXVII-32-34; 2 S.B.E. 303, 304; Yad., II, 132, 134, classifies them in a different order. Vishnu, XV-130 and Vashishth, XVII-12-39, agree with each other but differ from Manu with whom Yama cited in Dattak Chandrika (V-3) and Narad (XIII-45-47), generally agree. Brihaspati (2 Dig. 343) regards only two sons, viz., *Auras* (one's own) son and that of the appointed daughter, as entitled to inherit, the rest being merely kinsmen and so relegated to the second class, adding: "The sons made in various ways by the ancient *Rishis*, the powerless modern people have not the power to make in the Kaliyug (or present age)," cited in Datt. Mim., 1-64 (Sutherland, p. 16).

may be legitimate or illegitimate and may belong to either sex, though, except in the case of dancing women, a child taken in adoption must be a male. But legally, there is no legal impediment to the adoption of a daughter, so that the father may theoretically possess children of either sex who are either natural or adopted. Of the 12 kinds of sons of various degress, mentioned by the ancient law-givers (§ 56) only two now survive, *viz.*, the legitimate son and the son by adoption. Of these, the legitimate son calls for no notice. His legitimacy is a question of proof or of presumption to be made in accordance with the next rule. The adopted son is a subsidiary son and one still recognized. The law relating to him will be found set out in the next chapter.

466. This chapter deals only with the *status* of natural children, and of these, the subject may be considered in the following order:—

(*i*) Presumption of legitimacy, (*ii*) proof of legitimacy, (*iii*) proof of illegitimacy, (*iv*) status of a legitimate son, (*v*) status of a legitimate daughter, (*vi*) status of an illegitimate son, (*vii*) status of an illegitimate daughter.

Presumption of legitimacy.

32. The legitimacy of a child born of a married wife of a person is conclusively presumed in the following cases, namely:—

(*a*) where it was born during the continuance of the marriage, or

(b) within 280 days after its dissolution, the mother remaining unmarried, unless it is proved that the parties to the marriage had no access to each other at any time when it could have been begotten, or the husband was, by reason of his age or other incapacity, incapable to beget a child.

Illustrations.

(*a*) *A* had validly married *B* in the morning. *B* was delivered of a child in the evening. The child is the legitimate child of *A* and *B*, and evidence cannot be given to disprove it.

(*b*) *A* had validly married *B*. After his marriage *A* became an ascetic. He visited *B* casually now and then. *B* was delivered of a child. It is the legitimate child of *A* and *B*, and evidence cannot be given to prove that by reason of his vow, *A* could not have begotten it.

(*c*) *A* validly married *B*. *A* was then aged 10 and *B* aged 14. A few months after the marriage, *B* was delivered of a child. The child is the illegitimate child of *B*, since *A* could not have begotten it.

(*d*) *A* aged 30 married *B* aged 15. *B* subsequently gave birth to a child. It is the legitimate child of *A* and *B*, and evidence cannot be given to disprove it.

(*e*) *A* had validly married, *B*. A child was born to them in wedlock. Evidence is led to prove that *A* was congenitally impotent. The evidence is admissible as proving sexual non-access.

467. **Analogous Law.**—The rule here enacted is adopted from S. 112 of the Evidence Act which enacts a rule in consonance with both the English and Hindu Laws,[1] but at variance with the Mahomedan Law.[2] The

(1) *Per* Lord Langdale in *Jeswunt Sing* v. *Jet Singh*, (1844) 6 W.R. 46 (47) P.C.; *Per* Sir Barnes Peacock in *Pedda Amani* v. *Zemindar of Marungapuri*, (1874) 14 B.L.R. 115 (122) P.C.; S. 112 of the Evidence Act was drawn from the statement of the common law in the *Banbury Peerage case*, 1 Sim. St. 153.

(2) *Per* Lord Langdale in *Hargrace* v. *Hargrace*, 9 Beav. 552 (556).

former treat a child as legitimate whenever conceived, if it was born in wedlock but the latter treats it as legitimate only if the parties were married at the date of conception. The Evidence Act now formulates a general rule and this section merely reproduces it here, being equally applicable to Hindu Law.

468. The word "access" used in the proviso is held to mean "generating access,"[1] *i.e.*, such access as made conception possible. It has accordingly, been held that the presumption may equally be rebutted by proof of impotency in the husband.[2] Non-accessibility in this sense was pleaded in a case in which, however, the husband's incapacity due to illness was alleged, but not proved.[3] The period of 280 days fixed in clause (*b*) is regarded by the obstetricians as about the maximum period of normal gestation, though instances are on record of the period being as much as 311 days, and in some rare cases, it may extend to even 322 days.[4] The Evidence Act takes the usual period for presumption, and leaves other cases to proof.

469. **Presumption of Legitimacy.**—The presumption of legitimacy under this section is conclusive if it is proved or admitted that the child was born in wedlock.[5] But since marriage may itself be the subject of a presumption,[6] it follows that in order to raise the presumption of legitimacy, all that is necessary is to prove birth of the child on the wife within any time however short or long after marriage up to 280 days of the death of the husband, or divorce of the wife by him. This presumption is conclusive in the sense that it is not open to the parties to rebut it in any way otherwise than as stated in the proviso. Consequently, such presumption cannot be rebutted by proof that the child was begotten by some one else, or that other people had likewise access to the wife,[7] or in fact, by any other circumstance of general improbability. (**§ 448**)

470. The only fact allowed to be proved in rebuttal is non-access to the wife.[8] This includes, as previously remarked, not only non-access in fact but also non-access in the sexual sense such as precludes the possibility of conception. Evidence may then be led to prove that the husband was impotent,[9] too young or too old, or otherwise incapacitated to beget a child. The fact that the parties lived apart, or that the husband had remarried, and deserted and discarded his wife would not exclude the presumption, unless there was proof of non-access to her[10] evidence as to which must be cogent and almost irresistible.[11] Such evidence was furnished in the case where the wife had admittedly lived in open concubinage with another man and they both had acknowledged the children born of them.[12]

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(1) *Ashrufooddowlah* v. *Hyder Hossein*, 11 M.I.A. 94. *Bhagwan Baksh* v. *Mahash Baksh*, (1935) P.C. 199; *Karapaya* v. *Mayandi*, 12 R. 243 P.C.

(2) *Banbury Peerage case*, 1 Sim. and St. 153; *Cope* v. *Cope*, 1 M. & Rob. 275; *Bury* v. *Philpot*, 2 My. & K. 349.

(3) *Narendra* v. *Ram Gobind*, 29 C. 111 (125) P.C.

(4) 2 Taylor Med. Jur. (14th Ed.), p. 265.

(5) S. 1 *ante*: *Ghazaffar Ali* v. *Kaniz Fatema*, 11 C.L.J. 649, P.C.; *Manji Lal* v. *Chandrabati*, 38 C. 700 P.C.

(6) *Umra* v. *Mhd. Hayat*, (1907) P. R. 79.

(7) *Mooris* v. *Davies*, 3 C. & P. 215; *Cope* v. *Cope*, 5 C. & P. 604; *Wright* v. *Moldgate*, 3 C. & K. 158.

(8) S. 112, Ev. Act. (I of 1872); *Bhima* v. *Dulappa*, 7 Bom.L.R. 95.

(9) *Rozario* v. *Ingles*, 18 B. 468.

(10) *C.F.R.* v. *Mansfield*, 11 Q.B. 444.

(11) *Bosvile* v. *Attorney-General*, 12 P.D. 177.

(12) *Bahadur Singh* v. *Viru*, (1906) P.R. 28.

471. The same presumption in favour of legitimacy continues for a period of 280 days after dissolution of the marriage by death or divorce. Considered as a rule of limitation, the day of death or dissolution would probably be excluded.

Proof Aliunde.

472. But apart from presumption, legitimacy may be the subject of direct proof, though where one can rest his case on so conclusive a presumption, it would be not only supererogatory, but at times risky, to attempt it.

473. Other Presumptions.—Besides the conclusive presumption in favour of legitimacy, others may arise from circumstances, the strength of which must naturally vary in each case. So in a case of disputed legitimacy of the plaintiff on the ground that there could be no legal marriage between his mother, who was alleged but not proved to be a dancing girl, attached to a Pagoda, and his father, who was Zemindar, it was found that both were, however, Shudras belonging to different castes between whom intermarriage was uncommon and its legality doubtful. The evidence on both sides was conflicting, and that adduced by the plaintiff as to how his mother (co-plaintiff and his next friend in the case) was married to the Zemindar false. But their Lordships held that the evidence failing, the presumption remained: "The legal presumption in favour of a child born in his father's house of a mother lodged, and apparently treated, as a wife, treated as a legitimate child by his father, and whose legitimacy is disputed after the father's death, is one safe and proper to be made; and the opposing case should be put to strict proof."[1] The plaintiff's claim was, consequently, decreed.

474. In the case of disputed legitimacy, it is the child and not its mother that possesses the "legal character" referred to in S. 42 of the Specific Relief Act to obtain a declaration as therein provided.[2]

Children's right of maintenance.

33. Every child, whether legitimate or illegitimate, possesses the right of maintenance against its father or his estate: Provided that in a family subject to the Bengal School, such right, in the case of an illegitimate child, ceases upon its attaining majority.

475. Analogous Law.—The children's right of maintenance against their father is supported by the *jus naturale*, and is recognized in all systems of law. It underlies S. 488 of the Code of Criminal Procedure, which prescribes a summary remedy for the maintenance of wives and children limited to a monthly allowance not exceeding Rs. 50. The common law right here declared is independent of that section and may be enforced by suit. In the case of legitimate issue, the right is lifelong, but both the Mitakshara and the Dayabhag qualify it in the case of illegitimate issue, the former by continued service and obedience to the head of the family, the latter by his age and capacity to earn his own livelihood.[3] According to Yadnavalkya, the illegitimate child of a regenerate father is entitled to maintenance not as a matter of consideration, nor as a provision against starvation and vagrancy, but as a matter of right and in recognition of his *status* as a member of his father's family[4] and by reason of his exclusion

(1) *Ramamani* v. *Kulanthai*, 14 M. I.A. 346 (365, 366).
(2) *Latifan* v. *Moorti*, 23 C.W.N. 171.
(3) *Ananthaya* v. *Vishnu*, 17 M. 160.
(4) *Vellaiyappa* v. *Natarajan*, 55 M. 1 (15) P.C.

from inheritance. As in the case of females of the family or of disqualified heirs, an illegitimate son is entitled to maintenance as long as he lives, and possesses such right independent of his earnings, though they cannot be ignored in fixing his maintenance. But though the claim, while it lasts, may be charged upon the inheritance, it still remains a purely personal claim and is not a heritable right.[1] It is not settled that the right of maintenance is independent of the mode of illegitimacy, so that the child, whether born of a permanent mistress or a concubine, is equally entitled to it.[2] The right of the child cannot be affected by reason of the fact that it was the issue of an adulterous intercourse.[3]

Amount of Maintenance.

476. The amount of maintenance depends upon circumstances. It must bear some relation to the position and property of the father, but an illegitimate son cannot claim a share therein in the guise of maintenance.[4] In one case, the court decreed it at Rs. 25 per mensem, but the value of the estate did not enter into its calculation, and it was treated merely as a compassionate allowance.[5] In another case, the person entitled to maintenance was in possession of the inheritance, the income from which yielded only Rs. 150 per annum, which was found insufficient to maintain the claimant. The heir asserted his right to possession of the estate which the court decreed, but burdened it with the payment of that amount, though it represented the entire profit received therefrom.[6]

It has been held in a case that the common law right of maintenance is only available to an illegitimate son and not to an illegitimate daughter whose case is not supported by any text.[7]

[For a further discussion, *see* Chapter VII on "Maintenance," *post*.]

(1) *Roshan Singh* v. *Balwant Singh*, 22 A. 191 (198) P.C.

(2) *Choutwrya* v. *Sahib Purhulad*, 7 M.I.A. 18 (50, 52), followed in *Roshan Singh* v. *Balwant Singh*, 22 A. 191 (197) P.C. affirming *Balwant Singh* v. *Roshan Singh*, 18 A. 25.

(3) *Rahi* v. *Govinda*, 1 B. 97; *Subramanya* v. *Velu*, 20 M.L.J. 350: 5 I.C. 919; *Muttusamy* v. *Venkataswara*, 12 M.I.A. 203; *Venkatachella* v. *Parvatham*, 8 M.H.C.R. 134; *Kuppa* v. *Singaravelu*, 8 M. 325 (327); *Viramuthi* v. *Singaravelu*, 1 M. 306.

(4) *Gopalasami* v. *Arunachelam*, 27 M. 32.

(5) *Ib.*, p. 37.

(6) *Qomrao* v. *Mankoonwer*, 2 N.W. P.H.C.R. 136.

(7) *Bhayalal* v. *Churaman*, 9 C.P.L. R. 38.

CHAPTER V.

ADOPTION.

477. Topical Introduction.—It has already been seen that the adoption of children is not an institution peculiar to Hinduism, but owes its origin to the social communism peculiar to the primitive races. All the European races have outlived that stage. In India, it has become stereotyped as an integral part of the Hindu personal law. In early times, children, irrespective of their sex, were taken in adoption, and this is recommended by Nand Pandit who commends the adoption of daughters as equally conductive to spiritual efficacy, since both the gift of a daughter in marriage[1] and the birth of a son to her are spiritually meritorious acts,[2] and children of both sexes are necessary to free one from the torments of hell.[3] This special pleading to bring into vogue an old custom which had long since fallen into desuetude does not appear to have appealed to the populace, and though the adoption of a daughter is not altogether unknown,[4] it is now as dead as the dodo amongst all classes of Hindus, except the dancing girls amongst whom it is still common.

Leaving this out of account for the present, the adoption, as now practised, is the adoption of a son.

Adoption defined.

34. (1) Adoption is a formal recognition of a person as the son of another.

(2) No adoption is valid unless it is made in conformity with law.[5]

478. Analogous Law.—The law of adoption is supported by numerous texts.[6]

479. What is an Adopted Son?—An adopted son is a creature of the law. He is spoken of as a secondary, subsidiary or a substituted son. His affiliation is stated to be an imitation of nature. His necessity arose from secular motive. His continuance has been assured by an assumed spiritual benefit he is supposed to confer upon his adoptive father, and his ancestors. But even persons, *e.g.*, the Jains, who do not believe in a hereafter, practise adoption. The fact that other sons whose spiritual efficacy was as great, if not greater, have become obsolete, and the adopted son remains, suggests that its *raison d'etre* must be "the ordinary human

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(1) Datt. Mim. VII-1, 16.
(2) *Ib.*, VII, 16-18.
(3) *Ib.*, VII-3.
(4) *Nawab Ray* v. *Bhugbutte*, 6 B.L. R. 5; *Nursing* v. *Bhuttan Lal*, W.R. (Gap. No. 194).
(5) Yajur Veda, *Ashtak*, VI-3-10; Hang. Vol. I, p. 179; Manu, IX-127, 160, 168; Vashisth, and Atri (Cal. Ed.) Vol. I, p. 17, cited in Mandlik's H.L. p. 458, f.n. (2)—all texts cited in Hindu Code, (3rd ed.) § 635, pp. 353, 354.
(6) *Ib.*

desire for perpetuation of family properties and names."[1] This was stated by Manu himself in a passage already quoted.

But according to the sacred precepts, the adoption of a son by a sonless man is a matter of religious necessity, but it does not mean that it is, therefore, necessarily a matter of legal obligation. All that it means is that adoption is commendable to one who has no present issue.[2]

35. Save as provided by any law for the time being in force, every Hindu has the right to adopt a son, provided—

Who may adopt.

(*a*) has no living son legitimate[3] or adopted,[4] or having a son; the latter was married under the Special Marriage (Amendment) Act, 1923,[5] or is civilly dead;[6] and has no other son; grandson or great grandson in the male line then living;

(*b*) is possessed of sound mind;[7]

(*c*) he has attained the age of discretion;[8] and

(*d*) is not suffering from any mental or physical disability which disqualifies him from inheritance.[9]

Explanation 1.—The facts that the adopter is a bachelor[10] or a widower,[11] or that his wife is pregnant,[12] or does not consent;[13] or opposes the adoption[14] are immaterial to the validity of adoption.

Explanation 2.—A son mentioned in clause (*b*) does not include a son who suffers from any of the disabilities which disqualify him from inheritance.[15]

Illustrations.

(*a*) *A* marries *B* under the Special Marriage Act, 1872, as amended by Act XXI of 1923, both professing the Hindu, Buddhist, Sikh, or Jain religion. They cannot adopt.[16]

(*b*) *A* is a Government ward subject to an Act which prohibits *A* from adopting without the consent of the Local Government. *A* adopts. The adoption is invalid unless consented to as provided in the Act.

(*c*) An eunuch registered under Act (XXVII of 1871) is declared by S. 29 thereof incapable of adopting a son. *A* cannot adopt.

(*d*) *A* has turned a Sanyasi and so renounced the world. *A* cannot adopt.

(*e*) *A* has a son who is a congenital idiot. *A* can adopt.

(*f*) *A* who has an adopted son *B*, adopts *C*. The adoption is invalid, for a Hindu cannot have two adopted sons at the same time.

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(1) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 (414): 21 A. 460 (477) P.C.

(2) *Sri Balusu* v. *Sri Balusu*, 22 M. 398; *contra in Rajendro* v. *Saroda Soondaree*, 15 W.R. 548.

(3) Illegitimate son is no bar—*Maharaja of Kolhapur* v. *Sundaram*, 48 M. 1.

(4) *Gopee Lal* v. *Chundraolee*, (1872) I.A. (Sup. Vol.) 131.

(5) *See* S. 26 of Act XXX of 1923.

(6) Datt. VI, 1.

(7) *Tayammal* v. *Sashachalla*, 10 M. I.A. 429 (434, 435).

(8) *Jamoona Dassya* v. *Bama Soondari*, 1 C. 289 (295, 296) P.C.

(9) Datt. VI-1, 2; Contra Sarkar's Adoption.

(10) *Gopal* v. *Narayan*, 12 B. 329.

(11) *Chandrasekharudu* v. *Bramhanna*, 4 M.H.C. 270.

(12) *Nagabhushanam* v. *Seshammagaru*, 3 M. 180; *Daulah* v. *Ram Lal*, 29 A. 310; *Hanmant* v. *Bhima Charya*, 12 B. 105.

(13) *Rungamma* v. *Atchama*, 4 M.I.A. 1.

(14) *Narain* v. *Gopal*, 33 I.C. (O.) 31.

(15) Datt. Chan. VI-1, 2. *Nagammal* v. *Shankarappa; contra Bharmappa* v. *Ujjangauda*, 46 B. 455.

(16) S. 25 of Act III of 1872.

480. Who may adopt.—The necessity of a son to perform one's obsequies and so ensure salvation has given rise to the custom of adoption, which was at one time a part of the laws of other races, *e.g.*, the Romans, and is still the law in force in Canada and in Japan. As previously stated (§ 462) an adoption had not only the spiritual background but also a secular one, in that it provided to a family in an age of mutual raids. That an adoption was in early age permitted even to the father with legitimate sons alive is borne out by the Vedic legend of Vishwamitra's adoption of Devawrat, even though he had then 100 sons of his own. [1] But in later times, this privilege was narrowed and it became settled that only a person with no son of his own could take one in adoption. The two writers on adoption struggled to reconcile the old text with the current usage, Nand Pandit observing that the father had the right to adopt a son if his legitimate son permitted him to do so.[2] But the Privy Council have given a quietus to this license holding there can be no adoption so long as a legitimate son is alive.[3]

Cl. (*a*) Has no living son.

481. The term "son" in this section means the natural son and includes an adopted son. It does not include the fraternal nephew though he is declared by Manu to be a son of all his father's brothers.[4] Similarly, the existence of a daughter's son is no bar to adoption, though he is spoken of as equivalent to the son's son. Where a marriage with a sword or dagger is illegal, sons born of such alliance, though entitled to maintenance, do not preclude an adoption, since adoption is presumed to confer the spiritual benefit only by the adoption of a legal son.[5] Even where such marriages are customary, but the sons are regarded as inferior, and not competent to perform the obsequies of their ancestors, their presence is no bar to adoption.[6]

Nephew and Daughter's Son No Bar to Adoption.

482. The existence of any of the relations specified in clause (*a*) of the section is a bar to an adoption, for every one of them is an heir and is capable of conferring the fullest spiritual benefit on the adopter. It does not make any difference in the rule if the person in existence is himself an adopted son.[7] For much the same reason, the simultaneous adoption of two or more sons is invalid as to all. This was laid down by the High Court of Calcutta in several cases, one of which has been affirmed by the Privy Council, who said: "The observation which appears to their Lordships to be the strongest against such an adoption as this being allowed by the Hindu Law, is that no authority and no text has been, or apparently can be produced showing that the Hindu Law allows it..... The entire absence of any authority in favour of such an adoption is an argument that the Hindu Law did not recognize it, and that it has really not been the practice amongst Hindus; for if such a practice had prevailed

Simultaneous adoptions invalid.

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(1) Veda Atreya.

(2) Datt. Mim. Sec. 1-12; Datta Chan., I-3-8.

(3) *Rangama* v. *Atchama*, 4 M.I.A. 1; explained in *Akhoy* v. *Kalapahar*, 12 C. 406 (412) P.C.

(4) Manu:—"If amongst uterine brothers one becomes father of a son, Manu ordained that all the rest became fathers of male issue by that son."—IX-182; Datt. Mim., II-29.

(5) *Maharaja of Kolhapur* v. *Sundaram*, 48 M. 1 F.B.

(6) *Ib.*

(7) *Bhujagonda* v. *Babu*, 44 B. 627.

to any appreciable extent, some authorities would have been found on the subject."[1]

According to Golap Shastri, simultaneous adoptions are not only legal but usual in Bengal.[2] He argues that the fiction of adoption should imitate nature. But the courts, even in Bengal, have answered both the questions in the negative, holding two simultaneous or successive adoptions equally invalid and unsupported by the text or usage.[3] And the questions are really ones for usage and not logic to answer. In any case, it is against the policy of law to favour the creation of artificial relations, and it would treat that as prohibited which is not expressly permitted.

Where Son Disqualified, Civilly or Presumably Dead.

483. Since the primary purpose of adoption, as now understood, is to provide for the adopter's spiritual advancement by having some one legally qualified to perform his obsequies, and since such qualification must be judged by Hindu Law, which disqualifies a son who is impotent, an idiot or insane, blind, deaf, dumb, lame, congenitally suffering from leprosy or from any infirmity or disease which disqualifies him for inheritance,[4] or one who has become a convert to an alien faith or has turned a hermit, sanyasi or a fakir[5] and thereby snapped the natural tie by which he was bound to his father, the latter may make an adoption as such disqualified son is as good as civilly dead to him. This is also the view of Nand Pandit who argues that, since subsidiary sons were neither entitled to perform the obsequies, nor share the inheritance, and participation in the obsequies and estate is the result of filial relation, a person who is impotent and the rest, merely bears the semblance of being a son, but is of no use for either purpose.[6] A son who has merely become a Bairagi, who is not an ascetic, does not forfeit his religious efficacy.[7] In order to have that effect, the renunciation must be complete with no legal possibility of returning to civil life. Such is the case of an ascetic, sanyasi or a fakir[8] who then form a brotherhood of their own and whose return even to their domestic life does not revive their lost right of inheritance.[9] There is, of course, nothing in the Caste Disabilities Removal Act[10] to militate against this view, since the renunciation of wordly pursuits and wordly ties does not amount to his "renouncing or having been excluded from the communion of any religion, or being deprived of caste."[11]

Effect of Act, XII of 1928.

484. Persons congenitally deaf and dumb are now made statutorily eligible to inherit their patrimony. Now, as the Hindu texts Judge of a person's competency to adopt from his competency to inherit, that

(1) *Monemotho Nath* v. *Onath Nath*, Bourke 189; *Sidessur* v. *Doorga, Ib.*, 260; *Gyanandra* v. *Kalapahar*, 9 C. 50, affirmed O. A. *Akhoy Chunder* v. *Kalapahar*, 12 C. 406 (412) P.C.; *Doorga* v. *Surendra*, 12 C. 68, O.A. 19 C. 513 P.C. *Mahesh* v. *Taruck*, 20 C. 487.

(2) Adoption (2nd Ed.), pp. 183, 184.

(3) *Joy Chunder* v. *Bhyrub Chunder*, (1849) S.D.A. 461; *Sudanund* v. *Bonomallee*, 1 Marsh 317.

(4) *Rungama* v. *Ramanadha*, 4 M.I.A. 1 (54, 55); *Nagammal* v. *Sankarappa*, 54 M. 576: 131 I.C. 9; contra *Bharmappa* v. *Ujjanagauda*, 46 B. 455 (458-463). Cf. *Ran Bijai* v. *Jagat Pal*, 18 C. 111 (118) P.C.

(5) *Mahru* v. *Moti*, (1875) P.R. 52.

(6) Datt. Mim., S. II-62 (Suth.), p. 31. To the same effect, 1 Strange H. L., p. 77; Sarkar's Adoption (2nd Ed.), pp. 195, 196.

(7) *Teeluk Chunder* v. *Shama Churn*, 1 W.R. 209; *Jagannath* v. *Bidyanunda*, 10 W.R. 172; *Khooderam* v. *Rookhinee*, 15 W.R. 197.

(8) *Mohun* v. *Mati*, (1875) P.R. 52.

(9) Dayabhag, 5-14.

(10) XXI of 1850.

(11) *Contra* Sarkar's Adoption, (2nd Ed.), p. 197.

test of the Shastras must be deemed to have been overruled by the Legislature. But still as the primary purpose of adoption is spiritual benefit, it follows that a son, though competent to inherit is still ineligible to perform the obsequies of his father, he is as good as civilly dead for the purpose of his father's adoption, and his presence offers no legal bar to the exercise of his right by the father. This debacle flows from the Legislature having amended the law of secular rights and left the performance of spiritual duty untouched. The fact is that what was given as an unreal spiritual sanction has now been construed as the primary purpose of adoption, overlooking the real purpose which remains masked in the cloak of religion.

485. For the same reason a father whose son has disappeared for a time, sufficiently long to raise the presumption of death, is set free to make an adoption. Such presumption will arise if he has not been heard of for seven years by those who would naturally have heard of him if he had been alive.[1]

It has been said that in such a case the adoption is not valid unless it is proved that the son was dead at the date of the adoption,[2] but presumption is one mode of proof where the son has not been heard of for seven years prior to the date of adoption. Of course, where the question of the date of death is material it must be proved and cannot be left to presumption, since presumption merely extends to death and not to the date and time thereof.

486. The father of a person who has contracted marriage under the amending provisions of the Special Marriage Act, 1923[3] has been statutorily given the right to make an adoption,[4] though the person so married has no such right.[5] These provisions were added by the present writer not only to do away with an obsolete custom, but also to give the father the right of adoption, as the son might marry out of caste and so cause him spiritual disquiet.

487. Adoption is a solemn act and alters the course of devolution of property. In effect, it is even more far-reaching than a will. There can, therefore, be no valid adoption unless, the adopter had obtained sufficient maturity of understanding and was otherwise in possession of his senses. While therefore, an idiot and a lunatic are not inherently incompetent to make an adoption, an adopter made by them may be set aside on the ground that they did not fully understand the nature of the act and of its effect upon their rights. So in setting aside the adoption and a will alleged to have been made by a dying man almost continually insensible, though occasionally roused to consciousness by loud tones or pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility with his mind quite inert, and instantly fatigued upon the slightest exertion, their Lordships observed: "How is it possible that a man in such a condition could be capable of any act requiring judg-

Cl. (b) Who is of sound Mind.

(1) S. 108, Ev. Act. (I of 1872), as to the meaning of which see *In re Phene's Trusts*, L.R. 5 Ch. 139 (144); *Parmeshar* v. *Bishessar*, 1 A. 53 F.B.; *Mazhar Ali* v. *Budh Singh*, 7 A. 297; *Dharup* v. *Gobind* 8 A. 614; *Dhondo* v. *Ganesh*, 11 B. 433; *Rango* v. *Mudyeppa*, 32 B. 296 (303); *Contra* in *Janumajay* v. *Keshudial*, 2 B.L.R. (A.C.) 134; *Guru Das* v. *Matilal*, 6 B.L.R. (App.) 16, following the Hindu Law, are now superseded by the Evidence Act.

(2) Trev. H. L., (2nd Ed.), 105.

(3) Act XXX of 1923.

(4) S. 26, Act III of 1872 as amended by Act XXX of 1923.

(5) *Ibid.*, S. 25.

ment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared. In such a state as that described, even if the mind were passively awake to the suggestions made to it, would naturally cling to repose, and yield, for the sake of it, to any external suggestion.....If the law were to countenance acts of this description, performed at such a time and under such circumstances, without the clearest and most cogent evidence to establish their validity, relations and the managers would be encouraged to advance their own private notions of what might be advisable to be done for the good of the family, and to ascribe acts to a dying man in which he would have been the merely passive instrument to prolong their own gain and authority."[1] These words are equally applicable to persons of immature intellect, and especially women, who are often imposed upon to adopt by persons who are less anxious for the repose of the adopter's soul than for feathering their own nests.

Cl. (c) Age of discretion.

488. In the matter of adoption the Indian Majority Act is inapplicable. Consequently, there is no statutory bar as regards the age of adoption, and since the only direct provisions of Hindu Law fixes the age of minority, in the sixteenth year[2] it follows that a person below that age cannot adopt. But since the affiliation of a stranger calls for the exercise of discretion, the courts have laid down that no one who has not attained the age of discretion is competent to make an adoption.

489. The question then is what is an age of discretion. It would seem that, in the absence of any specific rule of Hindu Law, the statutory law of majority should guide the courts as courts administering the rules of justice, equity and good conscience. This the courts have generally enjoined but on the subject of adoption they have held the attainment of 15 or 16 years by a husband as a sufficient age "which according to the law prevalent in Bengal is to be regarded as the age of discretion."[3] But this case was never intended to settle a general rule of Hindu majority, and if it has that effect, then a Hindu adopter would fare much worse than a Hindu transferor or testator, inasmuch as a boy of 16 might at the age of impressionable youth, moved perhaps by a feeling of religious piety, or unduly alarmed by a passing ailment, commit an act for which he might heartily feel sorry when he foresees the consequence of it. Moreover the two ages of majority may, at times, lead to awkward results. Thus while a person below 18 may not execute an authority to adopt a son, since it is compulsorily registrable,[4] he is competent to confer such authority verbally or by a will, and what is more, make an adoption himself. In other words, he is to that extent like a major competent to delegate his authority to another, though not a major to exercise it himself.

490. The Legislature has made some provision for protecting such minors as are placed under a certificated guardian,[5] or the management of whose estate is assumed by the Court of Wards,[6] but the Legislature should certainly protect other minors as well. As it is, it is left to the

(1) *Maharaja of Kolhapur* v. *Sundaram*, 48 M. 1 F.B.; *Tayammal* v. *Seshachaliah*, 10 M.I.A. 429 (434, 435); *Bullub* v. *Kishenpria*, 6 B.L.R. 219.

(2) Manu, VII-72.

(3) *Rajendra* v. *Sarada Soondaree*, 15 W.R. 548, followed in *Jumoona* v. *Ramasoondari*, 1 C. 289 (295, 296) P.C.

(4) Ss. 17 (3) and 35 (3) (*b*) of the Registration Act (XVI of 1908).

(5) The Guardians and Wards Act (VIII of 1890).

(6) The Court of Wards Acts.

court to decide whether the adopter in a given case had attained sufficient maturity of understanding to judge of the nature of his act and its consequences upon his natural heirs and after-born progeny.[1]

Cl. (d). Congenitally Disqualified to Inherit.

491. The question whether a person suffering from mental and physical infirmities, *e.g.*, congenital blindness, deafness, dumbness, impotency, lameness, virulent leprosy, idiocy, lunacy, disqualifying him from inheritance, forfeits his right of adoption is neither covered by authority nor by judicial precedent, though it is the subject of a direct text which forbids them an adoption.[2] In a case of disputed succession to a Mahant, ultimately decided by the Privy Council, the plaintiff claimed to succeed to the *Muth* properties as the *chela* of the deceased Mahant. The defence was that the Mahant was a leper and so disqualified to make a valid appointment of his successor. The High Court threw out his suit holding that the plaintiff had failed to prove that he had been appointed by the Mahant, and that the Mahant could not have validly adopted him for he was suffering from leprosy. Mr. Mayne who supported this decree before the Privy Council, conceded on the authority of decided cases,[3] that only virulent leprosy would have disqualified the Mahant and that his leprosy was not of that type. As there was no evidence to prove that the deceased's leprosy was of this type, the Privy Council reversed the decision of the High Court by merely reversing their finding that the plaintiff had failed to prove his appointment.[4] But the fact that Mr. Mayne conceded and Sir R. Couch adopted this concession as the statement of sound law, in delivering the judgment of their Lordships, by observing that "in order to disqualify from making an adoption the leprosy must be of a virulent form" shows that this malady was treated by all concerned as a sufficient disqualification for adoption. If so, the other infirmities which occur in the same text would be equally a bar to adoption. In the case of Shudras, leprosy is no bar.[5] It is submitted, that neither leprosy nor any other infirmity is a legal bar to adoption because a leper still remains a Hindu and has a right to have his obsequies performed and his soul transferred to heavenly regions which he would not be able to do without adoption. If at all, adoption is to him a greater necessity, otherwise, since his sufferings of this life are due to the sins he had committed in his past life, if he dies with his obsequial rites unperformed, he would be exposed to even greater torments in the next life against which adoption is the only cure.[6] Moreover, the author of Dattakmimansa commenting on the text of Yadnavalkya[7] on the right of the issue of disqualified persons, expressly

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(1) *Ramachari* v. *Saraswati,* (1920) M.W.N. 721: 60 I.C. 246.

(2) Mit. 11-x-10, 11; Datt. Chand, VI-1-2 *contra* Sarkar's Adoption (2nd Ed.) pp. 202, 203.

(3) *Ananta* v. *Ramabai,* 1 B.H.C. R. 554; *Janardhan* v. *Gopal,* 5 B.H.C. R. (A.C.) 145; *Muthuvelayuda* v. *Parasakti,* (1859-1862) Mad. S.D.A. 238.

(4) *Bhagaban* v. *Ram Praparna,* 22 C. 843 (858) P.C. In *Bhoobunessuree* v. *Gouree Dass,* 11 W.R. 535, the plaintiff had admitted that the disability due to leprosy could be expiated by penance (citing Shama Charan Sircar's Vyavashta Dharpan, 2nd Ed., p. 1010), which the two courts below had found against the plaintiff. No further question was therefore gone into.

(5) *Sukumari* v. *Anantta,* 28 C. 168.

(6) Sarkar's Adoption (2nd Ed.), p. 202.

(7) "But their sons, whether legitimate, or the offspring of a wife by a kinsman, are entitled to allotments, if free from similar defects".—Yad. 2 S. 141.

contemplates adoptions by them,[1] though the Mitakshara understands that text to forbid the adoption of other sons.[2]

But Babu Golap Shastri questions the correctness of the translation of the text, and rightly, for a reference to the original shows that what the commentator meant was that the specific mention of the *Auras* and *Kshetraj* sons by Yadnavalkya was intended "to exclude other sons from inheritance" on the principle of *expressio unius exclusio alterius*.[3]

Where Adoptor degraded.

492. But though the apostacy of the son frees the father for adoption, his own apostacy or degradation from caste does not disqualify him for adoption. In this, he is protected by the Caste Disabilities Removal Act.[4] But though a convert to Mahomedanism or Christianity may nominally continue to possess his previous right of adoption, it will be a question, whether, by his abandonment of Hinduism, and acceptance of the doctrines of a new religion he has not abandoned the practice of adoption which only the religion he had abandoned allowed, but which his new religion does not. Moreover, since adoption is merely a means to the attainment of spiritual beatitude in accordance with the tenets of the Hindu religion, the renunciation of the religion would carry with it also a necessary inference that the convert had also abandoned a usage of that religion.[5] But this is a mere presumption. It does not preclude the possibility of adoption by a converted Mahomedan, and such customary rights are known to have persisted in the Punjab[6] where adoptions by converted Mahomedans are both customary and common, and some of whom even closely follow the Hindu rule that a widow cannot adopt without the authority of her husband.[7]

A person who has committed murder becomes degraded (*patit*) but is not disqualified from adopting a son.[8]

In any case, if they still retain the right of adoption it must be by custom which must be proved; but such adoption could carry with it no right of inheritance unless it is a part of the custom which sanctions adoption.[9]

Usage may Prohibit Adoption.

493. Adoption may be prohibited by custom, but in this case, if the parties are admittedly Hindus, adoption will be presumed to be permissible till the contrary is established by custom.[10] But if the family was one of non-Hindu origin, and had adopted only some of the customs of Hinduism, then it would be on it to prove that the custom of adoption was also the one adopted by it. Such was held to be the case of a Cooch Bihar family which had only become partially Hinduised and as to whom

(1) Datt. Ch., Sect. VI-§ 1.

(2) Mit., II-x-10-11. *See* Suth. Note to Datt. Ch., p. 144.

(3) Sarkar's Adoption (2nd Ed.), p. 202.

(4) XXI of 1850.

(5) *Machhu Bai* v. *Hirbai*, 23 B. 264 (265).

(6) *Najibulla* v. *Nadir*, (1881) P.R. 120; *Umar Baksh* v. *Dhanda*, (1894) P. R. 39; *Nada* v. *Nur Muhammad*, (1894) P.R. 143; *Kur Ali* v. *Mawaz Khan*, (1900) P.R. 214; *Muhammad Niazuddin* v. *Mhd. Umar Khan*, (1907) P.R. 1; *Jiwan* v. *Harnam Das*, (1907) P.W.R. 77.

(7) *Abdul Rahman* v. *Bure Khan*, (1911) P.R. 196; *Kallu* v. *Nur Mahi*, (1891) P.R. 104.

(8) *Vaman* v. *Krishnaji*, 21 Bom. L. R. 427: 51 I.C. 363.

(9) *Mhd. Umar Khan* v. *Mhd. Niazudin*, 39 C. 418 (432) P.C. *Elahya* v. *Kanha*, (1871) P.R. 12; *Rachli Bai* v. *Hirbai*, 35 B. 264.

(10) *Vandravan* v. *Manilal* 16 B. 470 (476); *Verabhai* v. *Bai Hiraba*, 27 B. 492 (498, 499) P.C.; *Bishnath* v. *Ram-*

the custom of adoption was pleaded, but which the Privy Council held required to be proved like any other custom.[1]

494. So again lunacy is no bar to a person's right of adoption, provided the act is performed in a lucid interval. This he may do even though he had been adjudged lunatic and a manager appointed for the custody of his person and the management of his estate.[2] And since a lunatic may adopt, his wife cannot adopt during his lifetime for him, since her right to adopt arises only on her husband's death, and lunacy is not death.[3]

Cl. (e) or is a Lunatic.

495. There is no express authority prohibiting the adoption by a bachelor[4] or a widower, and both are therefore competent to adopt.[5]

Bachelor or a Widower.

496. Though Hindu Law counts the birth of a child as from the date of its conception,[6] there is no prohibition against adoption by a person during the pregnancy of his wife.[7] The right of adoption cannot be suspended upon so remote and contingent a possibility—and such contingencies may often occur, as not only the adopter's but his son's grandson's and great grandson's wives may become pregnant. As Sargeant, C. J., observed: "It may doubtless be contended, that when the wife is in a state of pregnancy there may be a son in the womb at the moment of adoption; but the possibility that the child *in utero* may be a female, would, if the power to adopt were to be deemed suspended by the mere fact of pregnancy, always imperil, and in some cases seriously so, the acquisition of those spiritual benefits which the rite of adoption is supposed to supply in default of a legitimate son."

Adoption during the Pregnancy of Wife.

497. But a person who has permanently renounced the world and turned a hermit has no need for adoption, and he is held to be ineligible.[8] But such ineligibility must arise from custom or the nature and purpose of the life affected. A mere change of status does not carry with it any disqualification to adopt as a matter of legal necessity. If any such did arise, it would be obnoxious to the provisions of the Caste Disabilities Removal Act. At any rate, there is no law to prevent a *Grihast Gosavi* from making an adoption. They are entitled to hold property and have

Adopter an Ascetic or Sanyasi.

churn, (1850) S.D.A.R. 20, followed in *Fanindra* v. *Rajesuar*, 11 C. 463 (478) P.C.

(1) *Fanindra* v. *Rajeswar*, 11 C. 463 (478) P.C.

(2) S. 67, Lunacy Act (IV of 1912); *Amanchi* v. *Amanchi*, 19 M.L.T. 243: 33 I.C. 578.

(3) *Ramkrishna* v. *Laxmi Narayan*, 59 I.C. (B) 458.

(4) *Gunappa* v. *Sankappa*, (1839) B. Sel. R. 202; *Gopal* v. *Narayan*, 12 B. 329; *Chandrasekharuda* v. *Brahmanna*, 4 M.H.C.R. 270; *Monemotho Nath Dey* v. *Gononthnath*, 2 I.J. (N.S.) 24 (43).

(5) *Nagappa* v. *Subha*, 2 M.H.C.R. 367; *Chandrasekarudu* v. *Brahmanna*, 4 M. H. C. R. 270; *Gopal* v. *Narayan*, 12 B. 329; *contra* Bhattacharie's H. L. (3rd Ed.) 348; Sarkar's Adoption (2nd Ed.) 200, *dubitante;* Somanath, in his Datt. Mim., cited *per* Strange, Manual of H. L., p. 61.

(6) Mit. 1 6-8-11; *Tagore* v. *Tagore*, 18 W.R. 359 P.C.

(7) *Doulat* v. *Ramlal*, 29 A. 310; *Nagabhushanam* v. *Seshamma*, 3 M. 180; *Hanmant* v. *Bhimacharya*, 12 B. 105.

(8) *Teku* v. *Busti*, (1874) P.R. 15; in *Mhalsa Bai* v. *Vithoba*, 7 B.H.C.R. (App.) XXVI (XXXI), the validity of an adoption was challenged on the ground that the adopter had undergone the ceremony of "Vibhut Vida" (*i.e.* the father had assumed the role of a Lingayat ascetic), but the court held this not proved and held that even if proved it did not amount to Sanyas or complete abandonment of worldly matters.

now come to be regarded as a class by themselves following a secular occupation.[1]

Adoption during Pollution.

498. The validity of an adoption cannot be attacked on the ground that it was made during the period of ceremonial impurity following the birth or death of a relative.[2]

The question was raised and considered by Madras High Court in which they said: "Pollution is only a bar to a religious act and renders religious ceremonies inefficacious, but a gift and acceptance are secular acts, and may, therefore, be supplemented by *Datta Homa* after the period of pollution.[3] As, however, *Datta Homa* is not necessary in all cases, it follows that an adoption may be completed even during a period of pollution.[4] And this seems to be essential since the services of a son, natural or adopted, are indispensable for the performance of the obsequial rites. Moreover, the *Shastras* provide for the vicarious performance of the ceremonies of adoption and the natural father has been held competent to delegate his authority to a relative, in case of his own sickness, to make the delivery,[5] for otherwise the delay might imperil, and in some cases seriously so, the acquisition of those spiritual benefits which the rite of adoption is supposed to supply in default of a legitimate son. As observed in a Bombay case: "A man in bad health or on his death bed, as in the present case, might not live till the child was born and yet, if the rule be as contended for the appellant, the suspension must *ipso facto* take place in all cases during pregnancy; for we entirely agree with the Madras High Court that it would be impossible to make the validity of an adoption dependent on knowledge or ignorance of the fact of pregnancy."[6]

Assent of Wife Unnecessary.

499. It will be presently seen that the wife has no power to adopt without the consent of her husband, but is the husband on his part bound to consult his wife before introducing a stranger into the family? An adoption being regarded as an imitation of nature, the wife logically could not be ignored. This argument was addressed to Nand Pandit who had no difficulty in answering it on the ground of the inferiority of women and the superiority of the husband,[7] who can validity adopt a son not only without consulting her but in spite of her opposition,[8] but she neverthe-

(1) *Balwant Rao* v. *Baji Rao*, 47 I.C. 213; 16 N. 187; *Hari Gir* v. *Anand Bharti*, 21 N. 127 P.C.; *Balagir* v. *Dhonegir*, 5 Bom.L.R. 114.

(2) The period of pollution (mourning) varies with the caste and closeness of relationship. The extreme period for Brahmins is 10 days, for Kshatriyas 12 days, for Vaishyas 16 days and for Shudras 30 days. But on the death of a man's parent or a woman's husband the period of pollution lasts for a whole year.

(3) *Santappayya* v. *Kanagappayya*, 18 M. 397 (398, 399), followed in *Asita* v. *Nirodi*, 20 C.W.N. 901 (908); 35 I.C. 127; *Ranganayakamma* v. *Alwar Setti*, 13 M. 214 (222); pollution was incidentally mentioned as an objection to adoption, but its effect was not considered, the adoption being set aside as having been brought about by coercion (see *Ib.*, p. 224). So in *Ramalinga* v. *Sadasiva*, 1 W. R. 25 P.C., pollution was pleaded as a bar, but the P.C. found as a fact that the adoption had been made after the period of pollution which they observed extended to 16 days.

(4) *Thangathanni* v. *Ramu*, 5 M. 358.

(5) *Jamnabai* v. *Raychand*, 7 B. 221 (227, 228); *Vijiarangam* v. *Lakshuman*, 8 B.H.C.R. 244 (257), and see *post*.

(6) *Hanmant* v. *Bhimachanya*, 12 B. 105.

(7) Datt. Mim., 11-22 (Suth.), p. 5; *Annapurni* v. *Collector*, 18 M. 277 (283), affirmed O. A. *Sub nom Annapurni* v. *Forbes*, 23 M. 1 P.C.

(8) *Narain* v. *Gopal*, 18 O.C. 341: 33 I.C. 31.

less, if she is the sole wife, comes to be regarded as mother of the adopted son and her parents, as his maternal grand parents.[1]

Adoption by the wife.

36. A wife may adopt a son to her husband with his express consent.[2]

But Where One of the Wives Participates.

500. But while the wife does not count in the matter of adoption, and it makes no difference in her *status* if she is the sole wife, her non-participation will, however, prejudice her right if she has a co-wife who had joined in the adoption. In that case the latter acquires the status of a mother and the former that of a stepmother, so that on the death of the adopted son, the former inherits to him to the exclusion of the latter.[3]

Exp. (2).

501. The question whether a person with a son disqualified for inheritance by reason of his mental or physical infirmities is free to make an adoption is now reduced to very narrow limits since the statutary amendment of the Shastric rule on the subject.[4] Still the question remains and will be found discussed elsewhere (§ **491**).

Jain Adoption.

502. It has already been seen that, Jains though forming a sect of dissenters are classed as Hindus (§§ **197, 198**). As such, they have the same right of adoption though their adoption is a purely secular institution,[5] and is free from many of the restrictions of orthodox Hinduism.[6] The subject will have to be discussed in the sequel (S. 60).

One Adoption by Two Persons.

503. Two persons, even brothers, cannot take the same boy in adoption either conjointly or consecutively. If they do, both the adoptions would be invalid.[7] Even as regards the adoption by two widows taking one boy in adoption to their husband, its legality depends upon local custom which justifies such adoption in Western India,[8] but not elsewhere.

Motive Immaterial.

504. The adopter's motive influencing his adoption is wholly immaterial, and does not affect its validity, even if it be to defeat an alienation or disappoint an expectant heir. But, of course, an adoption cannot be made a cloak for defrauding *bona fide* transferees who would be entitled to retain their property, or decreed restitution, if their title is attacked by the adopted son in collusion with the adopter.

Statutory Prohibition against Adoption.

505. The right of a ward of court to adopt is now the subject of express statutory enactments, which prohibit a Government ward from making an adoption without the previous or subsequent consent of the Local Government. The question in such a case is one of construction of the statutes concerned and the extent of

(1) Datt. Mim., Sec. VI 50; *Annapurni*, v. *Collector*, 18 M. 277 (283).

(2) *Narayan* v. *Nana*, 7 B.H.C.R. (A.C.) 153.

(3) *Annapurni* v. *Forbes*, 23 M. 1 (9) P.C. following *Kasheeshuree* v. *Greesh Chunder*, (1864) W.R. (Sup. Vol.) 71, dissenting from Macnaughten's view in his Prel. Remarks to his H.L. pp. 12, 13.

(4) Act XII of 1928.

(5) *Sheo Singh* v. *Dakho*, 1 A. 688, P.C.; *Dhanraj* v. *Soni Bai*, 52, C. 482 (494) P.C. *Ashrafi Kunwar* v. *Rupchand*, 30 A. 197.

(6) *Lakshmichand* v. *Gatto*, 8 A. 319; *Harnabh* v. *Mandil*, 27 C. 379.

(7) *Raj Coomar* v. *Bissesur*, 10 C. 688 (696, 697).

(8) *Indar Kunwar* v. *Jaipal*, 15 C. 725 (746, 747) P.C.; *Narasimha* v. *Parthasarathy*, 37 M. 199 (220) P.C.

their legality which should, however, be presumed.[1] Eunuchs registered under the provisions of the Criminal Tribes Act[2] are expressly precluded from adopting a son. They therefore forfeit by force of this statute any common law right they may have had to make an adoption.

506. Adoption by a wife is supported by the text of Vashisth who allows it subject to the assent of her Lord.[3] Cases of such adoptions are rare. Such an adoption contemplates the absence of the husband, in which case, the wife exercises the authority within the limits set by her husband and is, in effect, his agent for that purpose. The consent requisite is express, though it may be oral[4] but when given in a non-testamentary writing, it must be registered.[5] And since the provisions of the Registration Act are not controlled by Hindu Law, and are only subject to the Majority Act, and the Registrar has no option but to refuse registration of any such instrument if executed by a "minor, an idiot or a lunatic,"[6] it follows that a person under 18 years of age cannot validly convey his authority in writing, though he may do so by parol, a result which the law could never have contemplated, while extending its policy of *laissez faire* to the Hindus in the matter of adoption when enacting the Indian law of majority. But the law must remain in this unsatisfactory state till the Legislature intervenes to place it on a more logical footing. Where, of the two wives, the junior joins with her husband in adoption, she becomes the adoptive mother and is entitled to succeed to the adopted son in preference to the senior co-wife, who is assigned only the status of a step-mother.[7]

Joint Authority Invalid.

507. The authority given must be to the wife alone and not to her conjointly with another. Such authority, if given, vitiates it altogether.[8] But a person may, while authorizing his wife to adopt, provide that she should not adopt without consulting a person named,[9] or even make the exercise of the power contingent upon the consent of other persons.[10]

The subject of authority to adopt will be found more fully discussed in the sequel.

Adoption by Delegated Authority.

37. (1) The power of giving and taking in adoption is a right that primarily belongs only to a man, which he is not free to delegate to any relation other than his wife or widow, and when they are more than one to such of them as he may select.

(2) But on the man's death, his power of adoption may, by presumed delegation, be exercised by his widow subject to the provisions of the ensuing sections.

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(1) For provisions prohibiting adoption by a Government ward, *see* C.P. Court of Wards Act, S. 32 (XXIV of 1899); Beng. Act IX of 1879, S. 81, read with Act, VII of 1912, S. 5; Mad. Act I of 1902, S. 34; *Jamoona* v. *Boma Soonderi*, 1 C. 289 (295) P.C.; Mad. Reg. V of 1804, S. 25; U.P. Act IV of 1912, S. 37; Punj. Act II of 1903, S. 15; Orissa, Beng. Act IX of 1879, S. 61; Bombay (Bom. Act I of 1903); Ajmere (Reg. I of 1888) seems to be a similar provision.

(2) III of 1911.

(3) *Narayan* v. *Nana*, 7 B.H.C.R. (A.C.) 153.

(4) *Soonder* v. *Gudodhur*, 7 M.I.A. 54.

(5) S. 17 (3), Registration Act (XVI of 1908); *Somasundara* v. *Duraisami*, 27 M. 30.

(6) *Ib.*, S. 35 (2) (*b*); *contra* 12 C. W.N. cxxxviii, cannot be maintained.

(7) *Surendra* v. *Savlaja*, 18 C. 385.

(8) *Beem Churn* v. *Heeralall*, I.J. (N. S.) 225; *Amrito Lal* v. *Surnomoyee*, 27 C. 996(1002) P.C.; *Bal Gangadhar Tilak* v. *Shrinivasa*, 39 B. 441.

(9) *Annapurni* v. *Collector*, 18 M. 277 (283).

(10) *Amrito Lal* v. *Surnomoyee*, 27 C. 996 (1002, 1003) P.C.

(3) Apart from the power of adoption, the consequential ceremonies including that of giving and taking may be performed by any person by delegation from either parent.[1]

508. Analogous Law.—The origin of the father's sole right to give away his son in adoption and his daughter in marriage flows from his quandom ownership of his children. This section formulates rules relating to his power of giving and taking a son in adoption which follows the law of gift. The power of giving and taking in adoption is the direct outcome of his personal authority which can only be delegated to his wife or widow. The latter as the donee of his power is bound by his express mandate, in the absence of which, usage has supervened and created rights which will be found set out in this chapter.

This section is limited to the exercise of his delegated authority. As such, the power of gift and its acceptance can only be exercised by him or by his widow, but with this difference that, outside the limits of the Mayukh law, his widow cannot take a son in adoption, nor can she give away her son in adoption, since the power to take, and the power to give are equally subject to the husband's authority. Once this power is exercised, the consequential ceremony of giving and taking might be left to be performed through another, preferably a relation. But there is no rigid enabling or disabling rule on the subject.

509. Power and Limits of Delegation.—Adoption is the gift of his son by the natural father to another, and is completed on its acceptance by the latter.[2] This may partake of a contract followed up by simultaneous or subsequent manual delivery and acceptance, which symbolizes and completes the transfer of the boy from one parental control to another. The first essential contract of gift and acceptance can only be made by the parent of the child. It cannot be left to be performed vicariously. But if the contract of gift and acceptance is concluded between the principals, competent to give and take,[3] and if either of them is, through illness or otherwise, unable to perform the only indispensable ceremony of corporal giving and taking[4] or of the *Datt Homa*, if necessary, its performance may be delegated to be performed by the wife,[5] or another son[6] on the part of the giver and any relation, such as the uncle of the receiver,[7] or indeed, any other suitable person.[8]

Conditional Delegation.

510. The father may depute his wife to give away his son. In that case she acts as his delegate and is bound to act strictly according to his instruction. If he had ordered her to act only on the fulfilment of a certain condition, then she has

(1) *Lakshmibai* v. *Ramchandra*, 22 B. 590; *Shamsing* v. *Santabai*, 25 B. 551; *Vijayarangam* v. *Lakshuman*, 8 B.H.C. R. 244.

(2) *Collector of Surat* v. *Dhirsingi*, 10 B.H.C.R. 234 (237).

(3) *Bhagwan Das* v. *Rajmal*, 10 B.H. C.R. 241 (265) citing *Kenchava* v. *Ningappa*, *Ibid.*, 265 note; *Venkata* v. *Subhadra*, 7 M. 548 (551); *Subbarayar* v. *Subbammal*, 21 M. 497 502), O.A.: 24 M. 214 P.C.; *Shamsingh* v. *Santabai*, 25 P. 551 (555).

(4) *Vijayarangam* v. *Lakshuman*, 8 B.H.C.R. (O.C.) 244 (257).

(5) *Subbarayar* v. *Subbammal*, 21 M. 497.

(6) *Venkata* v. *Subhadra*, 7 M. 548 (551) 3 N.L.J. 191: 56 I.C. (N.) 620.

(7) *Vijayarangam* v. *Lakshuman*, 8 B. H.C.R. (O.C.) 244 (257); *Jamnabai* v. *Raychand*, 7 B. 225 (227).

(8) *Chunni Bai* v. *Girdhari*, (1934) N. 1 (6).

no power to act till that condition, however unnecessary, and even though imposed in consequence of a mistake, is fulfilled, provided it was made an essential term of her employment. So where the father had agreed to give his boy in adoption, only if the adopter obtained the previous assent of the British Government to it, without which the mother was not to give away her son in adoption, as there had been "former wrangles" about the estate. In this he was mistaken. His wife completed the adoption, but the court set it aside holding that the condition precedent to her authority had not been fulfilled. "The mere fact that a man might have judged more wisely or have obtained more acurate information, does not justify those to whom his permission is requisite for a legal transaction, to think and judge for him. His volition and its legal consequences are, in fact, not affected by a mistake under which he may labour. The business of the other parties concerned is not to supersede but to persuade him."[1]

38 (1) (*a*) **The widow has no right of her own to make an adoption, though she may adopt a son to her husband if she is authorised by him to do so.**[2]

Adoption by the widow.

(*b*) **The widow, subject to the Mitakshara or the Dayabhag schools of law, cannot adopt except with such authority.**[3]

(*c*) **But the widow subject to the Dravid and the Maharashtra schools of law are, even in the absence of such authority, permitted to adopt in accordance with the provisions of the next following sections.**

(2) **The widow authorised or empowered in this behalf may adopt at her option, but is not compellable to do so.**[4]

Exception.—**Nothing herein contained applies to an adoption authorised by custom as provided in sections 66-71.**

511. Analogous Law.—The foundation of the woman's right to adopt is the following text of Vashishth:—

Vashishth.—"Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause. Therefore, the father and the mother have power to give, to sell, and to abandon their son."

"Let a woman neither give nor receive a son except with her husband's permission."[5]

This text makes her power subject to the assent of her lord.[6] But latter usage has interpreted this text, giving rise to a diversity of views which have become more or less crystallized into fixed rules qualifying it. Thus in Bombay, whether the husband died, joint or separated, his assent is presumed and the widow is empowered to make an adoption unrestricted by any of his relatives whose just expectations she might disappoint.[7] In Madras, the widow can never adopt free

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(1) *Ranga Bai* v. *Bagirathi Bai*, 2 B. 377 (383).
(2) Vashisth, XV-1, 2, 5; 14 S.B.E. 75.
(3) *Ib.*
(4) *Mutsaddi Lal* v. *Kundan Lal*, 28 A. 377 P.C.
(5) Ch. XV-1, 2, 5; 14 S.B.E. 75.
(6) *Mutsaddi Lal* v. *Kundan Lal*, 28 A. 377 P.C.
(7) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (436); *Gopal* v. *Vishnu*, 23 B. 250 (256); *Malgauda* v. *Babaji*, 37 B. 107; *Maharaja of Kolhapur* v. *Sundaram*, 48 M. 1 F.B.; *Harigir* v. *Anand*, (1925) P.C. 127; 88 I.C. 343.

from the control of a masculine mind, whether her husband died separated or not. In either case, she must have been either possessed of the authority of the husband, or in its absence, she must act with the consent of her husband's sapindas. She is bound to consult all, but for the validity of her adoption it is not necessary that all must concur in her act. If all, or the majority do, then her act becomes final, but if only some of them concur and the rest dissent, then the validity of her act is put to another test: was it proper and made in pursuance of a religious duty? The question in this case becomes one of fact to be decided on the circumstances of the family and a fair consideration of its expediency.

512. The Bengal, and Benares[1] schools understand Vashisth's text to imply the express authority of her husband and insist upon it, while in the Mithila country, the widow can, under no circumstances, adopt a son to her husband even with his express authority, though she may adopt a son to herself in the Kritrim from.[2] But such adoption is not an adoption to her husband, but to herself, and consequently, the adopted son does not succeed to any estate but her own.[3] In the Punjab, adoption is so entirely subject to tribal and territorial custom that it admits of no general statement.

The question whether a remarried widow can take a son in adoption to her deceased husband has been raised in Bombay and decided in the negative.[4]

The next few sections state the general rules and the discussion thereunder sets out their detailed import.

513. All start by accepting the text of Vashisth as of unquestionable authority. But the text is bald and merely provides that the wife must adopt with the "asent of her lord." What is the meaning of "assent"? This is the sole question upon which there is divergence of views between the various schools. According to some, the consent of the husband is provided for, because he is the natural guardian of the wife. Adoption affects the family and he consents for the family who should have something to say in his absence. This is no longer necessary in Bombay, though the necessity of the Sapinda's consent still holds good in Madras.

514. According to the Western or Bombay school, in the case of a husband, whether separate or joint, his consent is necessarily implied, and in the absence of a prohibition, must be presumed,[5] while according to the Eastern or Benares and Bengal schools, it cannot be presumed but must be expressly given.[6] The Dravid (or Madras) school adopts an intermediate

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(1) *Janki* v. *Sadasheo*, 1 Beng. S.R. 197; *Solukhna* v. *Ramdolal*, 1 Beng. S. R. 435; 6 I.D. (O.S.) 318; *Tara Munee* v. *Devnarayan*, 3 Beng.S.R. 516: 6 I.D. (O.S.) 1058; *Babu Motising* v. *Durgabai*, 53 B. 242 (244).

(2) *Oomra Singh* v. *Mahtab Koonwar*, 3 Agra 103; *Haimun* v. *Gunsheam*, 5 W.R. 69 P.C.; *Pudum Singh (Chowdhry)* v. *Koer Oodey Singh*, 12 M.I.A. 350; *Tulshi Ram* v. *Behari Lal*, 12 A. 328.

(3) *Sreenarain* v. *Bhya Jha*, 2 Beng. S.R. 23 (27).

(4) *Fakirappa* v. *Savitrewa*, 23 Bom. L.R. 482.

(5) *Dalpatsingji* v. *Baisingji*, 39 B. 528; *Lakshmi Bai* v. *Saraswati Bai*, 23 B. 789 (795). *Contra per* Westropp, J., *(dissentiente)*, in *Bayabai* v. *Bala*, 7 B.H.C.R. (App.) 1, who held *express* authority necessary.

(6) *Babu Motising* v. *Durgabai*, 53 B. 242 (244).

course, between the stricter law of Bengal and the wider law of Bombay, by making an adoption by the widow dependent either, as elsewhere, upon the consent of the husband or, in its absence, upon the concurrence of her husband's *sapindas*.

Adoption by Dravida and Bombay Widows.

515. But while this text has been literally understood in Bengal and Benares, the Dravid school understands it merely to signify that the assent of a masculine mind is all that is required and it would be sufficient to validate a woman's adoption, and it may be furnished, not only by the husband, but by any of his kinsmen who are interested in him and in his estate. Such assent is provided for to prevent a woman from making an improper adoption which is prejudicial to the family. Being condemned to a life-long tutelage, a widow was not intended to act independently of those who are her guardians. Consequently, when her husband was alive, his consent was sufficient. But on his death his guardianship ceasing, any consent given by him to a *post mortem* adoption became inoperative, except only in the case when he died separate from the family, in which case the widow, being the heir, she took the estate independent of his kinsmen's control. And as adoption was beneficial to his soul, he must be presumed to have consented to an act which was conductive to his spiritual advantage.[1] Therefore, in such a case, in the absence of an express prohibition, consent is presumed. On this subject then, the Eastern and the Western schools, take diametrically opposite views. The one presumes prohibition and requires express consent; the other presumes consent, till any prohibition is proved. The Madras school presumes neither way, but stipulates for consent either of the husband or his sapindas.

Motive Immaterial.

516. In an old case decided in 1868, the Privy Council observed that "in order to be valid an adoption by the widow must be made in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."[2] They went on to add: "In this case no issue raises the question that the consents were purchased, and not *bona fide* attained." This dictum was quoted with approval by the same board in a recent case.[3] In accordance with this *dictum*, which applies to widow's adoptions, whether in the Maharashtra or the Dravid peninsula, even where the widow adopts to her separated husband, her act may be challenged on the ground that the adoption had been induced by corrupt motives and not in the *bona fide* assertion of a right. Such charge was made against a widow who had admittedly received Rs. 4,000 from the father of the adopted boy as a consideration for the latter's adoption, but the court held it to be insufficient to rebut the presumption in her favour.[4] In a later case the Full Bench of the same court had to consider the question of motive and held it to be altogether irrelevant.[5] This is in consonance with the principle that a person having a right to do a thing is entitled to do it, whatever his motive. In the case of adoption in an undivided family, it was observed "that even supposing that the motives which influence the widow

(1) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (435); *Datto* v. *Pandurang*, 32 B. 499.

(2) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (442, 443) followed in *Rakhena Bai* v. *Radha Bai*, 5 B.H.C.R. (A.C.) 181 (191).

(3) *Yadao* v. *Namdeo*, 49 C. 1 P.C.

(4) *Mahabaleshwar* v. *Durga Bai*, 22 B. 199.

(5) *Ramachandra* v. *Malji*, 22 B. 558 (568) F.B.

may be puerile or even malicious, still if no fraud or deception has been practised on the head of the family, who is her rightful guardian and protector, and with whom she lives, and to whom she must look for maintenance, and if he had assented to her taking a proper person in adoption, then that son takes the estate of the widow's late husband."[1] The fact that the motive was to defeat or divest her husband's kinsmen of her husband's interest which had devolved on them by survivorship is no ground for attacking an adoption, for it is one of its necessary incidents. As the Privy Council observed: "It would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow."[2]

517. Husband's Prohibition to Adopt.—It will be observed that by the consensus of opinions of all schools, the express permission of the husband entitles the widow everywhere to make an adoption. But his express prohibition is nowhere stated to be necessary to destroy her right. If, therefore, by his words and acts a prohibition might be reasonably inferred, then it amounts to such prohibition as will be sufficient in law to preclude an adoption by her. This was pointed out in the Ramnad case,[3] in which their Lordships observed: "Inasmuch as the authorities in favour of the widow's power to adopt, with the assent of her husband's kinsmen, proceed, in a great measure, upon the assumption that his assent to this meritorious act is to be implied, wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties or from other circumstances of his family, which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete, or fulfil, defective religious rites."[4]

518. The prohibition to adopt may be expressed or implied and may equally be inferred from other facts inconsistent with a sanction. So where the husband at the point of death positively refused to adopt a son, and died without retracting his refusal, the court considered it necessarily to carry with it an implied prohibition to the wife to do what he himself had deliberately refused to do.[5] So where the wife had misbehaved and had been for 30 years living apart from her husband, who had deserted her and married three other wives in succession, adopted a son with the consent of her husband's brother, the court held that the presumed authority in a normal case was more than rebutted by those facts which justified a finding of prohibition to her to adopt, whereupon the consent of his brother to the adoption became irrelevant.[6] So where a testator by his will provided for the contingency of his having a son in these words, *viz.* "If by divine favour, I have child of the male sex," these words were construed to mean

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(1) *Vithoba* v. *Bapu*, 15 B. 110 (134, 135).
(2) *Vellanki* v. *Venkata*, 1 M. 174 (190) P.C.
(3) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (443); *Yadao* v. *Namdeo*, 49 C. 1, P.C.; *Jagannath* v. *Ram Bharosa*, (1936) P.C. 201 (203).
(4) *Ib.*, p. 443.
(5) *Bayabai* v. *Bala*, 7 B.H.C.R. (App.) 1 (xix-xx) *dissented* from in *Sitabai* v. *Govind Rao*, 51 C. 217 (220, 221).
(6) *Dyanoba* v. *Radhabai*, (1894) B. P.J. 22.

only a natural son and were not sufficient to confer an authority to adopt.[1] The terms of a will or other disposition of property by the husband might imply a prohibition.[2]

519. It has already been stated, that such prohibition is legally presumed both under the Bengal and Benares systems of law, while under the other two systems, there is equally a presumed permission in favour of adoption. The burden of proving permission in the one case lies upon the widow, while the burden of proving prohibition in the other case lies upon those who dispute her presumed authority.

Adoption by Bengal and Benares Widows.

520. The view that the widow, subject to the Bengal[3] and Benares school[4] cannot adopt without the express authority of her husband is supported by the highest authorities.[5] In Bengal, the question was settled as far back as 1811, when the Pandits consulted opined that the widow was competent to adopt with the authority of her husband which may be provisional as, if he had a son then alive, the husband might direct that, in the event of his death, the widow was at liberty to adopt.[6] Such authority might be verbal or in writing.[7] As regards Benares, a similar question put to the Pandits in 1816 elicited the reply that, though the authority of the widow to adopt without the authority of her husband was admitted by Vir Mitrodai and Samskar Koustubh, their authority was overruled by that of the Dattak Mimansa which required his authority.[8] The authority of her "lord" could not, the Pandits added, mean or be replaced by the authority of his kindred.[9] The same opinion was expressed as regards the Dattak adoption in Bihar, and on the same grounds.[10] In all these cases, the permission is assumed to be express and not merely implied. That is how they have been understood by the Calcutta High Court.[11] It has already been stated that the written authority of her husband releases her power, which the widow may then exercise or not at her discretion, and unless her authority is limited, as to time, there is no limitation to its exercise.[12]

Cl. (2) Adoption Discretionary.

521. But all schools are agreed that whatever the nature of qualification upon her right, her power of adoption remains discretionary in her. She is not bound to adopt, unless she chooses to do so. Delay does

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(1) *Shiyali* v. *Calve*, 21 M.L.T. 315: 37 I.C. 404.

(2) *Malganda* v. *Babaji*, 37 B. 107.

(3) *Solukhna* v. *Pande*, (1811) 1 Beng.S.R. 435: 6 I.D. (O.S.) 318 (320); *Tara Muni* v. *Devnarayan*, (1824) 3 Beng.S.R. 516; 6 I.D. (O.S.) 1058.

(4) *Shumshere* (*Raja*) v. *Dilraj Konwur*, (1816) 2 Beng.S.R. 217; 6 I.D. (O.S.) 523; *Haimunchull* (*Raja*) v. *Ghunsheam*, 5 W.R. 69 P.C.; *Pudum Singh* (*Chowdhry*) v. *Koer Oodey Singh*, 12 M.I.A. 350; *Tulshi Ram* v. *Behari Lall*, 12 A. 328.

(5) *Solukhna* v. *Pande*, (1811) 1 Beng. S.R. 435: 6 I.D. (O.S.) 318 (320).

(6) *Tara Munee* v. *Devnarayan*, 3 Beng.S.R. 516: 1 I.D. (O.S.) 1058; in *Janki* v. *Rai*, (1807) Beng.S.R. 283: 6 I.D. (O.S.) 198, the necessity for authority was admitted though the one produced was found forged.

(7) In *Jai Ram* v. *Muson*, (1830) 3 Beng.S.R. 3: 1 I.D. (O.S.) 336 (341), there is a note that "the necessity of the husband's permission to legalize the widow's adoption in Bengal is established by many printed cases."

(8) *Shameshere* (*Raja*) v. *Dilraj Konwar*, (1816) 2 Beng.S.R. 217: 6 I.D. (O.S.) 523 (525) (a Gorakhpur case).

(9) *Ib.*, p. 526.

(10) *Jai Ram* v. *Musan*, (1830) 3 Beng.S.R. 3: 7 I.D. (O.S.) 336 (340).

(11) *Lala Parbhu Lal* v. *Mylne*, 14 C. 401 (415, 416).

(12) *Ramundoss* v. *Tarinee*, 7 M.I.A. 169 (190); *Mutasaddi Lal* v. *Kundan Lal*, 28 A. 377 P.C.; *Uma Sundari* v. *Sornobinee*, 7 C. 288.

not destroy her right.[1] But if she does adopt, then the "assent of her lord," which may be given either orally or in writing, must be strictly pursued. If, therefore, the assent did not limit her as to time, she may exercise the power at any time.[2] But the authority is, of course, personal to her. She cannot delegate, transmit or transfer it to another.[3] Nor can she abuse it for her own advantage. For if she enters into an agreement, whereby she undertakes not to adopt in consideration of her getting some properties, the agreement is bad as opposed to public policy, since the authority to adopt is given to her not for herself but for her husband.[4]

The widow's right to adopt does not, it is said, depend upon her inheriting any property from her husband, and she may make an adoption though no property vests in her.[5] This view probably proceeds on the distinction implied between status and succession.[6]

522. Adoption by a Minor Female.—The Indian Majority Act saves a Hindu as regards marriage, dower, and adoption,[7] which means that in these matters, the Hindu Law remains unaffected by that Act. The question, therefore, arises as to the age of majority of a Hindu female. The Smritis prescribe an age of majority for a male to be the 15th[8] or the 16th year[9] which may mean either the commencement or completion of that year.[10] This has been assumed to be the age of majority also for a Hindu female in a case in which it has been held that no Hindu minor can make any adoption before the completion of her 15th year.[11] But this assumption would appear to be unjustifiable, since while the Smritis have of necessity to prescribe an age of adolescence for males, after which they have to enter upon their pre-ordained duties, there is no necessity to prescribe the same or any age for the majority of women, who, according to the oft-repeated text, are condemned to life-long dependence upon men,[12] and who, therefore, never in the eye of the law, attain the age of discretion in the same way as men.

523. There being then a paucity of express text prescribing an age of majority for women, the only view possible is that the age of discretion for women must be deemed to be the same age as is prescribed by the Indian Majority Act, not *proprio vigore*, but as embodying the rule of justice, equity and good conscience. In this view a woman on completion of her 18th year may validly make an adoption, though even then there must be some evidence that she had done so after taking independent advice, and realizing the nature of her act and its effect upon her own rights. The necessity for such independent advice will be greater if she

(1) *Pratab Singh* v. *Agar Singh*, 43 B. 778 (793) P.C.; *Bahadur Singh* v. *Beni Bahadur*, (1926) P.C. 97 (99).

(2) *Collector of Tirhoot* v. *Huropershad*, 7 W.R. 500; *Shibo Kooree* v. *Joogun Singh*, 8 W.R. 155.

(3) *Bamundoss* v. *Tarinee*, 7 M.I.A. 169 (190); *Mutasadi Lal* v. *Kundan Lal*, 28 A. 377 P.C.; *Uma Sundari* v. *Saurobinee*, 7 C. 288.

(4) *Jagannatha* v. *Kunja Behari*, 25 M.L.J. 204: 49 I.C. 929.

(5) *Pratap Singh* v. *Agar Singh*, 43 B. 778 P.C.

(6) *See* S. 48 Comm. *Post.*

(7) Act IX of 1875, S. 2.

(8) *Madhu Sudan* v. *Debigobinda*, 1 B.L.R. 49 F.B.; *Mothoormohun* v. *Soorendra*, 1 C. 108 (114) F.B.; *Sattiraju* v. *Venkataswami*, 40 M. 925 (929).

(9) Manu, VIII-27.

(10) But in *Verabhai* v. *Bai Hiraba*, 27 B. 492 P.C.; the Privy Council regarded a boy before completion of his 16th year as a minor even under Hindu Law. See *Ib.*, pp. 496-499; p. 496 for the S.J.'s opinion, affirmed by P.C. at p. 499. To the same effect, *Kishori Lal* v. *Chunilal*, 31 A. 116 (127) P.C.

(11) *Sattiraju* v. *Venkataswami*, 40 M. 925.

(12) Manu, IX-3; V-148; Yadnavalkya, I-85.

is a young pardanashin woman leading a secluded life, who is ignorant and had taken no part in the business of her husband.

524. If the adopter was below 18, then her tender years would be her best protection, and no court would drive her to the logical consequence of her act unless it is convinced that she had acted of her own free will with one advertence to the sacrifice she was making in letting a stranger into her family.[1] In one case, however, an adoption by a widow aged 15 was upheld on the ground that she obtained sufficient maturity of understanding to comprehend the nature and effect of the act.[2] But such infant prodigies are rare, for numerous cases will be found to engage the courts when grown up women are found to adopt in haste and to lament at leisure, often invoking the intervention of the court to relieve them from their ill-advised act.

525. Where a person claims to disinherit such a minor heir on the score of his adoption by her, the burden is upon him to shew not only that he had been duly and validly adopted, but that his adoptive mother had done so after mature reflexion and with the advice of her competent advisers.

526. If her husband had charged her with the power to take a particular boy in adoption and she does so, her act would be intelligible, as, in that case, she was merely acting as the instrument of his will. There is then no necessity for independent advice. Even so, but to a less degree, would be an adoption made in pursuance of a general power to adopt conferred by her deceased husband. But time in such cases is a material factor. If the widow had refrained from making an adoption for, say 10 or 20 years, some explanation may be due for the delay in discharging her delegated power.

527. This is the trend of the cases which look askance at an adoption by an ignorant Hindu female of immature years and insufficient intelligence or knowledge of the result of her act upon her own rights,[3] a similar protection being given even to males making a death-bed adoption, even in the presence and with the aid of his wife, unless it was supported by antecedent probabilities.[4] These cases were not those of *pardanashins* who are entitled to greater protection and whose adoption would call for greater scrutiny.[5]

528. Such cases, however bear no analogy to adoptions made by minors, though they are equally entitled to protection. As previously observed, adoption to a Hindu is a religious necessity, and adoption, if otherwise valid, cannot be held invalid, merely because it was made with the authority of a minor husband, or was made by the minor himself,[6] provided he had then

(1) *Seshayyar* v. *Saraswati*, (1920) M.W.N. 721; *Ramachari* v. *Saraswati*, (1920) M.W.N. 721 : 60 I.C. 246; *Murugappa* v. *Kalava*, 44 B. 327; *Bhimrao*, v. *Ganga*, 27 N. 291.

(2) *Basappa* v. *Shidramappa*, 43 B. 481. In another case an adoption by a widow of 12½ years was upheld, because it had long been acquiesced in; *Abaambai* v. *Raja Mathna*, (1927) M.W.N. 298.

(3) *Bayabai* v. *Bala*, 7 B.H.C.R. (App.) 1; followed in *Somashekraja* v. *Sibhadramaji*, 6 B. 524.

(4) *Tayammaul* v. *Seshachalla*, 1 M.I.A. 429 (433); *Ranganayakamma*, v. *Alwar*, 13 M. 214 (221).

(5) *Sajjad Hussain* v. *Wazir Ali*, 31 A. 455 (462) P.C. *Kali Baksh* v. *Ram Gopal*, 36 A. 81 (89) P.C.

(6) *Rajendra* v. *Saroda Soonduree*, 15 W.R. 548; *Jumoona* v. *Bama Sundari*, 1 C. 289 P.C.; *Mondakini* v. *Adinath*, 18 C. 69 (72).

attained the years of discretion,[1] that is to say, was in or had completed his sixteenth year.

39. (1) The widow, subject to the Dravid school of law, may, in the absence of her husband's authority, adopt with the consent of his Sapindas,[2] but the validity of her adoption is, in such case, a question of fact to be decided upon consideration of the character of his estate, the kinsmen surviving him, the nearness of kin of those consulted and assenting to the adoption, its time and purpose, and all the circumstances of the family.

Dravid Widow's Adoption.

(2) Without prejudice to the generality of the foregoing provision, her adoption is generally subject to the following rules, namely:—

(*a*) That if her husband was a member of a coparcenary at the time of his death, the consent of the majority of his surviving coparceners, or of her father-in-law or the manager would be deemed sufficient for an adoption made in their own lifetime, or within a reasonable time after their death; provided that there had been no material change in the circumstances of the family sufficient to render their consent ineffectual.[3]

(*b*) That if her husband had died a separate member of the family, then the consent of his next reversioner,[4] or of the majority of her reversioners would be deemed sufficient, provided that if only some of them consent to an adoption, it will not be invalid, if it is proper and was made in the *bona fide* discharge of her religious duty;

(*c*) That if her husband had died leaving him surviving both coparceners and heirs in respect of some property joint, and other separate, then the consent must be obtained of his undivided coparceners in accordance with the rule applicable to joint family.[5]

Explanation (1).—The consent mentioned in this clause must be free and not induced by fraud or corrupt or improper motive.

Explanation (2).—The consent is not improper if the surviving coparcener giving it stipulates that his own share should not be reduced[6] or where he had nothing to lose by his consent[7] or that his own son was taken in adoption.[8]

Explanation (3).—Where the majority of the coparceners or the sapindas, as the case may be, have consented to an adoption, it will be presumed that their consent was *bona fide*.

Illustrations.

(*a*) *A* died leaving him surviving his son and widow. The son died unmarried, leaving a will authorizing his mother to adopt, and providing that the son so adopted should inherit his estate. The mother thereupon adopted *B* to her husband, in 1908. Her next reversioner, *C*, died a year and a half thereafter, without of objecting to *B's adoption*. The adoption is invalid.[9]

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(1) *Jumoona* v. *Bama Sundari*, 1 C. 289 (296) P.C., following *Rajendro* v. *Saroda Soonduree*, 15 W.R. 548.

(2) Mit. Ch. I, Sec. IX, § 9, and Colebrooke's note, accepted by P.C. in *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (432, 433).

(3) *Annapurnamma* v. *Appayya*, 52 M. 620 (637-639) F.B.

(4) *Krishnayya* v. *Lakshmipathi*, 43 M. 650 (654) P.C.

(5) *Sri Virada Pratapa* v. *Sri Brozo Kishore*, 1 M. 69 (81) P.C.

(6) *Srinivasa* v. *Rangasami*, 30 M. 450.

(7) *Anna Purnamma* v. *Appayya*, 52 M. 620 (637) F.B.

(8) *Salaimalai* v. *Sokammal*, (1934) M. 567 (571); *obiter* in *Krishnayya* v. *Raja of Pittapur*, 51 M. 893 (925).

(9) *Annapurnamma* v. *Appayya*, 52 M. 620 F.B.

(*b*) *A* adopted *B* with the consent of one, not the nearest, out of 6 Sapindas. The adoption is invalid.[1]

(*c*) *A*, a member of the joint family, died as *A's* coparcener. *C* consents to his widow's adoption on condition that the adopted son will not claim a share of the joint estate. *C's* consent is valid, since it is not given from corrupt or improper motives.[2]

(*d*) *A* pays *B* a sum of money to induce her to adopt *C*. *B* takes the money and adopts *C*. The adoption is invalid.[3]

(*e*) The widow asks for the consent of her husband's two brothers. One refuses from corrupt motives, the other consents to an adoption of his own son. The adoption is valid.[4]

529. **Analogous Law.**—As the whole law of adoption by a female has been evolved out of a single sentence of Vashith's, so the whole of Dravid view of that law is the outcome of a single sentence in Colebrooke's note on the Mitakshara,[5] where he says that, in some of the schools, adoption is admitted to be valid "if made by the widow with the assent of the husband's kindred." This statement was repeated by Sir Thomas Strange in his Hindu Law[6] in which he said, "According to the doctrine of the Benares and Maharashtra schools prevailing in the Peninsula, it (*i.e.*, the husband's assent) may be supplied by that of his kindred, her natural guardians." The Privy Council quoted and accepted these opinions,[7] and held them to reflert the current usage of the Dravid country, also supported to that extent by a collection of Sanskrit texts, made for the purpose of the case before their Lordships[8] as well as by the opinions of the Pandits[9] and of the decided cases[10] cited and discussed in the Court below.[11]

Genesis of the Dravid rule.

530. The statement that, in the absence of the husband's authority, the widow could adopt, with the "assent of her husband's kindred" has thus been the foundation of all law relating to the subject of woman's right to adopt in the Dravid country now to be examined. That Colebrooke's statement is as vague as the text of Vashisth was admitted by the Privy Council,[12] who have, in several cases, striven to elucidate the law on the subject, as summarized in the section. In the leading case, since followed in several cases of their Board,[13] they decided that where the husband was a member of a coparcenary, his father's consent was alone

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(1) *Krishnayya* v. *Lakshmipathi*, 43 M. 650 P.C.

(2) *Shrinivas* v. *Rangasami*, 30 M. 450.

(3) *Sitaram* v. *Harihar*, 35 B. 169.

(4) *Krishnaya* v. *Surya Rao*, (1935) P.C. 190.

(5) Ch. I, Sec. XI, § 9.

(6) 1 Strange H.L., p. 79.

(7) *Collector of Modura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (432, 433).

(8) Dattaka Mimamsa of Vidyaranya Swami, in which the widow is declared to possess the right to adopt with the authority of her father-in-law etc.; cited *per curiam* in *Collector of Madura* v. *Muttu*, 2 M.H.C.R. 206 (221), O. A. 12 M.I.A. 397 (438).

(9) *See* them collected in the H.C. judgment in *Collector of Madura* v. *Muttu*, 2 M.H.C.R. 206, affirmed O. A. 12 M.I.A. 397.

(10) *Appaniengar* v. *Alelmaloo*, (1858) S.D.A.M. 5, 6.

(11) *Collector of Madura* v. *Muttu*, 2 M.H.C.R. 206.

(12) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M.I.A. 397 (441, 442).

(13) *Ib., followed* in *Sri Virada* v. *Sri Brozo Kishore*, 1 M. 69 (79, 80) P.C.; (law stated *obiter*) *Veerabasana* v. *Bala Surya*, 41 M. 998 (1009) P.C.; *Krishnayya* v. *Lukshmipathi*, 43 M. 650 P.C.

sufficient as he was both the venerable protector of his daughter-in-law as the nearest heir of his son. Ordinarily, he would also be the head and manager of the joint family, but in his absence, the manager's consent was sufficient; in the absence of which, the consent of the majority of her husband's coparceners would be ordinarily necessary. (§§ 532-537). But the question does not depend upon arithmetical rule, since, in considering the question of consent, the court has to take into account all the circumstances of the family.[1]

531. The question what is implied by the "assent of the husband's kindred" still remains. Adverting to its obvious ambiguity, the Privy Council held that, where an adoption is to be made to a deceased whose father is alive, his consent to his daughter-in-law's adoption would be alone sufficient.[2] But in his absence, it is not possible to lay down an inflexible rule; but one thing is certain that she has to take the consent of her husband's *sapindas*, who might be either his coparceners or reversioners, and consequently, interested in his estate. But nevertheless, she has to ask for their consent. Consequently, where the family is joint, the consent of the manager is both necessary and sufficient.[3]

Consent of Sapindas.

532. But if the consent of either the father-in-law or of the manager is not available, then the widow is not bound to call the family council to consider the propriety of her adoption,[4] though she must consult all her husband's sapindas, *i.e.*, her own reversionary heirs, that is only the agnatic relations of her husband, and not his cognatic relations, such as the daughter[5] or the daughter's son.[6] And amongst them, it is essential that she should consult, and if possible, receive the assent of her next reversioners whose reversionary right will be defeated by the adoption. If these do not agree to the adoption, she may then secure the assent of those next to them, and so on, but the question of consent cannot be decided by the numerical votes of the reversioners, but rather by the nature of the interest possessed by those who have consented to the act. For instance, an adoption would probably be upheld, if it is made with the consent of the next reversioner, though it be opposed by the rest.[7] A consent once given enures even though the consenting party be dead, and the next sapindas be opposed to the adoption, when it is made. As such, the court has upheld adoptions made with the consent of the son[8] or of the father-in-law[9] given in their wills, though in the latter case, the adoption was not made for a period of 19 years after the father-in-law's death, but in both cases, it was conceded that such consent would lapse if the circumstances have since materially changed, as if a nearer sapinda has since come into existence, or the estate has become vested in third persons.

533. To enable her to adopt, she is not bound to obtain their unanimous assent to her act. This was the view of the Madras High Court in a case which was affirmed on appeal by the Privy Council[10] who admitted

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(1) *Vide foot-note* (13) at p. 186.
(2) *Collector of Madura* v. *Moottoo Ramalinga*, 12 M.I.A. 397 (441, 442).
(3) *Pratapa* v. *Kishoro*, 1 M. 79 (81) P.C.
(4) *Brahma Sastri* v. *Sumitramma*, 57 M. 411 (421).
(5) *Ib.*, (448).
(6) *Adusumilli* v. *Adusumilli*, 43 M. 650 P.C.; *Vadrevu* v. *Ryali*, 43 M. 876; *Subbamma* v. *Adimoorthappa*, 86 I.C. (M.) 269: (1925) M. 635.
(7) *Kandukuri* v. *Kandukuri*, 41 M. 998 P.C.
(8) *Annapurnamma* v. *Appayya*, 52 M. 620 (638, 639) F.B.
(9) *Ammanna* v. *Satyanarayana*, 49 M. 636 (648, 649).
(10 *Collector of Madura* v. *Moottoo*, 2 H.M.C.R. 206 (230), O.A. 12 M.I.A.

that the assent of all the kinsmen was not necessary, but that "there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."[1]

534. On the assumption made by the Privy Council that the propriety of such an act should be referred to and decided by a family council,[2] it is clear that if the majority of the members consent, then the adoption will be presumed to be *prima facie* justifiable and valid.[3] But it does not mean that all the available sapindas should be made to sit in conclave and decide the question.[4] As was observed in a case, affirmed by the Privy Council: "The expression 'family council' in the above extract is no doubt rather too general and comprehensive. It is not probable that it was intended to include the whole circle of sapindas and samanodakas or to imply that they should assemble. The presumptive reversionary heir or heirs are the nearest of kin to the deceased husband, and as such the natural advisers of the widow; and if his or their assent be obtained and the same be given *bona fide*, and not from any corrupt motive, that would be sufficient authority on which she could act, and it would not be necessary that she should seek the assent of remoter reversionary heirs,"[5] whose dissent is then immaterial.[6] But, of course, it is not always that the expectant heir is anxious to forswear his heritage. In that case, the widow must seek the counsel and consent of those in the next degree, and finally, of the general body without reference to their propinquity.

535. It is, of course, a counsel of perfection to the next reversioner to subordinate his self-interest to his duty and to offer disinterested advice to the widow, though such is the behest of law.[7] But as this is sometimes paid for, if received, and even if then refused, the widow is not helpless in the exercise of her power which she may do, even with the consent of remote reversioners accounting for the refusal of the nearest on the ground of self-interest, in which case, the court will uphold the adoption regarding their refusal as improper.[8]

536. But it may be that the widow does not even secure a majority, as while some consent, the majority might dissent from her decision. In that case too, the adoption may be valid, though its validity cannot be presumed; but nevertheless, the widow or her adopted son may establish

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397; *Brahma* v. *Sumitramma*, 57 M. 411 (421, 422).

(1) *Collector of Madura* v. *Moottoo Ramalinga*, 12 M.I.A. 397 (442, 443), explained in *Arundad* v. *Kuppammal*, 3 M.H.C.R. 283: *Raghunatha* v. *Brozo*, 1 M. 69 (79) P.C.; *Prasara* v. *Rangaraja*, 2 M. 202; *Venkata Krishnamma* v. *Annapurnamma*, 23 M. 486 (488); *Brahma* v. *Sumitramma*, 57 M. 411 (423): *Krishnayya* v. *Lakshmipathi*, 43 M. 650 P.C. explained in *Brahma Sastri* v. *Sumitramma*, 57 M. 411 (423).

(2) *Vellanki* v. *Venkata*, 1 M. 174 (191) P.C.; *Vadrevu* v. *Ryali* 43 M. 876.

(3) *Venkata Krishnamma* v. *Annapurnamma*, 23 M. 486 (488, 489); *Adusumilli* v. *Adusumilli*, 43 M. 650 P.C.; *Anne* v. *Rattayya*, 47 M. 716.

(4) *Adusumilli* v. *Adusumilli* 30 M.L.J. 265: 32 I.C. 253.

(5) *Subramanyam* v. *Venkamma*, 26 M. 627, affirmed O.A. 30 M. 50 P.C.; *Veera Basavaraja* v. *Balasurya*, (1914) M.W.N. 502: 25 I.C. 8, affirmed in O.A. 41 M. 928 P.C.; *Adusumilli* v. *Adusumilli*, 30 M.L.J. 265: 32 I.C. 253; *Parasara* v. *Rangara*, 2 M. 202.

(6) *Sohaj Ram* v. *Ramlal*, (1914) P.L.R. 78: 22 I.C. 542.

(7) *Venkatarama* v. *Bappamma*, 39 M. 77.

(8) *Adusumilli* v. *Adusumilli*, 30 M.L.J. 265: 32 I.C. 253 O.A. *Adusumilli* v. *Adusumilli*, 43 M. 650 (P.C.); *Nagarampalli* v. *Nagarampalli*, (1914) M.W.N. 620: 24 I.C. 257; *Krishna Rao* v. *Raja of Pittapur*, 102 I.C. 713: (1927) M. 733.

its validity by proving that the adoption was made "in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

537. Proof of this must necessarily depend upon the circumstances of the family. But in such a case, the court will require strong evidence to support an adoption affecting the rights of parties in actual possession not forgetting the "pernicious influences which interested advisers are too apt in India to exert over women, possessed of, or capable of exercising dominion over, property."[1] On the other hand, it must not be forgotten that the right of adoption is inherent in the widow, and the consent of the kinsmen is required, not because their rights in property will be prejudicially affected by her act, but rather because law assigns to the woman a position of perpetual incapacity without the direction of a masculine mind.[2] But when this is unavailable, the consent of the husband's mother was held sufficient to validate an adoption.[3]

What is Valid Consent? Minority, Acquiescence, Corruption, Fraud Excluded.

538. It is perhaps unnecessary to add that such a consent must be by a person, who, if otherwise competent, though a female, must not be a minor.[4] It was so held where the widow of a predeceased son of one Vithoba justified her adoption on the ground that it had been consented to by his two daughters aged 25 and 12 in whom the estate had vested on their father's death. The only fact proved was that they were both present at the adoption. But the court threw out the adopted son's suit, holding *first,* that one of the daughters, being a minor, could not legally consent, and that the consent of the adult daughter could not be proved by her mere presence at the adoption. Even if such presence amounted to acquiescence, it is not equivalent to the consent legally necessary to legalize such an adoption.[5] As the Privy Council *remarked*: "One of the plaintiffs in this case is an infant, the other is a Hindu female. Against neither it is the practice of the courts in India to press a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title, and especially not of such a title as this certificate evidences."[6] But this does not preclude such evidence being given in support of ratification in a case properly pleaded or where it is relied upon to prove consent or a case of estoppel.[7] But since previous consent of the reversioners is a *conditio sine qua non* under the textual law, a mere ratification *ex post facto* is not such consent as the law contemplates,[8] though it may estop a party from pleading it.[9]

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(1) *Raghunatha* v. *Brozo*, 1 M. 69 (83) P.C.

(2) *Collector of Madura* v. *Moottoo*, 12 M.I.A. 397 (442); *Narayanasami* v. *Mangammal*, 28 M. 315 (319).

(3) *Maharaja of Kolhapur* v. *Sundaram*, 48 M. 1 F.B.

(4) *Vasudeo* v. *Ramachandra*, 22 B. 551.

(5) *Vasudeo* v. *Ramachandra*, 22 B. 551 (557, 558), following, on the subject of presence as being insufficient to prove consent, *Ramamani* v. *Kulanthai*, 14 M. I. A. 346; *Rungama* v. *Atchama*, 4 M.I.A. 1 (107, 108), followed in *Bhimappa* v. *Basawa*, 29 B. 400 (403). To the same effect, *Tarinee* v. *Sharoda*, 11 W.R. 468 (476).

(6) *Ramamani* v. *Kulanthai*, 14 M.I. A. 346 (360).

(7) *Bhimappa* v. *Basawa*, 29 B. 400 (403); *Seetharamamma* v. *Subranarayana*, 49 M. 969. *See* this subject discussed in S. 58 *post.*

(8) *Bahanna* v. *Parava*, 50 B. 815; *Dorasami* v. *Chinna*, 22 M.L.T. 538.

(9) *Dharam Kunwar* v. *Balwant Singh*, 34 A. 398 P.C.

Since the consent of the sapindas is required to perform a religious duty, it follows that a sapinda who withholds his consent from corrupt or selfish motives fails in his duty and the widow is entitled to ignore his refusal and make an adoption with the consent of another sapinda of equal degree.[1]

Explanation (1).

539. No consent is valid if it is obtained by corruption, coercion, undue influence, fraud or misrepresentation. These facts vitiate both the consent as well as the adoption consequent thereon (**S. 46**).

Explanation (2).

540. A consent purchased is not a free consent, though there is nothing illegal in a co-parcener of the husband stipulating with his consent that his own share should remain undisturbed by the adoption, since the protection of one's share in such cases cannot be said to constitute a corrupt or improper motive actuating his consent, if it did not prejudice those for whom he was equally consenting.[2] The question is really one of degree. Where, however, the consenting sapinda had stipulated for some land to be transferred to him by the widow,[3] or some one offered him Rs. 1,000 for his consent,[4] the court naturally regarded them as cases of naked bribery. Such was the case where the consenting manager of the family agreed to an adoption stipulating for himself, that he should be the guardian, and obtained a declaration from the widow that a village, admittedly belonging to the joint family was his self-acquisition, as having descended to him from his maternal grandfather. The adoption was sought to be put in force against the manager's brothers, but the Privy Council held that, in the circumstances, it could not bind them.[5]

Consent of Co-widow Unnecessary.

541. From this it follows that the widow is not bound to consult any female member of her household not even her junior co-widow.[6] She is in an equal position of dependence with her, though, as between her and herself, the latter occupies a position of pre-eminence due to her being the elder wife of her husband.

Consent Revocable.

542. A reversioner cannot revoke his consent capriciously after it is once given.[7] The fact that it is gratuitous in the sole exercise of his discretion makes it revisable, but there must be sufficient grounds for his so doing. And so far as regards the widow, she cannot obtain a consent to adopt "any boy at any time" as such consent cannot be described as discreet and given after due deliberation. Where the widow acts upon a consent given to her she must adopt within a reasonable time, otherwise the consent would be deemed to have lapsed.[8]

Case of Divided Counsels.

543. Though the Dravid widow has to secure the assent of her husband's kinsmen for the validity of her adoption, the question arises as to whose consent is sufficient. It has already been seen, that the

(1) *Parasara* v. *Rangaraja*, 2 M. 202; approved in *Krishnayya* v. *Surya Rao*, (1935) P.C. 190 (195); *Krishnayya* v. *Lakshipathi*, 43 M. 650 P.C. after remand, in 57 M. 1 P.C.

(2) *Srinivasa* v. *Rangasami*, 30 M. 450.

(3) *Rami* v. *Rangamma*, 11 M.L.J. 20.

(4) *Danakoti* v. *Bala Sundara*, 36 M. 19 (27).

(5) *Ganesha* v. *Gopala*, 2 M. 270 (280, 281) P.C.

(6) *Ib.*

(7) *Shiv Surya* v. *Audinarayana*, (1937) M. 110 F.B.

(8) *Ammanna* v. *Satyanarayana*, 49 M. 636 (648, 649).

consent of the father-in-law as the head and manager of the undivided family, and in his absence, the consent of the manager is sufficient without reference to the other co-parceners.[1] But if the manager's consent is not available, and in the Dravid country, there is no manager, the family being divided, whose consent should then be applied for?

544. It is conceded that if all the sapindas or the majority of them consent, then it has the same effect, in the absence of which, consent of the nearest sapinda is essential and sufficient. Consequently, if the deceased has left an undivided brother or brothers related to him in equal degree, the consent of one of them should suffice, though the rest may withhold their consent for reasons of their own.[2] But she is bound to consult them, although she might believe that some of them were hostile to her proposal, and would certainly refuse their assent.[3] The general rule applicable to such cases was stated by the Privy Council to be "there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."[4]

40. In the absence of a mandate of the husband to the contrary, the Maharashtra widow is entitled to make an adoption on a presumed authority from him[5] and this she may do whether he had died a joint or a separate member of the family.[6]

Maharashtra Widow's Adoption.

545. Adoption by the Maharashtra Widow.—In the matter of adoption, the Maratha widow possesses a peculiar privilege of adopting to her husband without his or anybody else's permission. The genesis of this rule is the outcome of the following reasoning. There is nothing in Manu or in the Mitakshara on the subject of woman's adoption. Therefore the Bombay school turns to their local authorities for the definition of her power. The Mayukh carries it no further than the Dravid school,[7] but her power is carried a step further in the Dattak Chandrika which is a recognized authority in the Maratha country:—

Genesis of her Power.

"But by a woman the gift may be made with her husband's sanction, if he be alive or even without it, if he be dead, have emigrated, or entered a religious order."

"Now, if there be no prohibition even, there is assent: on account of the maxim, 'the intention of another, not prohibited is sanction.'"[8]

546. This view is affirmed by the Privy Council in several cases[9] which have firmly established the widow's right of adoption in the

(1) *Mami* v. *Subbarayar*, 36 M. 145.
(2) *Parasara* v. *Rangaraja*, 2 M. 202 (206, 207), explaining *Sri Virada* v. *Sri Brozo*, 1 M. 69 P.C.
(3) *Subrahmanyam* v. *Venkamma*, 26 M. 627, affirmed O.A. 30 M. 50 P.C.; *Palaniswamy* v. *Vanjiammal*, 4 I.C. (M.) 36; *Veera Basavaraja* v. *Balasurya Prasada Row*, 41 M. 998 P.C.; *Adusumilli* v. *Adusumilli*, 43 M. 650 P.C.
(4) *Vellanki* v. *Venkata*, 1 M. 174 (190, 191) P.C.
(5) Datt. Chand. Sec. I §§ 31, 32.
(5) Datt. Chand. Sec. I §§ 31, 32 and cases in the next foot-note.
(6) *Yadao* v. *Namdeo*, 49 C. 1 P.C.; *Bhimabai* v. *Gurunathgauda*, 57 B. 157 P.C.; *Vijayasangji* v. *Shiv Sangji*, 59 B. 360 (365) P.C.; *Jagannath* v. *Rambharosa*, (1936) P.C. 201 (203).
(7) Mayukh, Ch. IV, Sec. V, § 17.
(8) Datt. Chand, Sec. 1, §§ 31, 32.
(9) *Yadao* v. *Namdeo*, 49 C. 1 (11-18) P.C. *Bhimabai* v. *Gurunathgauda*, 57 B. 157 P.C.; *Vijaysangji* v. *Shivasangji*, 59 B. 360 (364) P.C.

Maharastra. But though that was a period when such power was held limited to where the husband had died a separated member,[1] and that where he had died a coparcener, she could not adopt without the consent of the surviving coparceners—a limitation now swept away on the ground that it qualifies a spiritual act by secular considerations for which there is no justification.[2] But while it is so, there must be some limitation upon her power, which, however, cannot go beyond that stated in **S. 54.**

41. The widow is bound to strictly obey any directions given by her husband touching an adoption to him.[3]

Husband's mandate.

547. Analogous Law.—Since the widow in Bombay possesses the power to adopt on a presumed authority of her husband, which must be expressly conferred elsewhere, it follows that he may vary his authority by his words or act which his widow must strictly obey. But the mandate only creates a moral, not a leyal obligation on the part of the widow. If, therefore, the husband directs his widow to adopt the son of *A*, the injunction fetters the widow's option, but if does not give the husband's nominee the right to specifically enforce his claim to be so adopted, nor can the widow be held liable for damages, if she fails or refuses to make the desired adoption; at the same time, the widow being enjoined to adopt the son of *A*, she is not free to adopt another. In other words, if she does adopt, she must adopt the son of *A*, or not at all.

548. Husband's Mandate.—The right of the widow to adopt to her husband is the right which she possesses as the donee of her husband's power. As such, she is bound to follow his directions with the utmost fidelity. As the Privy Council have again and again observed, the authority given to the wife must be strictly pursued.[4] And in construing the husband's directions the court would follow the ordinary rule as to the construction of powers which prevails in England.[5] Her power of adoption may be rescinded or modified in any way at the discretion of her husband. So where the husband expressly enjoined on his wife the duty of adopting "as far as possible" one Shankar, failing whom she was to adopt any other boy with the advice of the trustees named in the husband's will, it was held that the widow was bound to apply for the adoption of Shankar, though his adoption was extremely improbable owing to her enmity with Shankar and his family. But nevertheless, she could not validly adopt another boy, which she did, unless she had acted upon the mandatory direction of her husband to secure Shankar whom she never tried to adopt.[6] This was a Maharashtra case, and aptly illustrates the necessity under which the widow is to follow the behests of her lord. If, therefore, the husband had forbidden her to adopt any of her relations and she adopted his brother's daughter's son, the adoption was held invalid, being opposed to her husband's

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(1) *Ramji* v. *Ghammu*, 6 B. 498 F. B.; *Dinkar* v. *Ganesh*, ib., 505 F.B.; *Ishwar* v. *Gaia Bai*, 50 B. 468 F.B., overruled in *Bhimabai* v. *Gurunathgauda*, 57 B. 157 (172) P.C., *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (654, 657) P.C.; *Vijaysangji* v. *Shivasangji*, 59 B. 360 (364) P.C.

(2) *Ib.*, *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (654, 657) P.C.

(3) *Chowdhary Padam Singh* v. *Koer Oodey Singh*, 12 M.I.A. 350 (356); *Surendra Keshub* v. *Doorga Sundary*, 19 C. 513 P.C.; *Rajendra* v. *Gopal Prasad*, 10 Pat. 187 P.C.

(4) *Ib.*

(5) *Rajendra* v. *Gopal Prasad*, 10 Pat. 187 (195) P.C.

(6) *Sitabai* v. *Bapu*, 47 C. 1012 (1018, 1019) P.C.

mandate.[1] The wife's power to adopt might be limited not only by what the husband might say, but equally by what he might have done. Thus, a previous adoption by him would prevent another adoption by his widow, during the lifetime of the adoptee or the proved invalidity of his adoption. Hence an adoption by the husband amounts to an implied prohibition of another adoption by his wife,[2] though his refusal to adopt has not necessarily the same effect.[3]

549. Where the husband empowers the widow to make an adoption with the consent of a person named, and that person dies before the adoption is made, the power to adopt is at an end.[4] The question is one of construction and intention. If the condition was a condition precedent, the impossibility of its fulfilment would be fatal to the power. But it would be otherwise if the power was not conditional on consent. But ordinarily, it would be so regarded.[5]

Form of authority.

42. The authority by the husband to adopt may be express or implied,[6] verbal or in writing, but if it is in writing of a non-testamentary nature, it must be stamped and registered.[7]

550. **Form of Authority.**—There is no general law[8] requiring the husband's authority to be in writing, and without such law, its reduction to writing is optional.[9] If the writing be in the nature of a will, then its registration is optional; otherwise, such authority must both bear stamp of Rs. 10,[10] and be registered.[11] Otherwise, it cannot be used in evidence at all[12] and secondary evidence of that fact would be barred by S. 91 of the Evidence Act; which means that the authority cannot be proved at all. It has already been stated that, for this purpose, the husband is subject to the Majority Act, and that if he has not attained the age of majority, there fixed, he cannot register his authority as the Registrar is bound to refuse registration of a document presented to him for registration by a minor within the meaning of that Act, inasmuch as the Registration Act has not saved any rule of Hindu Law on the subject of majority.[13] Law has prescribed no form in which an authority to adopt should be couched.

551. Such a writing is known as *Anumati Patra* or consent deed and it usually recites the status of the husband in his family—whether he is joint or separate, the fact that he is without any male issue, the reason and necessity for adoption, and why it was deferred during his own lifetime. Where the husband has more than one wife, the authority may further define how far they are to act in concert. The boy to be adopted may also

(1) *Kalawati* v. *Dharam Prakash*, 55 A. 78 P.C.

(2) *Bhujangouda* v. *Bala Bokare*, 44 B. 627, affirmed O.A. *Bhan* v. *Narasagouda*, 46 B. 400.

(3) *Sitabai* v. *Kashi Nath*, 51 B. 217.

(4) *Rajendra* v. *Gopal*, 10 Pat. 187 (196) P.C. overruling *ib.*, 4 Pat. 67; *Baij Nath* v. *Ratan Lal*, 14 L. 345 (351).

(5) *Prangopal* v. *Chandra Mohan*, 41 C.L.J. 55: (1925) C. 619.

(6) *Seetharamamma* v. *Suryanarayana*, 49 M. 969 (976, 977).

(7) S. 17 (3) Registration Act (XVI of 1908).

(8) Under the Oudh Estates Act (I of 1869), the Taluqdar's authority to adopt should have been in writing; *Bhasba* v. *Indar Kunwar*, 16 C. 556 (562) P.C.

(9) *Soondar* v. *Gadadhar*, 7 M.I.A. 54 (64); *Mutasaddi Lal* v. *Kundan Lal*, 28 A. 377 P.C.

(10) Stamp Act (II of 1899), Sch. I, Art. 3.

(11) Registration Act (XVI of 1908) S. 17 (3); *Gopalswami* v. *Arunachalam*, 27 M. 32; *Kachoo* v. *Khushaldas*, (1886) 4 Bom.L.R. 883.

(12) Registration Act (XVI of 1908), S. 49; *Gopalswami* v. *Arunachalam*, 27 M. 32.

(13) Act XVI of 1908, S. 1.

be named. It is usual however to confer upon the wife full discretion both as to the choice of the boy and the time of adoption. The question whether a writing constitutes a will or a mere authority to adopt depends upon whether the primary purpose was the one or the other.

552. Such a case arose before the Privy Council who had to construe a deed styled *Anumati Patra* (or a permission deed, by which the executant empowered his wife to adopt a son. His wife was afterwards delivered of a son. Two years after his birth, he executed another deed, similarly styled, authorising his wife to adopt on death of his legitimate son and to make successive adoptions to avoid extinction of the name. The son came of age and succeeded to his father and, on his death, his widow entered upon the inheritance as his heir. Some time after the son's death, his mother exercised the power given to her by her husband. The Sadar Diwani court construed the deed as a will and held, upon its construction as such, that it created a limitation on failure of male issue of the testator, in the lifetime of his wife, to the son to be adopted by her as a *persona designata*. But the Privy Council deprecated the introduction of English rules of construction which were wholly inapplicable to the deeds executed by Indians. "There is no doubt that, by the decision of courts of justice, the testamentary powers of disposition by Hindus has been established within the presidency of Bengal, but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of a state of society differing as far as possible from that which prevails amongst Hindus in India."[1] Finally, they held the deed to be what it was called and construed it as such, with the result that they set aside the adoption holding that the power must be exercised within reasonable time, and that its exercise would be to divest the son's widow, which it could not be permitted to do, whatever may have been the intention of the husband. An incomplete testament may be legitimately used as evidence to establish the husband's authority.[2]

553. An authority to adopt must be strictly proved and pursued.[3] If he authorizes her to adopt *A* or *B*, minor sons of his junior paternal uncle, it is not open to her to adopt *C*, quite a different person, without making any attempt to secure either *A* or *B*.[4] A Bengal father may, by his authority to adopt, direct that the adopted son should not interfere with or divest his adoptive mother of the estate during her life, just as he has the power to postpone the succession of his natural born son by interposing a life estate.[5] In Madras, the requisite authority may, it is said, be even implied.[6]

Construction of Authority.

(1) *Bhoobun* v. *Ram Kishore*, 10 M. I.A. 279 (308, 309).

(2) *Brijokishoree* v. *Sreenath*, 9 W. R. 463.

(3) *Pudum Singh (Chowdhry)* v. *Koeroodey Singh*, 12 M.I.A. 350 (356). where the Privy Council are reported to have said: "Of course, such a power must be strictly pursued," but in the report of the case in 2 B.L.R. (P.C.) 101 (104) the words reported are: "Of course such authority must be strictly proved."—*Amrito Lal* v. *Surnomoye*, 27 C. 996 P.C.; *Mutsaddi Lal* v. *Kundan Lal*, 28 A. 377 P.C.

(4) *Sindigi* v. *Sindigi*, 32 M.L.J. 47: 38 I.C. 164.

(5) *Bhupendra* v. *Amarendra*, 43 C. 432 P.C.

(6) *Seetharamamma* v. *Suryanarayana*, 49 M. 969 (972, 976, 977).

554. Where the authority is in writing, the question whether it empowers the wife in sufficiently clear terms to make an adoption is simplified to a mere question of its interpretation. But where it is alleged to be verbal, which is the present unsatisfactory state of the law, it possesses some advantage over written authority, but the question becomes then more involved. For the court has then to find both the *factum* as well as its terms. And it is not always easy. Both the questions are of course, questions of fact in the determination of which the court cannot disregard antecedent probabilities. It is sometimes said that there is an antecedent probability in favour of such authority, because every Hindu desires a son, and every sonless Hindu must, therefore, desire to adopt one.[1] This is no doubt true. But as the Privy Council observed, cases cannot be decided upon mere probabilities. The court must look to the facts. And even against this probability, one must also consider the circumstance that if the Hindu longed for such a son why did he not make an adoption before his very eyes? It may be that the pious thought arose uppermost in his mind as death approached and with it the fear of an unredeemed purgatory. The fact that the deceased could have committed his authority to writing but did not, that he was not imbued with an ultra orthodoxical value of adoption, that he was young and was carried off in a short illness from which he hoped to recover, that he was attached to his nephews or any of them, whom he should have named, that he could have made no provision for adoption without making some provision for the maintenance of his wife and those near and dear to him, whom the tenure of his whole life seemed to favour, are only some of the numerous questions that present themselves for consideration and will be found more fully set out in the sequel.

Hindu Wills Act.

555. An authority to adopt given by a husband in a will, subject to the provisions of the Hindu Wills Act,[2] which extends to the Province of Bengal and to the towns of Madras and Bombay, must conform to its provisions.[3]

556. **Other Relations Cannot Limit Right.**—No relation other than the husband can specially limit the widow's right of adoption,[4] though her power of adoption may be otherwise generally limited and be subject to the consent of her husband's kinsmen. A Hindu died in 1872, leaving him surviving a widow (*A*) and a daughter (*B*) of his predeceased son, and also his brother's sons and grandsons. He made a will bequeathing his entire estate to *A* for life, but permitttd her to adopt a son and declared the son so adopted to be the owner of his estate. He, however, prohibited *A* from making an adoption if a son was born to *B*, and in that case, on *A's* death, *B* and the sons that might be born to her were to be owners of the property. *B* gave birth to a son (the plaintiff *C*) in 1891 and five years later in 1896, *A* adopted the defendant (*D*). *B* died in 1897 and in a few days was followed by *A*. The plaintiff (*C*) sued to recover possession of the property from *A's* adopted son (*D*) but his right to succeed to *A* depended upon the question whether the remainder given to *B* by the will was vested or contingent; and it was held that *B* only took a remainder contingent on

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(1) *Soondur Koomaree* v. *Gudadhur*, 7 M.I.A. 54 (64).

(2) Act XXI of 1870; now S. 57, Sch. III of Act XXXIX of 1925.

(3) *Ib.*, S. 2: now S. 57, Sch. III of Act XXXIX of 1925.

(4) *Natvarlal* v. *Ranchhod*, 22 Bom. L.R. 71: 55 I.C. 313.

A's dying without taking a son in adoption. The fact that *A's* power of adoption was limited could not affect the power of adoption which she otherwise possessed under Hindu Law. The only effect of the testator's limitation on *A's* power of adoption was to affect the right of *A's* adopted son to take under the testator's will as a *persona designata*. The plaintiff's adoption could not, therefore, be assailed, though by his adoption he became *a bandhu*, and as such, had to yield place to the testator's nearer heirs.[1]

Construction and limits of authority.

43. (1) The authority to adopt can only be conferred on, and used by the wife.[2]

(2) He who confers the authority may revoke it at any time before it is used.[3]

(3) Such authority may be general or limited, but it will be ineffectual if it is illegal, vague or void.[4]

(4) The authority of the husband to adopt must be liberally, though reasonably, construed so as to advance the purpose he had in view.[5]

Illustrations.

(*a*) *A* authorized his wife *B* to adopt a son. *B* adopted *C* who died after the adoption, whereupon *B* adopted *D*. The adoption of *D* is valid for the general authority to adopt empowered *B* to make any number of successive adoptions.[6]

(*b*) *A* authorizes his wife *B* to adopt *C*. *C* dies. *B* has no power to adopt.

(*c*) *A* authorizes *B* to adopt a son should their son *C* die *unmarried*. *C* dies unmarried. *B* adopts. The adoption is valid.

(*d*) *A* authorizes his wife *B* to make an adoption should their son *C* die. *C* died leaving his widow *D* surviving him as his heir. *B* adopted *E*. The adption is invalid as the power to adopt had vested in *D*.[7]

(*e*) *A* authorized *B* to adopt *C*. *B* adopts *D*. The adoption is invalid for *B's* authority was limited to the adoption of *C*.

(*f*) *A* authorizes his wife *B* and executor *C* to adopt. The authority is invalid as *A* was legally competent only to authorize *B*.[8]

557. **Analogous Law.**—Clause (4) is supported by the authority of the Privy Council,[9] who have overruled the earlier view that such authority must be strictly construed.[10]

Clause (3) recognizes that the authority to adopt may be general, in which case, the widow's power to adopt is co-extensive with that of her husband and extends to any number of successive adoptions, or it may be limited, in which case, she is bound by the limits of her authority. But illustration (*d*) drawn from a reported case, clearly shows that an authority,

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(1) *Natvarlal* v. *Ranchhod*, 22 Bom. L.R. 71: 55 I.C. 313.

(2) *Amrita Lal* v. *Surnamoye*, 27 C. 996 P.C.; *Bhagwan Das* v. *Rajmal*, 10 B.H.C.R. 241.

(3) *Venkata Narayana* v. *Subammal*, 39 M. 107 P.C.

(4) *Sarda Prasad* v. *Rama*, 17 C.W.N. 319 (323).

(5) *Suryanarayana* v. *Venkataramana*, 29 M. 382 (388) P.C.

(6) *Ib.*

(7) *Bhoobun Mayee* v. *Ramkishore*, 10 M.I.A. 299 (311, 312).

(8) *Rajendra Prasad* v. *Gopal Prasad*, 10 Pat. 187 P.C.

(9) *Suryanarayana* v. *Venkataramana*, 29 M. 382 P.C., affirming O.A. 26 M. 681, overruling *contra Gour Nath* v. *Annopoorna*, (1852) S.D.A.B. 332: 12 I.D. (O.S.) 257; *Dharam Kunwar* v. *Balwant Singh*, 30 A. 549, affirmed O. A. 34 A. 398 P.C., in which, however, the right to successive adoptions was upheld on the ground of estoppel; *Bhagwat Prasad* v. *Murarilal*, 15 C.L.J. 97 (108).

(10) *Gour Nath* v. *Annopoorna*, (1852) S.D.A.B. 332: 12 I.D. (O.S.) 25.

however unlimited in intention, may necessarily become limited by the interposition of other interests.[1]

558. **Only Wife Can Adopt.**—Since an adoption is the right of a man, and the adopted son is the reflex of an *auras* or natural born son, it follows that it can only be made by him or by his express or presumed authority by the wife, and by no other person. Consequently, if a person authorises his widow and his father and uncle jointly to make an adoption, the authority is invalid. As Lord Bolehouse observed: "That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu Law, and one so constantly occurring in ordinary life, that it is difficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in various ways, and among them, by requiring the consent of persons named by the husband is also familiar law."[2]

Clause (1).

Now, since the term "wife" includes the plural, it follows that an authority given to the wife means, when a person has left more than one wife, that all of them must adopt jointly or not at all.[3] Consequently, the power to adopt lapses on the death of one of them.[4] But where the authority is given to the widows severally, the right must be exercised in the order of seniority, the junior widow adopting only after the senior widow has refused to do so.[5] But once the latter has adopted, the power to adopt is at an end, so long at least as the adopted son is alive.[6]

559. **Liberal Construction.**—The sole object of construction of the authority of the donor of power is to reach as near as possible to his real intention, and give effect to it. But the difficulty arises not from the statement of the rule but in its application to a given case, since it is not always clear what was his dominant motive. Now, this may be both spiritual and temporal or a blend of both, but in what proportion, it may be impossible to Judge. Probably, the donor, if he came back to life merely to interpret his own words, would return to his grave equally puzzled, since many people do not speak and write without adverting to the effect and consequence of their words. But it is the duty of the court to reduce to precision by interpretation what he had failed to do by clear expression. For this purpose, it has to ask itself many questions: Was it to secure merely the performance of his obsequies by a son, or was that motive blended with the desire to benefit a *persona designata* who was really the object of his bounty, or was it to provide merely an heir to his estate and prevent its extinction by survivorship or escheat, or its devolution upon other heirs, or was it that the injunction to take counsel of another was intended to control his wife's discretion or merely to guide it? If a boy was mentioned, was she to adopt him or not at all and what if he was dead or unavailable?

560. Two questions arise in this connection: One is the question of construction, the other of compliance. On the first, the courts allow themselves

(1) *Bhoobun Moyee* v. *Ram Kishore*, 10 M.I.A. 299 (311, 312).
(2) *Amrito Lal* v. *Surnomoye*, 27 C. 996 (1002) P.C.; *Venkata* v. *Rangayya*, 29 M. 437 (444, 445).
(3) *Narasimha* v. *Parthasarathy*, 37 M. 199 (220, 221) P.C.; *Tiruvengalam* v. *Butchayya*, 52 M. 373; *Lachmi* v. *Mt. Parbati*, 42 A. 266.
(4) *Narasimha* v. *Parthasarathi*, 37 M. 199 (220, 221) P.C.
(5) *Ranjit Lal* v. *Bijoy Krishna*, 39 C. 582; *Bijoy* v. *Ranjit*, 38 C. 964; *Mondakini* v. *Adinath Dey*, 18 C. 69.
(6) *Shivappa* v. *Rudrava*, 57 B. 1.

some latitude in that their sole duty being to fathom the dominant intention, they take into consideration all the circumstances, but once the construction is settled the courts are strict in enforcing the terms of the authority.[1] In this view, their Lordships have construed a general authority to adopt as covering a second adoption on the death of the first adoptee, if it appears that, in giving his authority, the husband had two objects in view, his own spiritual benefit and the continuance of his line.[2] But the case is different where to secure an heir to his estate, the testator, subject to the Dayabhag Law, authorised his widow, then aged 13 or 14 years of age, to adopt his half-brother, and failing him, another according to the "opinion or advise of his father". He died in 1869. The adoption of the *persona designata* failed, and on the death of her father-in-law in 1873, she made an adoption twelve years later in 1885. The Privy Council held that as the peramount intention of the testator, shown by the deed, was not to obtain the spiritual benefit, but to have a son to inherit, the permission of the father was a condition precedent and the adoption was accordingly invalid.[3] It is clear that this case would have been differently decided if the motive of the testator had been equally spiritual as in the case last cited.

561. So where the husband authorized one of the sons of Hardeo Das to be adopted "within a year or two" and the adoption was not in fact made until about six years after the husband's death, and the boy adopted was not any of the four sons, which Hardeo Das had at the time of the husband's authority, but a son subsequently born, the Privy Council upheld the adoption holding that inasmuch as the husband had named none of Hardeo's sons to be adopted, he had apparently intended merely to indicate that one of Hardeo's family should be adopted and that the direction had been sufficiently complied with by the affiliation of a boy who was of a more suitable age than his elder brothers and that as regards the time, the words, when read contextually, could not be treated as words of limitation.[4] Where the husband had given the power to his two widows jointly, having made no provision what was to happen if one of them died before any adoption was made, the court held that, as the exercise of the power was vested in the discretion of the joint donees, the death of one of them put an end to the power, and the survivor of them could not make a valid adoption. The conclusion at which their Lordships arrived was based not on any peculiar doctrine of English Law or the English cases but on the very nature and incidents of a joint power.[5] Where a person could exercise the power in one character but not in another, the court will presume that the power was conferred only in the character in which it could be exercised. The testator (*A*), father of his deceased son (*B*), executed a will in which he expressed a desire to adopt his nephew *C*, but added that if he could not do so (as then his daughter-in-law (*D*), *B's* widow, was to adopt him, he had appointed him as his heir. It was held that the direction to *D* to adopt must be construed as a direction to her to adopt a son to her deceased husband *B* and not a son to her father-in-law *A*, as that was the only adoption which she was by Hindu Law competent to make.[6]

(1) *Suryanarayana* v. *Venkataramana*, 29 M. 382 (388) P.C.

(2) *Ib.*, P. 388.

(3) *Rajendra Prasad* v. *Gopal Prasad*, 10 Pat. 187 (195) P.C.; following *Amrito Lal* v. *Surnomoye*, 27 C. 996 (1002) P.C.; *Radha Madhab* v. *Rejendra Prasad*, 12 Pat. 727.

(4) *Mutasaddi Lal* v. *Kundan Lal*, 28 A. 377 (382) P.C.

(5) *Narasimha* v. *Parthasarathy*, 37 M. 191 (P.C.) overruling *Narasimha* v. *Rangaya Appa Row*, 29 M. 437.

(6) *Karsandas* v. *Ladkavahu*, 12 B. 185 (199).

Authority to Adopt a Persona Designata.

562. This doctrine of liberal construction has been put in force in the case of a direction to adopt a *persona designata*. So when the husband authorized his wife to adopt a boy named by him, the courts construed the naming of the boy as merely indicating a preference, so that if he was not available, being dead or refused, the widow was at liberty to adopt any other boy unless her authority was expressly limited as if the direction were: "Adopt *A* and no other."[1]

Construction must be Reasonable.

563. Construction, though liberal, must be equally reasonable and not outside the pale of probability and the rules of judicial interpretation. This was pointed out in a case, in which the son had executed a will appointing his wife, father and uncle his executors, and the latter two trustees as well, conferring upon all the three an authority to adopt and providing for his trustees to adopt should his wife die without making an adoption. The wife adopted the plaintiff with the consent of the uncle, her husband's father being then dead. It was contended that as the wife only could adopt, this power must be treated as one merely authorizing the wife and providing for the concurrence of the two executors. But the Privy Council held this to be a mere speculation, which could not override the clear provisions of the will which intended to confer the power of adoption on all the three, and in case of the wife's death, on his two executors, which showed the father and the uncle were conferred a power to adopt independently of the widow. The joint power being invalid, the adoption made by the widow with the consent of one of the executors was equally invalid.[2]

The same view was held in other cases where the testator had empowered his wife to adopt a son along with a living son, in which case the direction could not be construed to mean an authority to adopt on the death of the son.[3]

Provision for Consent.

564. Such joint authority, which is inconsistent with the sole legal authority inherent in the widow, for the proper exercise of which the consent of the husband is made pre-requisite, is not to be confused with a condition providing for the consultation or advice of a person named. So where the testator appointed his cousin as manager of his estate, and provided that his wife will "manage all his affairs with the consent of the said manager," that if she did any wrongful act the said manager could cancel it, and that his wife "will adopt a son with the good advice and opinion of the manager", the wife adopted without the advice of the manager who refused to advise or attend the

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(1) *Jagannath* v. *Rambharos*, (1936) P.C. 201; *Ramchandra* v. *Bapu*, (1877) B.P.J. 42; *Lakshmi Bai* v. *Rajaji*, 22 B. 996, followed in *Suryanarayana* v. *Venkataramana*, 26 M. 681 (684); *Shankar* v. *Sawitri*, 50 I.C. (N.) 599. The somewhat narrower construction in *Amirthayyan* v. *Ketharamayyan*, 14 M. 65, may be justified on the terms of the will the court had to construe.

(2) *Amrita Lal* v. *Surmoye*, 25 C. 662, affirmed O.A. 27 C. 996 (1002, 1003) P.C.

(3) *Joy Chundro* v. *Bhyrub*, (1849) S.D.A.B. 461: 10 I.D. (O.S.) 1006; *Basoo* v. *Basoo*, (1856) S.D.A.M. 20; *Veraprashiya* v. *Santanraja*, (1860) S. D. A. M. 168.

ceremony, the court held the adoption good on the ground that while the will prescribed a penalty for mismanagement, it did not say that the manager's non-consent should invalidate the adoption. That the condition as to his consent was, therefore, not a condition precedent to the validity of an adoption by her, and as adoption by his wife was the testator's primary purpose, it could not fail for want of the manager's consent.[1] This was the view taken in another case, in which the authority was given in the following words: "If my younger brother has children, and if he would give his second son among them in adoption, he should be taken. In the meanwhile, if another son is adopted, much trouble would occur. If a boy is available among relations, with reference to whom trouble may not ensue, he may be taken." It was held that these words were merely commendatory and not imperative and that it left the wife free to adopt a stranger.[2] A Hindu testator by his will appointed five trustees of his property, and gave power to his widow to adopt a son with their consent and advice. One of the trustees declined to act. She adopted a boy with the consent of the remaining trustees who had in fact made the selection. The Privy Council upheld the adoption holding that the refusal of one of the trustees to act could not invalidate it, and that the real authority to adopt was vested in the widow.[3]

Limited Authority.

565. The authority may be conditional, contingent or limited, but whatever its nature, "it must be strictly pursued."[4] So the husband may direct that his wife may adopt on the death of his legitimate son,[5] or that the adoption should be of a boy from a certain family or that it should not be from her own family[6] in which case the wife is bound to execute the limited authority. So where a Hindu made a will, executed in favour of his wife, addressing whom he said therein, "You must adopt for me a boy you like from the children that may be born in the families of my brothers" and later on added, "the principal object of this will is that you should adopt for me any suitable boy" and the wife adopted one outside the husband's brothers' family, though one of the brothers had offered his own son in adoption, the court set aside the adoption holding the second clause controlled by the first and thereby limiting her authority, which she could not exceed, by adopting an outsider.[7]

Illegal Authority.

566. Of course, it is a well-known principle of law that a person cannot authorize another to do what he is not able to do himself.[8] Consequently, the husband, being unable to make an illegal adoption cannot confer larger powers upon

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(1) *Surendra* v. *Sailaja*, 18 C. 385 (391); *Chennappa* v. *Ramappa*, 10 M.L.J. 131.

(2) *Radha* v. *Narasimha*, 17 M.L.J. 186.

(3) *Bal Gangadar Tilak* v. *Shrinivas Pandit*, 39 B. 441 P.C. Distig. in *Baij Nath* v. *Rattan Lal*, 14 L. 345. (One of the two executors consented, adoption held invalid.)

(4) *Padum Singh* v. *Koer Oodey Singh*, 12 M.I.A. 350 (356).

(5) *Solukhna* v. *Ramdolal*, 1 Beng. S.R. 434: 6 I.D. (O.S.) 318; *Bhubon Moyee* v. *Ramakishore*, 10 M.I.A. 279; *Bykant* v. *Kisto Soonderee*, 7 W.R. 392; *Velanki* v. *Venkata*, 1 M. 174 P.C.

(6) *Kalawati* v. *Dharam Prakash*, 55 A. 78 P.C.

(7) *Amirthayyan* v. *Ketharamayyan*, 14 M. 65.

(8) *Gopee Lal* v. *Chunderbolee*, 11 B. L.R. 391 P.C.

his wife. He cannot, for instance, make an adoption during the lifetime of a son. If, therefore, he permitted his wife to make an adoption of a co-heir with his son, the authority is altogether invalid and cannot be validated by construing it to authorize an adoption on the death of the natural son then living. As the court observed: "It is impossible to convert this permission into a permission for what is altogether a distinct purpose, *i.e.*, the adoption of a son *after the death* of the natural son then living.....It can furnish no authority for enabling a widow to correct an illegal permission by modifying it, or groundlessly assuming the existence of a permission which might have been legal."[1] So where the husband had two wives and a son by the senior wife, and when ill, his junior wife complained to him of the ill-treatment awaiting her at the hands of her co-wife and her son, whereupon the husband empowered her to adopt a son if she could not agree with her step-son, it was held that as the husband could not adopt while his son was alive, so could not his widow.[2] So where the husband gave each of his two wives permission to adopt three sons in succession, and acting upon this authority, the two widows adopted two sons simultaneously, and the question was, which of any of the two adoptions was valid, their Lordships held the two simultaneous adoptions invalid, *first*, because such adoptions are illegal, and *secondly*, because, if reasonably construed, the permission gave not a power to the widows to adopt simultaneously, but first to the elder widow power to adopt three sons successively, and then a similar power to the younger widow.[3]

567. So an authority, legal and sufficient, may by the intervention of other interests become invalid if exercised thereafter. Such would be the case where the power to adopt by the widow, in the event of the death of a legitimate son then living, was exercised on his death after his marriage, and when his wife entered into possession as his heir, and when the adoption made by his mother in the exercise of her power had the effect of divesting her daughter-in-law.[4]

568. So an authority may be void for vagueness. Such was the case of the husband who authorized his wife to adopt a boy "from amongst my near relatives" which clause was held to be too vague and, therefore, inoperative.[5] But in such cases the court strives, as far as possible, to place a reasonable and probable construction upon vague and incomplete words.

Vague Authority.

569. The testator, the Taluqdar of Balrampur in Oudh, who died childless leaving two widows, bequeathed to "the Maharani Sahiba" his entire estate, giving her also a power to adopt, and also providing maintenance for both his widows after such adoption. On the question arising

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(1) *Joy Chunder* v. *Bhyrub*, (1849) 5 S.D.A.B. 462: 10 I.D. (O.S.) 1006 (1009).

(2) *Solukhna* v. *Ram Dolal*, 1 Beng.S.R. 434: 6 I.D. (O.S.) 318 (320).

(3) *Akhoy Chunder* v. *Kalapahar*, 12 C. 406 (411, 414) P.C.

(4) *Bhoobun Moyee* v. *Ramkishore*, 10 M.I.A. 299 (311, 312); *Sri Virada* v. *Sri Brozo*, 1 M. 69 P.C.; *Ram Krishna* v. *Sham Rao*, 26 B. 526 (532); *Bachoo* v. *Mankorebai*, 31 B. 373 P.C.; *Amulya* v. *Kalidas*, 32 C. 861 F.B.; *Dutto* v. *Pandurang*, 32 B. 499; *Maniyamala* v. *Nanda Kumar*, 33 C. 1306; *Madana Mohana* v. *Purshotama*, 41 M. 855 P.C., affirming O.A. *Madana Mohana* v. *Purshotama*, 38 M. 1105.

(5) *Sarda Prasad* v. *Rama*, 17 C.W.N. 319 (323).

whether the term "Maharani Sahiba" applied to the senior or to the junior widow, the Judicial Commissioner held that term to refer to both the wives considered collectively, but the Privy Council overruled him holding that the employment of a singular number pointed only to one individual, which was otherwise consistent with the context, and that in that view, the senior widow who retained the pre-eminence of an elder wife must be held to be the donee of her husband's power.[1]

Revocation of Authority.

570. He who gives the authority may equally revoke it before it has been acted upon.[2] Such revocation may be express or implied. Such revocation will be presumed where after the authority is given, he himself gets a son or makes an adoption.[3]

Abuse of Authority.

The authority to adopt is the conferral of power which the donee cannot use to her personal advantage. Where, for instance, a Hindu widow, having authority to adopt from her husband entered into an agreement whereby she undertook not to adopt in consideration of her getting some properties, the agreement was held to be void as contrary to public policy, the authority being given to her not for herself but for her husband.[4]

Proof of Authority.

571. The proof of authority is no exception to the rule governing the proof of any other fact. But time is always a factor in determining its value. The fact that there was an adoption in fact by the widow does not, of course, warrant any presumption of authority. But where the adoption was made 42 years ago and the widow survived the adoption for a period of 30 years, during which it could have been, but had not been challenged, on the other hand, it was recognized by the local authorities as valid and the plaintiff had in various litigations acted along with the adopted son, acknowledging in the course of proceedings his right and all other parties had acted on the assumption of the adoption, the court held the evidence of witnesses, who proved both the adoption and the authority, as beyond cavil.[5] In another case, the court presumed authority to an adoption made in 1867, but only questioned after about 50 years and after the son had died.[6]

Successive Adoptions.

44. In the absence of a direction of the husband, or of any rule of law to the contrary, the widow's authority to make an adoption does not lapse on the making of a single adoption, but continues so long as the spiritual purpose of adoption has not been achieved.[7]

572. **Analogous Law.**—This section is supported by the undernoted cases.[8] Since the wife adopts to her husband and is the donee of his power,

(1) *Indar Kunwar* v. *Jaipal*, 15 C. 725 (748) P.C.

(2) *Jagannath* v. *Kunj Behari*, (1919) M.W.N. 52: 49 I.C. 929.

(3) *Goureepershaud* v. *Jymala*, 2 Beng. S.R. 174: 6 I.D. (O.S.) 491 (492). The legality of two successive adoptions by two co-widows upheld in this case, is now no longer tenable.

(4) *Jagannath* v. *Kunj Behari*, (1919) M.W.N. 52: 49 I.C. 929.

(5) *Sri Kanchumarthi* v. *Kanchumarthi*, (1925) P.C. 201: 89 I.C. 817.

(6) *Sambasiva* v. *Ramaswami*, 48 M. L.J. 353: 86 I.C. 772: (1925) M. 803.

(7) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (650) P.C.; followed in *Sasanka* v. *Gopi Ballav*, (1935) C. 716.

(8) *Ib.*

it follows that her authority to adopt depends upon the extent of his authorisation. As such, law presumes that in the absence of an express prohibition, he intended to adopt a son to perform the religious rites consequent upon his death and thereby secure his spiritual beatitude. One rule of law ensuring this purpose is that stated in S. 48. Save that and other similar rules the widow's right of adoption is a continuing right, entitling her to make successive adoptions in the event of her one or more sons dying issueless and unmarried, or if married, leaving behind a widow possessing no power of adoption. (For further commentary, *see* S. 48.)

45. Where the authority to adopt devolves or is conferred on two or more widows, in the absence of any express direction to the contrary, the power must be exercised by them in the order of seniority.[1]

Adoption by co-widows.

Illustrations.

(*a*) *A* directs that his two wives, *B* and *C*, may jointly adopt a son. Here *B*, though senior, cannot adopt without the concurrence of *C*, and if one of them dies the other cannot adopt.[2]

(*b*) *A* directs that his two wives *B* and *C* should make an adoption. There is nothing to indicate that they are to act jointly. *B*, if senior, may adopt, and if she dies or refuses, *C* may do so.[3]

573. **Analogous Law.**—Ordinarily, where the testator empowers his two or more widows to adopt and both have equal rights, the authority to adopt devolves upon them in their order of seniority. If the seniormost should refuse or become incapable of adopting, then the right devolves on the one next senior to her.[4] It is, however, open to the senior to waive her preferential right to adopt in favour of a junior widow. The latter would then become entitled to make the adoption.[5] But without such authority, the junior cannot even perform the ceremony of adoption of a boy selected by the senior for that purpose, since adoption implies the mutual acts of giving and receiving the child, and until they take place, there is necessarily a *locus penitentiae* for the elder widow, of which she may avail herself, although contrary to the wishes of the other widows, by changing her mind and selecting another child. To hold that any one of the junior widows might perform the formal act of adoption of the selected child, whenever it pleased her, is to force the hand of the elder widow, and compel her to complete the adoption, which, till it is completed, is, at the most, only *in fieri*.[6] Where both widows have equal presumed authority to adopt, the senior may adopt not only without consulting her junior but even in opposition to her wishes, and even though it may prejudice her right.[7] But this is only so where the husband does not give any specific directions to the contrary. He may, for instance, direct that it would be competent to his two widows to adopt jointly. In that case, the exercise of the power being vested in the discretion of the joint donees, one is incompetent to act

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(1) *Mondakini* v. *Adinath*, 18 C. 69.
(2) *Narasimha* v. *Parthasarathy*, 37 M. 225 P.C.
(3) *Mondakini* v. *Adinath*, 18 C. 69 (71, 72).
(4) *Saroda Prosad* v. *Rama*, 17 C.W.N. 319; *Mondakini* v. *Adinath*, 18 C. 69 (71-72); *Doorga* v. *Soorendra*, 12 C. 686; *Padajirav* v. *Ramrav*, 13 B. 160.
(5) *Padajirav* v. *Ramrav*, 13 B. 160 (167).
(6) *Padajirav* v. *Ramrav*, 13 B. 160.
(7) *Bhimawa* v. *Sangawa*, (1896) B. P.J. 351.

without the other, so that if one of them dies the power is at an end.[1] It is, of course, competent to the husband to authorize his junior widow to adopt to the exclusion of the senior widow.[2] Of the two co-widows in Bombay, the senior may adopt without any express authority of her husband, but the junior cannot adopt without the consent of the senior co-widow, or the special authority of her husband,[3] *a fortiori* she cannot adopt when the senior widow has already exercised her right.[4] Where the husband authorizes his two widows to adopt to him alternately up to the number of six, the the adoption by the junior widow, after the death of the son adopted by the senior widow is valid even though the estate does not vest in the adopting widow.[5]

Adoption by fraud, etc.

46. An adoption brought about by corruption, coercion, undue influence, fraud, misrepresentation, or mistake, or otherwise than by the free consent of the parties thereto, is voidable at the instance of the party wronged, but subject to the rights of other parties, it may be confirmed.[6]

Illustrations.

(*a*) *A*, a widow in the Dravid country, falsely represented to her husband's sapindas that she had authority from her husband to adopt. They thereupon accorded their consent. The adoption is invalid as their consent was obtained by misrepresentation.[7]

(*b*) *A* threatened *B* with a criminal prosecution falsely accusing her of forgery. *B* thereupon adopted *A's* son *C*. She treated *C* as her son for years. *B* could not afterwards avoid it, for she had ratified it.

574. **Analogous Law.**—This section merely applies the general law to the subject of adoption, and is amply supported by authorities.[8] So the Succession Act[9] embodies the following provision equally applicable to the Hindus, subject to the Hindu Wills Act.[10]

Will obtained by Fraud, Coercion or Importunity.

A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator is void, and the court is bound to ignore it. But assuming that fraud, etc., is pleaded, the proof by which it is supported must be precise and sufficient, and as it is too often ignored, the fraud proved must be the fraud pleaded, and not some other fraud which had never been pleaded at all and of which the other party had no notice. In the case of marriage and adoption, which materially alter the status of the person married or adopted, this precaution is especially necessary; for it may affect his rights, though, being a minor, he may have had no share in it at all.

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(1) *Narasimha* v. *Parthasarathy*, 37 M. 199 (225) P.C., overruling *Narasimha* v. *Rangayya*, 29 M. 437.

(2) *Chennappa* v. *Ramappa*, 10 M.L.J. 131; *Dnyanu* v. *Tanu*, 44 B. 508.

(3) *Basappa* v. *Shidramappa*, 43 B. 481; *Dnyanu* v. *Tanu*, 44 B. 508.

(4) *Shivappa* v. *Rudrava*, (1932) B. 410 (416, 417).

(5) *Shashankabhooshah* v. *Brtjendra Narayan*, 63 C. 385.

(6) *Venkata* v. *Rangayya*, 29 M. 437 (445, 446); *Venkamma* v. *Subramaniam*, 30 M. 50 (53) P.C.; *Bal Gangadhar Tilak* v. *Shrinivas*, 39 B. 441 (467) P.C.; *Sitaram* v. *Hurihar*, 12 Bom.L.R. 910: 8 I.C. 625.

(7) *Venkamma* v. *Subramaniam*, 30 M. 50 (52, 53).

(8) *Ib.*

(9) Act XXXIX of 1925.

(10) Act XXI of 1870, S. 2; now Sch. III, S. 57, Act XXXIX of 1925.

575. As regards the effect of these Acts, it has been held that neither coercion nor fraud nor undue influence nor misrepresentation renders an adoption invalid or void, though they make it voidable at the instance of the party coerced or the adopted son, whose *status* is altered to his prejudice by such coercion. But a party may have been coerced into the doing of a thing which he may ratify afterwards. Such was the case of the Hindu widow who had been coerced into making an adoption of a boy by an attorney, who threatened the mother with prosecution for the forgery of a will, executed in her favour, whereupon she took the boy in adoption, ratifying her act when the threat was removed by acknowledging the adoption and upholding it as a valid one.[1]

Ratification when possible.

576. The first pre-requisite of a valid adoption is that it should be made and taken out of affection[2] which, of course, implies that it should be the voluntary act of parties and not one brought about by corruption, coercion, or any of the other circumstances mentioned in the section, which may defeat the very purpose of adoption. So, in setting aside the death-bed adoption of a person, the Privy Council said: "How is it possible that a person in such a condition could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared? In such a state as that described, even if the mind were passively awake to the suggestions made to it, it would naturally cling to repose, and yield, for the sake of it, to any external suggestion."[3]

(1) It must be Voluntary.

577. Of course, a person who, from extreme youth or old age, is unable to judge of the nature of the act and its effect upon his rights, is equally incompetent to make an adoption. As was observed in a case, "a minor might make a valid adoption for the spiritual benefit of her husband, yet there must be cogent evidence to show that she did so under the intelligent and disinterested guidance of her legal guardian, seeking *bona fide* to provide for a spiritual necessity, with due regard to her interest as far as it is compatible with such necessity."[4]

578. Any consideration paid to the father for giving away his son in adoption is really the sale of the child, and is as such, now illegal and opposed to public policy.[5] But an adoption like a marriage involves the change of status and law does not ordinarily permit the cancellation of a filial relationship once

Corrupt Adoption.

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(1) *Venkata* v. *Rangayya*, 29 M. 437 (445, 446), reversed O.A. *Narasimha* v. *Parthasarathy*, 37 M. 199 P.C., though on a different point. The view set out in the text was dissented from in *Sattiraju* v. *Venkataswami*, 40 M. 925 (930).

(2) Manu, IX-168.

(3) *Tayammaul* v. *Sashachalla*, 10 M. I. A. 429 (435). To the same effect, *Bullub Kant* v. *Kishenpria*, 6 Beng.S.R. 271, 6 I.D. (O.S.) 869 (871).

(4) *Ranganayakamma* v. *Alwar Setti*, 13 M. 214 (221).

(5) A "son bought" is the 8th out of the 12 recognized sons in the *Smritis*, but

completed,[1] any more than it favours the cancellation of a marriage. But, nevertheless, it discourages trafficking in children, and regarding the passage of all consideration between the natural parent and the adopter as illegal, it would do all it can to prevent the parent profiting by it. Consequently, if the adopter borrowed money for payment to the natural parent, the money so borrowed is not recoverable from his estate or his heirs including the adopted son.[2] And if the amount is promised but not paid, it cannot be sued for.[3] But in such cases, the reason why the adoption is not cancelled is, that it may cause irreparable loss to the adopted son. As was observed in a case: "That a rule which makes an agreement to pay, or the payment of such a consideration as that in question invalidate the adoption itself, would strike at the mischief more effectually than one which only prohibits the grant of relief in respect of the agreement or the payment, it would be idle to suppose, so long as the sentiments of the people concerned remain what they are. It is abundantly clear from the evidence that in the community to which the parties belong such payments form the rule, and the contrary, the exception. And so long as these men continue to be moved by the desire for the perpetuation of lineage by recourse to the fiction of adoption, the payments will not cease and the consequence of the stricter rule would only be that the payments would be made in secret. . . "[4]

579. The court, however, takes this view in the interests of the adoptee, and if he feels injured by his affiliation, he is entitled to have it cancelled on the ground of corruption. But otherwise the question of motive is immaterial to its validity and the court will not allow a stranger to shake his title on that ground.

But as pointed out in a later case, this view is not sustainable, as the act of adoption is not an act in the nature of a contract, and the validity of the act changing the status of a person cannot be made to remain in suspense at the option of one of the actors in the transaction.[5] Such cases may more appropriately be supported on the ground of estoppel rather than of ratification.

But in another case, the widow in Madras, being required to obtain the consent of her sapindas to her adoption, falsely stated to them that she had the authority of her husband to adopt, which rendered their consent supererogatory. They, however, consented and the widow went through the form of adoption, but the court declared it to be a nullity on the ground that the widow had obtained the necessary sanction of the sapindas by misrepresentation, and that their consent was not the "independent approval of her natural advisers," the absence of which sufficed to vitiate the adoption.[6]

580. Not Corrupt.—A sapinda's consent cannot be ruled out on the ground that while giving his consent, he had stipulated that his own share

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he is no longer so recognised; *Eshan Kishore* v. *Hurish Chunder*, 21 W.R. 381 (382); *Murugappa* v. *Nagappa*, 29 M. 161.

(1) *Murugappa* v. *Nagappa*, 29 M. 161 (164, 165).

(2) *Sitaram* v. *Harihar*, 35 B. 169 (181).

(3) *Eshan Kishore* v. *Hurish Chunder*, 21 W.R. 381 (382).

(4) *Murugappa* v. *Nagappa*, 29 M. 161 (165).

(5) *Sattiraju* v. *Venkataswami*, 40 M. 925 (930); *Venkamma* v. *Jonalagadda*, 30 M. 50.

(6) *Sitaram* v. *Harihar*, 35 B. 169 (180, 181).

should not be reduced by the adoption,[1] or because his own son was adopted.[2]

Adoption by Fraud, etc.

581. An adoption by a widow must be made with an eye solely to the fitness of the boy to be adopted to fulfil the religious and secular duties binding on a son. That object is likely to be frustrated, if she is induced to adopt a boy out of greed for money and for pecuniary benefit to herself. If she is so induced, the money paid to her is a bribe, which is condemned by all smriti writers as an illegal payment. Still less is the object fulfilled, if she is defrauded or coerced into accepting a boy whom she is constrained to adopt, without the exercise of that unfettered judgment which is essential to the efficient discharge of her duties. It is consequently clear, that no adoption can be upheld, which is the result of coercion, fraud, misrepresentation or undue influence. These are large words and commonly used in concatenation, but as the Privy Council remarked: "Coercion, undue influence, fraud and misrepresentation are all separate and separable categories of law. It is true that they may overlap or may be combined."[3] But it is, nevertheless, necessary, and is indeed, a well-recognized rule of pleading[4] that he who relies upon them for relief must plead them specifically giving particulars, without which the court will take no notice of general allegations which do not amount even to an averment of fraud.[5] The motive for an adoption being spiritual, it cannot be avoided on the ground that the adoptee has nothing to inherit.[6]

Widow's estoppel.

47. The widow cannot dispute the validity of her husband's adoption.[7]

Illustration.

A adopts his sister's son, *B*, which is invalid. *A's* widow *C* thereupon adopts *D*. *D's* adoption is invalid, since *C* could not lawfully dispute the validity of her husband's adoption.[8]

Legal limitation on the widow's adoption.

48. The widow's power of adoption is not affected by the vesting of her husband's estate in a coparcener or other heir, nor is it exhausted by the birth of a son, although it remains suspended during his lifetime, reviving on his death if he should die issueless irrespective of his age[9] and without his own widow possessing the like power of adoption.[10]

Illustrations.

(*a*) *A*, the owner of an impartible Zemindari in Behar, subject to primogeniture, dies leaving him surviving his son *B*, and his widow whom he empowers to adopt should *B* predecease her, which he did, whereupon *B's* cousin *C* inherited his estate. *A's* widow

(1) *Srinivasa* v. *Rangaswami*, 30 M. 450.

(2) Obiter in *Krishnayya* v. *Raja of Pittapur*, 51 M. 893 (925); *Solaimalai* v. *Sokkammal*, (1934) M. 567 (571).

(3) *Bal Gangadhar Tilak* v. *Shrinivas*, 39 B. 441 (467) P.C.

(4) O. VI, R. 4, C.P.Code (V of 1908).

(5) *Wallingford* v. *Mutual Society*, 5 App. Cas. 685 (697); *Ganga Narain* v. *Tiluckram*, 15 C. 533 P.C.; *Bal Gangadhar Tilak* v. *Shrinivas*, 39 B. 441 (467) P.C.

(6) *Sri Virada* v. *Sri Brozo*, 1 M. 69 (83) P.C.; *Sukhdevdoss* v. *Mt. Choti Bai*, (1928) M.W.N. 32: (1928) M. 118 (123).

(7) *Bhau Adgouda Patil* v. *Narasa Gouda Tatya*, 46 B. 400; *Chimabai* v. *Mallappa*, 46 B. 946.

(8) *Ib.*

(9) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (654) P.C.; *Yadao* v. *Namdeo*, 49 C. [illegible] P.C.; *Bhimabai* v. *Gurunathgouda*, 57 B. 157 (172) P.C.; *Vijai Singh* v. *Shiv Sangji*, 59 B. 360 P.C.

(10) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (664) P.C.

then adopted *D*, which had the effect of divesting *C*. *D's* adoption was valid though it divested *C*.[1]

(*b*) Two brothers, *A* and *B*, were members of a Maharashtra joint family. *A* died leaving him surviving his brother *B* and widow who adopted *C* without consulting *B*. *C's* adoption is valid.[2]

(*c*) Of the three coparceners, *A*, *B* and *C*, *A* died leaving him surviving his widow *D* who, after the partition between *B* and *C*, adopted *D* who claimed *A's* share from *B* and *C*. *B* and *C* must give *D* his share.[3]

(*d*) *A*, the father of *B*, then aged 2 years empowers his wife *C* to adopt, should *B* die. *B* survived his father but died issueless and unmarried at the age of 21, whereupon *C* took *D* in adoption. *D* claimed the estate from *E* in whom it had vested as the then nearest heir of *A*, entitled to *A's* impartible Zemindari, *D* is entitled to divest *E*.[4]

(*e*) But if in the last case *B* had made an adoption before his death, or left a widow who could adopt, then his mother *C's* power to make an adoption would become extinguished.[5]

582. Analogous Law.—The power of the widow to adopt, though it has the effect of defeating a contingent interest, such as the interest of her reversioner, has long been recognized and never been doubted, but her power to defeat a vested right by her adoption had long been the subject of doubt on the ground stated by the Privy Council that an estate once vested cannot be divested by an adoption,[6] and that "it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will."[7] In a later case, they re-emphasised this view, adding that it was impossible not to see "that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over property. It seems, therefore, to be the duty of the court to keep the power strictly within the limits which the law has assigned to it."[8] In a still later case, their Lordships reiterated their view that, in giving effect to the religious duty, rights to property cannot be left out of consideration in the determination of the question.[9] These were all Madras cases, but the reasons given were general and applied to cases even from Bengal[10] which, therefore, were taken to guide the course of Indian decisions[11] till their current was reversed by their Lordships' decision in *Yadao* v. *Nam Deo*,[12] since when the courts have adopted the view that the religious obligation of the widow to make an adoption cannot be qualified

(1) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 P.C.

(2) *Yadao* v. *Namdeo*, 49 C. 1 P.C.; *Bhimabai* v. *Gurunathgouda*, 57 B. 157 P.C.; *Vijai Singh* v. *Shivsangji*, 59 B. 360 P.C.

(3) *Ib.*, *Panyam* v. *Ramalakshmamma*, 55 M. 581.

(4) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 P.C.

(5) *Ibid.*

(6) *Bhoobun Moyee* v. *Ramkishore*, 10 M.I.A. 279 (312).

(7) *Collector of Madura* v. *Muttu Ramalinga*, 12 M.I.A. 397 (441-442).

(8) *Sri Virada* v. *Sri Brozo Kishore*, 1 M. 62 (83) P.C.

(9) *Veerabasavaraju* v. *Balasurya*, 41 M. 998 (1010) P.C.

(10) *Bhubun Moyee* v. *Ramkishore*, 10 M.I.A. 279; *Padmakumari* v. *Court of Wards*, 8 C. 302 (309) P.C.; affirming O.A. 5 C. 615; *Tarachuran* v. *Sureshchander*, 17 C. 122 P.C. "Nothing would be gained, in their Lordships' opinion, by attempting a critical examination of these cases in view of two recent pronouncements of this Board." *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (655) P.C.

(11) *Ishwar* v. *Gajabai*, 50 B. 468 (511) F.B., overruled in *Bhimabai* v. *Gurunathgouda*, 57 B. 157 P.C.

(12) 49 C. 1 P.C.

with reference to considerations extraneous to it, and that, therefore, the fact that her adoption would have the effect of devesting vested interest cannot affect her spiritual duty.[1]

583. Another limitation on her power upon which the courts had settled down to a view, since pronounced erroneous, by the Privy Council, was the rule that if the widow's son had died reaching the age of "ceremonial competence" it had the effect of determining her own power, since, with the attainment of ceremonial competence the son acquired the inherent right to make his own adoption, and that, since there cannot be two persons possessing the same right, the widow's right must cease the moment her son became competent to perform the ceremony of adoption, which is only possible as stated in the section.

584. **Principle.**—Two motives underlie an adoption, spiritual and secular, and the case-law that has clustered round the subject depends upon which of the two motives is given pre-eminence. The one regards the primary purpose of an adoption to provide for the spiritual needs of a person in accordance with Hindu Law only possible through the medium of a son, natural or adopted, as also the continuance of the lineage for the same purpose; the other view which, while recognizing the force of spiritual necessity still treats the question as not wholly independent of its effect upon the devolution of property, the result being that the power of adoption is in each case limited by conditions which treat the one or the other question more important. In many cases[2] the secular consideration was held to limit the widow's power of adoption, but the Privy Council regard this view point fallacious, holding as they do the spiritual necessity as more vital to the orthodox Hindu, though the secular view had long gained currency in this country on the authority of the same Board who had held that where the husband had left coparceners, "it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will."[3]

585. **Nature and effect of widow's adoption.**—Since the widow's power of adoption is now supported on the theoretical basis of spiritual necessity, it is no longer held subject to the rule regarding the vesting of estates, (§ 582) or the attainment of "ceremonial competency" of her son, or, in the case of the widow of a joint coparcener in Bombay, upon the express authority of her husband or of her husband's coparceners,[4] or on the fact that she had inherited no property from her husband.[5] This view has made a clean sweep of an accumulated mass of case-law in which the logical deductions from the two rules, now abrogated, were set out. Now, that the rules themselves have gone, it would be futile to pass in review the earlier law on the subject; but a prolific crop of new cases are sure to be the outcome of the new rules, for the time being settled by the Privy Council. Meanwhile, it might be useful to forecast the trend of such derivative law as the rules incline to.

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(1) *Amarandra* v. *Sanathan Singh*, 12 Pat. 642 (654) P.C. and cases cited, *supra*.

(2) *See* Hindu Code, (3rd Ed.), S. 44 Comm.

(3) *Collector of Madura* v. *Muttu Ramalinga*, 12 M.I.A. 397 (441-442) cited in *Rakhmabai* v. *Radhabai*, 5 B.H.C.R. (A.C.) 181 (193) approved in *Bhimabai* v. *Gurunathgouda*, 57 B. 157 (172) P.C. though the fact stated in the text was not adverted to.

(4) *Yadao* v. *Namdeo*, 49 C. 1 (11-18) P.C.; *Bhimabai* v. *Gurunathgouda*, 57 B. 157 P.C.

(5) *Pratap Singh* v. *Agar Singh*, 43 B. 778 (793) P.C.

586. In the first place, since a deceased coparcener may now empower his widow to make an adoption, and the adoptee takes the place of a natural son, with effect from the death of his adoptive father, on the analogy of a posthumous son[1] it follows that such a son would rank as a coparcener as from that moment, possessing all rights of a coparcener; so that if the estate be an impartible one, he will succeed to it displacing his collaterals, even though one of them might, in the meantime, have inherited it as the presumptive heir of the deceased.[2] If the joint estate be partible he is still entitled to take his father's share, and if, in the meantime, the estate had been already partitioned he would be entitled to the allotment of his share,[3] though it would be no ground for a repartition of the whole estate; since a partition once made is not subject to repartition on that ground. In such cases, moreover, the rule that an adoption can only be made to the last male holder would not apply, since it is also a rule based on devesting.[4] Where the deceased has left two or more widows, all equally empowered or otherwise entitled to make an adoption, then all must join in making the adoption, but if the others refuse, the senior alone may make a valid adoption.[5] But if of two widows the junior had inherited the estate on the death of her own son, could she be devested of her vested estate by the adoption by her senior co-widow? That she could not be so devested had been previously held in cases which followed the general rule applicable to vested estate,[6] but since this rule no longer controls an adoption, it follows that such co-widow can be no better off than the coparcener and that both must bow to the effect of the spiritual duty upon their own estates.

587. But the case would be different, where the deceased left the widow and a son, then aged 2. In such a case, if the son should die on coming of age and married leaving him surviving his own widow, the question whether the father's widow would still retain the right of adoption depends upon whether the son's widow had equally that right. The Privy Council were clear that if she had, then the mother's right would become extinguished,[7] but they refrained from deciding what would be its effect if she had no such right,[8] though in a later passage, they seemed to suggest that in that case, her mother-in-law's right to make an adoption would remain unimpaired,[9] though in some previous cases decided by them, they regarded the mere survival of the widow as sufficient to divest her mother-in-law of her right of adoption; but in so holding they did not advert to her incapacity, but based their judgment on the rule that her vested estate could not be devested by her mother-in-law's adoption.[10] One thing is certain, that if the son should die unmarried, whatever his age, the mother's

(1) *Pratap Singh* v. *Agar Singh*, 43 B. 778 (794) P.C.
(2) *Pratap Singh* v. *Agar Singh*, 43 B. 778 (792) P.C.
(3) *See* S. 195 comm.
(4) *Ammanna* v. *Satyanarayan*, 49 M. 636 (645, 646).
(5) *Ramkumari* v. *Radhabai*, 5 B.H.C.R. 192; *Rupchand* v. *Rakhmabai*, 8 B.H.C.R. (A.C.) 1; *Ramji* v. *Ghamu*, 6 B. 498; *Keshava* v. *Govind*, 9 B. 91; *Bhimawa* v. *Sangawa*, 22 B. 206 (211); *Amava* v. *Mahadgauda*, 1 B. 416; *Narayanswami* v. *Mangammal*, 28 M. 315.
(6) *Ramkrishna* v. *Shamrao*, 26 B. 526 F.B.; *Anandi Bai* v. *Kashi Bai*, 28 B. 461 (464, 465); *Datto* v. *Pandurang*, 32 B. 499; *Faizuddin* v. *Tincawri*, 22 C. 565 (572).
(7) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (659) P.C.
(8) *Ib.* p. 659.
(9) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (664) P.C. citing with approval Wallace, J., in *Tripuramba* v. *Venkataratnam*, 46 M. 423 (433-434).
(10) *Bhoobun Moyee* v. *Ram Kishore*, 10 M.I.A. 279 (312); *Amarendra* v.

right of adoption would survive his death.[1] But, of course, if the son, though unmarried, died leaving an adopted son, then it would naturally suffice to extinguish his mother's right of adoption[2] even though the adopted son should die one moment after the adoption.

588. **Limits to Her Power.**—That the right of the widow to adopt, though large, is by no means unlimited, has been recognized by their Lordships even in the later cases in which they have given fuller recognition to the doctrine of religious duty. The fact is that the law of adoption, like any other law, can at best be only loosely logical. It would not bear all the deductions that might be held to flow legitimately from the recognition of a single doctrine. As their Lordships observed in a case, "It could hardly have been intended that after the lapse of several successive heirs, a son should be adopted to the great-grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied."[3] Again, while the widow may, by her adoption, create an estate in her son, in which she herself had no interest beyond a claim for her maintenance, and though her adoption may devest a vested interest, *a fortiori* a mere contingency, still her adoption cannot defeat her husband's devise[4] or the disposal of property to a *bona fide* transferee for value by the heir since displaced.[5] Her right would equally continue, where the son is himself adopted into another family.[6]

589. The presence of a daughter, or of a daughter and her sons, has never been held to be a bar to the mother's right of adoption, though by her adoption she would not only disappoint her husband's lineal heir but alter the entire course of succession. There has never been any doubt on this question, since, as already observed, the widow's right of adoption was never held to be affected by its effect upon a mere contingency, and the daughter and her sons, being mere reversioners possess no higher right.[7]

590. **Mother-in-law v. Daughter-in-law.**—The question whether the mother-in-law has a preferential claim to adoption against her daughter-in-law on the death of the latter's husband issueless has been settled so far that if the son's widow was authorised or entitled to adopt, it suffices to extinguish her mother-in-law's power whether the son's widow does or does not use her power. But this is not the only contingency in which the two might be in conflict, since suppose the widow be the widow of a predeceased son with power to adopt, or the widow of the son dying after his father but without power to adopt. In the former case, since the last holder was the father there can be no doubt that his widow would have the preferential right of adoption. The latter contingency cannot be met with the same degree of assurance, nor were their Lordships quite sure of the inclination of their mind in such a case, since in their latest considered judgment[8] they acknowledge that the previous decisions of their Board held the pre-

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Sanatan Singh, 12 Pat. 642 (659-664) P.C.; to the same effect *Verabhai* v. *Bai Hiraba*, 27 B. 492 (499) P.C., in which, however, the son had died both unmarried and a minor.

(1) *Ib.*, p. 662.

(2) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (655) P.C.; following 10 M.I.A. 279; approving 26 B. 526 F.B.

(3) *Bhoobun Moyee* v. *Ram Kishore*, 10 M.I.A. 279 (312).

(4) *Ammanna* v. *Satyanarayana*, 49 M. 636 (645, 646).

(5) *Pratap Singh* v. *Agar Singh*, 43 B. 778 (794) P.C.

(6) *Chinnasami* v. *Ramasamy*, 13 I.C. (M.) 7; *Rampeari* v. *Bhogis*, 8 I.C. (C.) 713.

(7) *Maharaja of Kolhapur* v. *Sundaram*, 48 M. 1, F.B.

(8) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (655, 656), P.C.

sence of the sons's widow as extinguishing her mother-in-law's power,[1] though in them the question of her capacity was not adverted to, and in their later case, they left the question open,[2] though, later on they expressed "complete agreement" with the statement of Wallace, J., in a Madras case[3] to the effect that, "If the only son dies without leaving any one to perpetuate the line, there seems no good reason for restricting the power of his mother to perpetuate it in the only way she can by adopting a son to her own husband."[4] This view of their Lordships though *obiter* and taken all in all not unequivocal would seem to be in consonance with the general line of their ratiocination.

No revival of determined power.

It is manifest that a widow's power of adoption, if once determined, cannot be revived upon the estate vesting in her. Consequently, where the estate becomes revested in the widow on the death of her son and his widow, she could not adopt to her husband.[5] The result would be the same if instead of dying the son was adopted in another family[6] and his widow re-marries.

Which estate may be divested by Adoption.

49. (1) An adoption by the widow of a sole surviving coparcener has not the effect of devesting his heir.[7]

(2) An adoption to a coparcener may defeat survivorship[8] but it cannot devest inheirtance.[9]

Illustrations.

(*a*) *A* and *B* are two coparceners. *A* dies and his interest vests in *B*. *A's* widow then adopts *D*. *D* will devest *B* to the extent of *A's* interest that had become vested in him before adoption.[10]

(*b*) But in the last case, if *B* had died before *D's* adoption and his own interest, enlarged with *A's*, had vested in his heir *C*, the latter cannot be devested of *A's* interest that had become merged into *B's* on whose death *C* had taken it by inheritance.[11]

Power to give in adoption.

50. A boy may be given in adoption by his natural father,[12] or with his consent, by the mother, except where such consent cannot be obtained owing to his death or disability, provided that he had not at any time expressly or impliedly prohibited her from so doing.[13]

591. **Analogous Law.**—The following text refer to the persons entitled to give in adoption:—

(1) *Madan Mohan* v. *Purushothama*, 41 M. 855, P.C.; approving *Ramachandra* v. *Sham Rao*, 26 B. 526 F.B.; *Pratap Singh* v. *Agar Singh*, 43 B. 778 P.C.; *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (658) P.C.

(2) *Ib.*, p. 659.

(3) *Tripuramba* v. *Venkataratnam*, 46 M. 423 (433-434).

(4) *Amarendra* v. *Sanatan Singh*, 12 Pat. 642 (664) P.C.

(5) *Krishnarav* v. *Shankarrao*, 17 B. 164; *Manikyamala* v. *Nand Kumar*, 33 C. 1306; *Ramchandra* v. *Murlidhar*, 39 Bom. L.R. 599.

(6) *Sinnachami* v. *Ramasamy*, 22 M. L.J. 85; 13 I.C. 7; *Rampeari* v. *Bhogis*, 8 I.C. (C.) 713.

(7) *Balu* v. *Sambhaji*, I.L.R. 1927 B. 508 F.B. (per Beaumont, C.J. and N.J. Wadia, J.; Rangnekar, J., dissentient; approving *Shankar* v. *Ramrao*, 60 B. 89; *Dhon* v. *Rama*, 60 B. 83.

(8) *Madana* v. *Purshothama*, 38 M. 1105, O.A. 41, M. 855 P.C.; *Chandra* v. *Gojrabai*, 14 B. 463.

(9) *Babu* v. *Sambhaji*, I.L.R. 1937 B. 508 F.B.; *Chandra* v. *Gojrabai*, 14 B. 463.

(10) *Vijay Singhji* v. *Shirsangji*, 59 B. 360, P.C.; *Amadendra* v. *Sanatan Singh*, 12 Pat. 642 P.C.

(11) *Balu* v. *Sambhaji*, I.L.R. (1937) B. 508 (542) F.B.

(12) *Narayanswami* v. *Kuppusami*, 11 M. 43 (47).

(13) *Jagesh Chandra* v. *Nrityakali*, 30 C. 965.

Vashisth.—"A son, formed of seminal fluids and of blood, proceeds from his father and mother as an effect from its cause; both parents have power to give or sell or desert him."[1] "Let not a woman give or accept a son, unless with the assent of her husband."[2]

Yadnavalkya.—"He whom his father or mother gives in adoption shall be considered as a son given."[3]

As previously explained, children being the property of their father the latter has the right of their disposal, of which adoption is one. After the father, the mother possesses the same right, but subject to control when possible. If, therefore, he is dead or incapable of consenting by loss of reason or otherwise, or if he is permanently absent from home, or if he has entered a religious order, then the mother may, in the absence of any express or implied prohibition from him, give away her son in adoption.[4] But since the father, and if he be dead or otherwise rendered incompetent, the mother are the only relatives entitled to give in adoption, it follows that that right belongs, and can be delegated to no other relation; consequently, a boy who has lost both his parents cannot be adopted.[5]

592. Father's Authority to give in Adoption.—The person who adopts or, with or without his authority, his wife may, in accordance with the rules already set out, take a boy in adoption. But the authority to give remains. Primarily, only the natural father possesses that power. An adoptive father has no right to give his adoptive son in adoption, for the simple reason that a boy who has once been taken in adoption cannot be again adopted.[6] Consequently, if the adoptive father begets a son he may give in adoption this son, but not his adopted son.

593. The right of the father to give is uncontrolled by the mother. Even if she objects, he has still the right to give his son in adoption, for "in the eye of Hindu Law, when a man gives his son in adoption he would seem to exercise a power, more like the power of an absolute proprietor than of a guardian."[7]

His Right Unaffected by Age or Conversion.

594. If a minor father can adopt, or authorize an adoption, there seems no reason why such a father should not be competent to give his son in adoption. The question in each case is whether he had, at the time, attained the age of discretion so as to be able to understand the nature of his act and its effect upon his rights.[8]

595. His conversion to an alien faith, *e.g.*, Mahomedanism,[9] a *fortiori* Brahmoism,[10] does not affect his paternal right of giving his son in adoption. The fact that he may have, by his conversion, incapacitated himself from performing the religious ceremony, *e.g.*, *Datt Homa*, is no

(1) *Vashisth* XV-172, 14 S.B.E., p. 75.

(2) *Ib.*, XV-4; cited in Datt. Mim., I-§§ 15 and 16 (Suth.), p. 4. This is repeated in Mayukh, Ch. IV—Sec. V, § 16.

(3) *Yadnavalkya*, II-130.

(4) Datt. Ch., 1-§32 (Suth.) p. 115.

(5) *Dhanraj* v. *Soni Bai*, 52 C. 482 P.C.

(6) Datt. Mim., 1-§ 30 (Suth.) p. 7: "The same son must not be adopted by two or three persons."

(7) *Chitko* v. *Janaki*, 11 B.H.C.R. 199. In *Alank* v. *Fakirchand*, 5 Beng. S. R. 418 (420), 7 I.D. (O.S.) 650 (651), the Judge, having questioned the Pandit of the court whether "the assent of the wife of the adopter was necessary to legalize the adoption," received a reply in the negative.

(8) In *Jumoona* v. *Bamasoondari*, 1 C. 289 (296) P.C., a minor under 18 was held competent to adopt as well as authorize an adoption. If so, he should be equally competent to give in adoption.

(9) *Shamsingh* v. *Santa Bai*, 25 B. 551 (554, 555).

(10) *Kusum Kumari* v. *Satyaranjan*, 30 C. 999.

disqualification, since law allows such rituals to be performed vicariously in case of necessity. Even excommunication from caste does not determine the paternal right to give in adoption, unless the terms of the excommunication suspend that right.[1]

596. There is no text declaring that a person suffering from any of the disabilities such as congential leprosy,[2] impotency, blindness, deafness, idiocy or the like has no right to give in adoption,[3] and as the gift of a son is a meritorious act, a father so afflicted would not be debarred from exercising a right which his position and his religious dogma alike justify.

597. Mother's Authority.—While, therefore, the father has an absolute authority, the mother's authority to give is subject to his consent when possible.[4] Consequently, if he is dead,[5] or has emigrated, or entered a religious order,[6] she can give. But these instances are merely illustrative and support the view that, in the absence of the husband, the wife is competent to give her son in adoption,[7] unless the husband has, at any time, expressly or impliedly prohibited it.[8] In other words, in the absence of any such prohibition, she has the presumed authority of her husband in favour of her power.[9] According to the Madras High Court, her implied authority can be curtailed only by an express prohibition of the husband to the contrary.[10] In any case, her right arises from material relation, and not by any presumed delegation from her husband.[11] Consequently, her conversion to an alien faith may not affect her right, though she would forfeit it upon her re-marriage as such re-marriage severs the link she had with her former husband.[12]

598. Who cannot give in Adoption?—It has been already stated that except the parents no other relation has the right to give their child in adoption. Following this principle, the courts have negatived the right of the adoptive father or mother,[13] the stepmother,[14] the paternal grand-

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(1) *Neelawa* v. *Gurshiddappa,* (1937) B. 169.

(2) *Anund Mohan* v. *Gobind,* (1864) W.R. 173.

(3) *Anund Mohun* v. *Gobind,* (1864) W.R. 173.

(4) *Narayan* v. *Nana,* 7 B.H.C.R. (A.C.) 153 (167, 168); *Bashetiappa* v. *Shivlingappa,* 10 B.H.C.R. 268 (271, 272); *Rangubai* v. *Bhagirathi Bai,* 2 B. 377 (379, 380); *Lallubhai* v. *Mankuvarbai, Ib.,* 388 (404) affirmed by F.B. at p. 435; *Santappayya* v. *Rangappayya,* 5 M.L.J. 66; *Arumachellum* v. *Iyasamy,* (1817) 1 M.S.D. 154; *Mhalsabai* v. *Vithoba,* 7 B.H.C.R. (App.) xxvi (xxxi); *Hurosoondree* v. *Chundermoney,* (1863) Sev. 938; *Jogeshchandra* v. *Nrityakali,* 30 C. 965 (971); *Chunnia* v. *Giridhar Lal,* 30 N. 62.

(5) *Tarinee* v. *Sharoda,* 11 W.R. 468 (476).

(6) Datt. Mim., 1-§ 31 (Suth.) p. 115, cited, *supra,* 1 Str. H.L., 82.

(7) 1 Str. H. L. 95; *Mhalsabai* v. *Vithoba,* 7 B.H.C.R. (App.) xxvi (xxxi-xxxii); *Makund Deb (Raja)* v. *Sri Jaganath,* 2 Pat. 469; *Ganpati* v. *Krishnappa,* 73 I.C. (B.) 204.

(8) *Mhalsabai* v. *Vithoba,* 7 B.H.C. R. (App.) xxvi (xxxii).

(9) Datt. Ch. Sec. 1 §§ 31, 42; Mit. Ch. 1, Sec. 11, § 9, Colebrooke's note; Mayukh, Ch. IV, Sec. V. § 1; *Rangubai* v. *Bhagirathi,* 2 B. 377 (380, 381); *Mhalsabai* v. *Vithoba,* 7 B.H.C.R. (App.) xxvi (xxxii).

(10) *Narayanaswami* v. *Kuppusami,* 11 M. 43 (47, 48), followed in *Gurulingasami* v. *Ramalakshmamma,* 18 M. 53 (58).

(11) *Putlabai* v. *Mahadu,* 33 B. 107 (113).

(12) *Fakirappa* v. *Savitreswa,* 23 Bom. L.R. 482: 62 I.C. 318 F.B.; *Jagesh Chandra* v. *Nityakali,* 30 C. 965; *Sheokabai* v. *Ganpat,* 20 N. 57 F.B.; *Bahore* v. *Lookain,* 28 N. 52.

(13) Datt. Mim., IV, § 62.

(14) *Papamma* v. *Appa Rau,* 16 M. 384 (394).

father,[1] and of the brother,[2] to give in adoption. But the case of the Jains is exceptional, since the adoption of an orphan being locally sanctioned by custom,[3] they are not subject to the same restrictions. On the other hand, while under the Mithila law Dattak adoption is recognized, it is subject to the rule that the father should give his consent to the adoption, thus ruling out an adoption by the widow.[4] But the Mithila law has a customary form of adoption of its own which more than removes the hardship of the narrower rule attached to the Dattak adoption (Ss. 68, 69).

Qualification for Adoption.

51. A boy must possess the following qualifications to be eligible for adoption, namely:—

(1) Except in the case of Shudras, and in the absence of custom, he must belong to the same caste as the parties giving and taking him in an adoption;[5]

(2) He must not be an orphan;[6]

(3) He must not have been adopted by any other person;[7]

(4) Except in Bombay,[8] he must not be married;[9]

(5) Under the Bengal and Benares Schools, he must not have been invested with the sacred thread;[10]

(6) In Dravid, he may be adopted after his investiture with the sacred thread, provided he is not married;[11]

(7) Except in Dravid, if the parties are Dwijas, he should not be the sister's son, daughter's son, and mother's sister's son of the adopter.[12]

Provided that, in the Bombay Presidency, and the Punjab, and amongst the Jains, he may be adopted at any age, even though older than his adopter,[13] is married and has children.[14]

Exception.—**Nothing in Clauses (5) and (7) applies to Shudras,[15]**

599. **Analogous Law.**—The scriptural texts,[16] bearing on the subject of this section, have been superseded by the decided cases.

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(1) *Tara Munee* v. *Devanarayan*, 3 Beng. S.R. 516; *Moothoosawmy* v. *Lutchmydavummah*, (1852) Mad. S. D. 96; *contra in Veeraperumall* v. *Narrain*, 1 M.H.C. 78 (109), dissented from in *Collector of Surat* v. *Dhirsingi*, 10 B.H. C.R. 235 (237); *Kenchawa* v. *Ningapa*, *ib.*, 265-note.

(2) *Collector of Surat* v. *Dhirsingi*, 10 B.H.C.R. 235; *Bashetiappa* v. *Shivlingappa*, 10 B.H.C.R. 268 (274); *Venkata* v. *Subhadra*, 7 M. 548 (551); *Jamnabai* v. *Raychand*, 7 B. 225 (227, 228); *Bandaru* v. *Bandaru*, 39 M.L.J. 495; 60 I.C. 141.

(3) *Parshotam* v. *Venichand*, 23 Bom. L.R. 227: 61 I.C. 492 (case of an orphan adoption in the Idar State in the Mahikantha agency in the Bombay Presidency).

(4) *Chandeshwar* v. *Bisheshwar*, 5 P. 777 (847).

(5) Manu, IX-168, quoted in Mit. Ch. I; *See* XI, § 9, the word *'Sadrusham'* literally means belonging to the same class but interpreted as belonging to the same caste.

(6) *Dhanraj* v. *Soni Bai*, 52 C. 482 P.C.; unless sanctioned by custom, as in Jats; *Basant Singh* v. *Brij Raj*, 57 A. 494 P.C.

(7) Datt. Mim., 1-§ 30 (Suth.) p. 7.

(8) *Mayukh*, Ch. IV. Sec. V (Mandlik) lik), p. 58.

(9) *Papamma* v. *Apparau*, 16 M. 384; *Gangashahai* v. *Lekhraj*, 9 A. 253 and cases cited in comm.

(10) *Ganga Sahai* v. *Lekhraj*, 9 A. 253; *Mukund Deb* v. *Jagannath*, 2 Pat. 469 (480), Custom amongst the Kashmiri Brahmins found. Contra *Durga Devi* v. *Shambhu Nath*, 5 L. 200 P.C.

(11) *Viraraghava* v. *Ramalinga*, 9 M. 148, F.B.; *Papamma* v. *Apparau*, 16 M. 384.

(12) Sakala, cited in Datt. Mim. II-14, 107; *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 (420, 424), Madras excepted, *Minakshi* v. *Ramanada*, 11 M. 49 (54) F.B.

(13) *Mallappa* v. *Gangava*, 43 B. 209; *Gopal* v. *Vishnu*, 23 B. 250 (257), *Balabai* v. *Mahadu*, 48 B. 387.

(14) *Balabai* v. *Mahadu*, 48 B. 387.

(15) *See* cases cited in comm.

(16) Quoted in the Hindu Code (3rd Ed.), § 772.

Textual Rules.

The sacred texts enunciate a large number of rules which have long since become obsolete and which the legal text-books record and refute in their historical sequence. It is sufficient to say that the current adoption rules are those stated in the section. Even they are subject to local variations, to be presently noticed.

A short historical retrospect of the archaic law is all that will be attempted here.

Same Caste.

As caste rigidity in the matter of marriage and adoption is but the result of the growing re-action of the last three or four hundred years, prior to which inter-caste marriages were customary and legal, there are no specific rules in the earlier Smritis as to the qualifications of the son to be taken in adoption. The only qualification Manu mentions is that the boy to be adopted must belong to the same caste or class as the adopter.[1]

Katyayan refers to adoption of a son of a different caste but adds that he is entitled to "food and raiment only."[2] Yadnavalkya also refers to such adoptions.[3]

Nand Pandit quotes Vridha Gautam in support of the view that the adopted son should belong to the adopter's *Gotra*[4] or be a *Sapinda*,[5] but this rule is obsolete.[6]

600. The text of Sakala lays down:

Sakal.—"A sonless twice-born shohld also adopt a son of a sapinda, next to him a sagotra, in default of whom he should adopt agotra excepting a daughter's son, sister's son and mother's sister's son.[7]

Prohibited relations.

This is construed to mean that, "in the order of selection for adoption, the first choice is directed in favour of a sapinda, failing him a sagotra and in default of these, a stranger, excepting always the specific instances mentioned, *viz.*, a daughter's son, a sister's son, and the mother's sister's son"—these three being strangers and neither "sapindas" nor "sagotras" of the adopter.[8]

Niyog Rules.

601. The rule which has aroused much comment is that incidentally mentioned by Saunaka as an attribute of the adopted son. Describing the ceremony of adoption, he says: "Having kissed the forehead of the child, having adorned with clothes, and so forth, the boy bearing the reflection of a son." This incomplete quotation Nand Pandit subjects to a lengthy comment, concluding that "such person is to be adopted as with the mother of whom, the adopter might have carnal knowledge.[9] He refers to the practice of Niyog and adds that the adopted son must be one as could have been produced on the wife by Niyog, thereby expressly excluding the brother,

(1) IX-§§ 168, 169. Nand Pandit points out that if Manu be followed, the result would be 13 kinds of sons; Datt. Mim., II-§ 55 (Suth.), p. 30.

(2) Datt. Mim., III-§ 3 (Suth.), 42.

(3) *Ib.*

(4) Datt. Mim., S. II-§ 4 (Suth.), p. 18; § 74 (Suth.), 34.

(5) Datt. Mim., S. II-§ 3 (Suth.), 18.

(6) *Gokoolanund* v. *Woma Daee*, 23 W.R. 340, O. A. *Uma Doyi* v. *Gokoolanund*, 3 C. 587 P.C.; *Babaji* v. *Bhagirathi Bai*, 6 B.H.C.R. (A.C.) 701; *Dharma* v. *Ram Krishna*, 10 B. 80.

(7) Sakal cited in Datt. Mim., II-14 107; literal translation, quoted in Datt., Ch. 1-10-17, 29; also in Mandlik's H.L. 52; *Walbai* v. *Heerbai*, 34 B. 491 (495).

(8) *Ramachandra* v. *Gopal*, 32 B. 619; *Walbai* v. *Heerbai*, 34 B. 491 (495).

(9) Datt. Mim., II-§ 20 (Suth.), 63.

paternal and maternal uncles, the daughter's son and that of the sister "for they bear not resemblance to a son."[1] The rule has been understood as prohibiting adoption of a person whose mother the adopter could not have married.[2]

602. It has been held applicable only to an adoption by a male, and inapplicable to an adoption by a female to her husband,[3] or any adoption by a Shudra.[4] Even where it is applicable, it is limited to the possibility of a marriage with her when she was a virgin, having reference only to the law of propinquity,[5] without any reference to the law of appointment of *Niyog*, with reference to which the rule was framed. But as *Niyog* is now obsolete, the courts have made it a new rule of their own. The rule originally framed was no doubt intended to prevent an incestuous connection between the adoptive father and the natural mother of the boy adopted, in imitation of nature. The rule substituted in its place has the same purpose in view, but since the original rule had reference to the relationship upon marriage, while the rule substituted refers only to the relationship before marriage, it is apparent that the two rules though possessing the same aim, are not in conflict, though they do not completely coincide.

603. But even any of these three, though excepted by the text, may be adopted if permitted by custom, and one such custom in favour of the validity of adoption of a daughter's son being proved, in a case arising in the Umbala District of the Punjab, the Privy Council held it unobjectionable,[6] and even in the case of Brahmins of Southern India, the custom of adopting a sister's or daughter's son has been recognized by the court.[7] And so Strange wrote in 1806 that "in practice, the adoption of a sister's son by persons of all castes is not uncommon."[8] And similarly, the custom of adopting the daughter's son has survived the appointment of a daughter for that purpose.[9]

604. Niyog Rules prohibit adoption of the following relations: the paternal and maternal uncles, the brother, the four first cousins on the paternal and maternal side, the brother-in-law, the sister's son, and the daughter's son. The marriage rules do not exclude adoption of the father's brother's son and the mother's brother's son,[10] but exclude the brother's daughter's son.[11]

605. The Bombay High Court has held the Niyog rules of ineligibility for adoption as merely directory, and not imperative,[12] and that the rule

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(1) Datt. Mim., II-§ 20 (Suth.), 63; §§ 16-17 (Suth.), p. 63. *See also* Datt. Ch., S. V-§ 8.

(2) *Minakshi* v. *Ramanada*, 11 M. 49; *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412.

(3) *Jivani* v. *Jivu*, 2 M.H.C.R. 462; *Sriramulu* v. *Ramayya*, 3 M. 15; *Minakshi* v. *Ramanada*, 11 M. 49; *Gopal* v. *Hanman*, 3 B. 273 (298); *Vyas* v. *Vyas*, 24 B. 473.

(4) *Sriramulu* v. *Ramayya*, 3 M. 15.

(5) *Minakshi* v. *Ramanada*, 11 M. 49.

(6) *Rup Narain* v. *Gopal*, 36 C. 780 (795) P.C.

(7) *Vayidinada* v. *Appu*, 9 M. 44 F.B.

(8) 2 Str. H.L. 100 (App.). To the same effect, 2 West and Buhler's H.L. (3rd Ed.), pp. 884-888.

(9) 2 West and Buhler's H.L. (3rd Ed.), pp. 884-888, cited with approval; *Vayidinada* v. *Appu*, 8 M. 44 (53) F.B.

(10) *Minakshi* v. *Ramanada*, 11 M. 49 (54).

(11) *Haridas* v. *Mamath Nath*, (1936) C. 1.

(12) *Virayya* v. *Hanumanta*, 14 M. 459 (460, 461); *Ramachandra* v. *Gopal*, 32 B. 619 (630); *Waibai* v. *Heerbai*, 34 B. 491.

that no one can be adopted whose mother the adopter could not have legally married, is confined to the three specific instances, forbidding the adoption of the son of a daughter or of a sister[1] or of mother's sister,[2] though he may also happen to be a son of his father's brother,[3] as the three are expressly excluded by both works on adoption.[4]

606. Persons Eligible for Adoption.—All Schools and courts now agree that the first pre-requisite of eligibility for adoption is that the boy selected must be of the same caste as the adopter.[5] For this purpose, law recognizes only the four primary castes and if the boy and his adopter both belong to any of them, then there is no Shastric impediment in the way of their adoption.[6] This rule is sought to be justified on various grounds, that an adoption being an imitation of nature, and since a son, if born, must belong to the father's caste, so must be the son adopted,[7] or that, since an adopter cannot marry a woman of a different caste, and the fiction of adoption is founded upon the fiction that the adopter has begotten the boy upon his natural mother, therefore, it is necessary that she should be a person who might lawfully have been his wife—a rule which, being pushed to its logical extreme, implies (*a*) not only that the two must belong to the same caste; but (*b*) that the two must not be within the prohibited degree of relationship for marriage.[8] But the fact that the Mitakshara recognizes intermarriages between different castes, as lawful,[9] Saunaka recognizes adoption of sons of different castes and Nand Pandit does not explain away this text but recognizes it as expounding the current law of his time[10] shows that the true reason to be found for desuetude of the custom is custom, and that there is no logic behind it.[11] That there can be no adoption of a boy belonging to a different caste is, however, settled, as regards the twice-born, though the Shudras belonging to one sub-caste are permitted both to intermarry and adopt persons of another sub-caste.[12] So the court refused to countenance the adoption of a Brahmin boy by a widow of the Rajbansi Thakur caste.[13] But if the caste is one, the fact that the adoptee's father belonged to the Sadharan Brahmo Samaj is no obstacle to his adoption into an orthodox Hindu family.[14]

(1) Identity of Caste.

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(1) *Subrao* v. *Radha*, 113 I.C. (B.) 491.

(2) *Vyas* v. *Vyas*, 24 B. 473 (481); *Ramachandra* v. *Gopal*, 32 B. 619; *Yamnava* v. *Laxman*, 36 B. 533; *Ramakrishna* v. *Chimnaji*, 15 Bom.L.R. 824; *Gajanan* v. *Kashi Nath*, 39 B. 410 (419); *Ragavendra* v. *Jayaram*, 20 M. 283; *contra* in *Minakshi* v. *Ramanada*, 11 M. 49.

(3) *Ramachandra* v. *Gopal*, 32 B. 619; *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 P.C. overruling 17 A. 294 F.B.

(4) *Walbai* v. *Heerbai*, 34 B. 491.

(5) *Manu*, IX-168, cited in Mit. Ch. I; *see* XI, § 9.

(6) Manu, IX-168; *Yadnavalkya* II 132; Mitak. Ch. 1, S. XI-§ 9; Mayukh, Ch. V, S. 5 § 4; Datt. Mim. II-§§ 22, 23-25 (Suth.), p. 21; Saunaka, cited *ib.*, § 21; (Suth.), p. 21; Datt. Ch., 1-§§ 12-16.

(7) Mit. Ch. 1, S. XI, § 9; Datt. Mim., II, 74-88.

(8) Sutherland's Synopsis, II-§ 1.

(9) Mit. Ch. 1, Sec. VIII; Dayabhag, Ch. IX.

(10) Datt. Mim., III-§§ 1-3.

(11) *Virayya* v. *Hanumanta*, 14 M. 459 (460).

(12) *Girish Chandra* v. *Mhd. Shajde*, 25 C.W.N. 634.

(13) *Narain Singh* v. *Shiam Kali*, 17 O.C. 186: 25 I.C. 45.

(14) *Kusum Kumari* v. *Satya Ranjan*, 30 C. 999 (1009, 1010).

(2) Must not be an Orphan.

607. Secondly, the boy to be adopted must not be an orphan, that is to say, one bereft of both parents, for, in that case, there is no one qualified to give him in adoption[1] (§ 598). And when there is no giving and taking, an adoption cannot be supported on the ground of *fuctum valet*,[2] and the adoptive father may himself dispute its validity, since there can be no estoppel in fraud of the law[3] (§ 634). But though this is unquestionably the rule, it is subject to custom to the contrary as was found in the case of Dhusars of the Girgaon district of Punjab,[4] or the facts of the Delhi district,[5] or the Nattukottai Chettis in the Madras Presidency.[6]

(3) Must Not be Adopted by Another.

608. Thirdly, since adoption is an imitation of nature, a person cannot be the son of two fathers, even though they be brothers, and his adoption to one disqualifies him for a second adoption.[7] But if his first adoption was invalid, there being no adoption in law, it does not stand in the way of a second adoption.

609. This is now the established view, though Nand Pandit[8] deduces an exception in favour of the adoption of a nephew by several brothers from an instance of such an adoption once having taken place in the mythical age; but his view was not based upon current custom and has not found favour with any text writer. As early as 1822, Sir William Macnaghten combated it in the following words: "A notion seems to have prevailed, that two brothers might adopt the same individual; but this is entirely erroneous. The supposition seems to have proceeded on a misconstruction of the following text of Manu: 'If among several brothers of the whole blood, one have a son born, Manu pronounces them all fathers of the male child by means of that son.'[9] But that text is not meant to authorize the **adoption of a nephew** even by two or more brothers. The adopted son of one brother would, of course, offer up oblations to the ancestors of all, and so far would perform the office of a son to them also; but he would not take the estate of his adopting father's brothers, in the event of their having any nearer heir."[10]

(4) Must not be married, Proviso, Cl. 7.

610. Much emphasis was laid in the earlier cases upon the fact that after a certain age, and the performance of certain ceremonies, such as tonsure in the natural family, the boy passes the age of his eligibility

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(1) *Dhanraj* v. *Soni Bai*, 52 C. 482 P.C.; *Balawantrao* v. *Bayabai*, 6 B.H.C.R. (O.C.) 83; *Bashetiappa* v. *Shivlingappa*, 10 B.H.C.R. 268; *Srinivas* v. *Balwant*, 37 B. 513 (518); *Rajambal* v. *Shanmuga*, (1922) M.W.N. 481; *Sakhbir Singh* v. *Mangisar Rao*, 49 A. 302. But *contra* the fat custom, *Basant Singh* v. *Brij Raj*, 57 A. 494 P.C.

(2) *Bandaru* v. *Bandaru*, 39 M.L.J. 495; *Soni Bai* v. *Dhanraj*, 56 I.C. (N.) 620.

(3) *Rajambal* v. *Shanmuga*, (1922) M.W.N. 481.

(4) *Ramkishore* v. *Jainarayan*, 49 C. 120 P.C.

(5) *Basant Singh* v. *Brij Raj*, 57 A. 494 P.C.

(6) *Subramanian* v. *Somasundaram*, 59 M. 1064.

(7) Dattak Mimansa, I-§§ 30-32, II-§ 40, Macn.H.L. (4th Ed.), p. 65.

(8) Dattak Mimansa, II-§§ 40-47.

(9) Cited in 3 Dig., p. 266.

(10) Macnaghten's H.L. (4th Ed.), p. 65; *see* also Mayne's H. L. (9th Ed.), § 149, p. 291.

for adoption. But these have all been superseded by later authorities to the contrary, summarized in the texts.[1]

Madras view.

611. In the cases cited, it was pointed out that even in the case of Shudras marriage was a bar to adoption,[2] and this has been the law even in Madras where, however, there is no restriction as to age, so much so that if the person is unmarried, the fact that he is aged 40 is no bar to adoption, provided he is a sapinda.[3] The prohibition of the adoption of a married man amongst the Lingayats of Dharwar still holds good, though Dharwar has been transferred to the Bombay Presidency.[4] That a married man cannot be adopted has also been decided in Allahabad[5] and in Nagpur[6] and is now the established doctrine of the Benares School applicable alike to the regenerate castes[7] and the Shudras[8] and even to the Jains[9] amongst whom, however, the custom of adoption of married men is not unknown and has been found proved in several cases.[10]

Bombay Excepted.

612. But in the Bombay Presidency, even marriage is no bar to an adoption,[11] and is in accordance both with the written law,[12] and the prevailing usuage,[13] which sanctions such adoptions even where the married man is aged 45 and is himself the father of a son.[14] Where a father becomes the son of another person, the latter acquires no right of accession in his adoptee's son who continues to retain his old gotra and his right of inheritance in the family of his birth. In other words, by his adoption into another family, the father alone goes out of the family, but he does not drag with him his son,[15] though he would necessarily have to take with him his wife who completes his individuality, and who, therefore, like her husband acquires his new gotra.[16]

Status of Son and Wife of the Adoptee.

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(1) For these cases *see* Gour's Hindu Code (3rd Ed.) §§ 781, 782, pp. 421, 422.

(2) *Annasami* v. *Sivagamy*, 1 Mad. D. 106; *Chetticolum* v. *Vencatachella*, (1823) M. S. D. A. 406; *Sreenevassein* v. *Sashymmal*, (1859) Mad. D. 118; *Vythilinga* v. *Vijayathammal*, 6 M. 43; *Pichuvayyan* v. *Subbayyan*, 13 M. 128.

(3) *Papamma* v. *Apparau*, 15 M. 384.

(4) *Somasekhara* v. *Mahadeva*, 53 M. 297.

(5) *Gangasahai* v. *Lekhraj*, 9 A. 253; *Damodarji* v. *Collector of Banda*, 7 A. L.J. 927; *Phul Chand* v. *Gobardhan*, (1929) A. 739, followed in *Manika Bai* v. *Gokuldas*, 49 B. 520 (522).

(6) *Tejabai* v. *Mohanlal*, 11 C.P.L. R. 56; *Kanhyalal* v. *Satiya*, 1 N.L.R. 1.

(7) *Bishunath* v. *Sheo Bahadur*, (1927) O. 265.

(8) *Damodarji* v. *Collector of Banda*, 7 A.L.J. 927; *Jankiram* v. *Venkiah*, 10 M.L.J. 92 : 11 I.C. 883; *Hira* v. *Hardab Singh*, (1922) P.L.R. 47: 68 I.C. (L.) 763.

(9) *Rupchand* v. *Jambuprasad*, 32 A. 247 P.C. in which their Lordships, however, confined their decision to the custom found not proved in that case.

(10) *Manoharlal* v. *Banarsidas*, 29 A. 495.

(11) *Mhalsabai* v. *Vithoba*, 7 B.H. C. R. (App.) 26; *Nathaji* v. *Hari*, 8 B. H. C. R. (A. C.) 67; *Dharma* v. *Ramkrishna*, 10 B. 80. *Query* as to Brahmins in *Sadashiv* v. *Hari*, 11 B.H.C.R. 190; *Lakshamappa* v. *Ramava*, 12 B.H.C. R. 364.

(12) Mayukh, Ch. IV, Sec. V (Mandlik), p. 58.

(13) *Brijbhukhanji* v. *Gookulootanji*, 1 Borr. 181.

(14) *Gopal* v. *Vishnu*, 23 B. 250; *Kalgavada* v. *Somappa*, 33 B. 669; *Balabai* v. *Mahadu*, 48 B. 387.

(15) *Kalgavada* v. *Somappa*, 33 B. 669; followed in *Manika Bai* v. *Gokuldas*, 49 B. 520 (522).

(16) *Ib.*, p. 687.

(5) Adoption Before Investiture in Bengal and Benares.
(6) But after Investiture valid in Madras.

613. The rule that in the case of the first three castes, the boy to be adopted must not have donned the sacred thread is enforced only by the Benares[1] and Bengal[2] schools, the Dravid and the Bombay schools permitting such adoptions, the former only on condition that the adoptee is not married,[3] which is the rule everywhere, except in Bombay and the Punjab. So dealing with the case of a Kshatriya adoption, Mahmud, J., held, "That according to the Hindu Law of adoption as prevalent in the Benares school, the performance of the *Upanayan*[4] or the ceremony of the investiture of the sacred thread, followed by the *Gayatri*, representing as it does the sacred birth of a boy and the beginning of his education in the duties of his tribe as prescribed by Manu, is the ultimate limit when a valid adoption in the *Dattak* form can take place."[5] This doctrine has no application to the Shudras, for in their case the only ceremony of consequence in its theological and legal aspect in Hindu Law, is the ceremony of marriage.[6]

Shudras excepted.

Age for Investiture.

614. Now, since the ceremony of investiture, as already stated, may be performed in the case of Brahmins at any time between the 8th and 16th year, that of a Kshatriya between the 11th and the 22nd year and that of a Vaishya between the 12th and 24th year, it follows that this is the extreme age limit for the performance of the investiture as also for adoption.[7] But should the boy be for any reason not invested with the sacred thread beyond this age, there appears to be no legal impediment to his adoption before marriage, for if his eligibility is determined by the *Upanayan*, it cannot be assumed where it has not been in fact performed, or, where though performed in fact, it is found to be invalid in law, being not in conformity with the customary ritual.[8] But here again, custom may override the law and such custom was found proved in the case of a Kashmiri Brahmin whose adoption at 17, after his *Upanayan*, was held valid, because it was so treated by the caste and not questioned for a period of 17 years.[9]

(7) Adoption of Prohibited Relations.

615. The texts favour the adoption of near relations, sapindas first, gotrajas next, and strangers last, if the first two are not available.[10] These injunctions have been held to be only monitory and not mandatory. Consequently, the adopter is free to choose any boy from amongst his caste

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(1) *Ganga Sahai* v. *Lakhraj*, 9 A. 253; *Makund Deb* v. *Jagannath*, 2 Pat. 469 (480).

(2) *Makunda Deb* v. *Jagannath*, 2 Pat. 469: 72 I.C. 230.

(3) *Viraragava* v. *Ramalinga*, 9 M. 148 F.B.; *Pichumayyan* v. *Subhayan*, 13 M. 128; but see *Visva Sundara* v. *Soma Sundara*, 43 M. 876.

(4) Lit. "*up*" near and "*nayan*" going, *i.e.*, "going near the preceptor" for commencement of his Vedic studies. All men are born Shudras and the ceremony of *Upanayan* symbolized by the investiture of the sacred thread is regarded as a second birth converting a Shudra into a *Dwija* or twice-born. It marks the termination of infancy and the commencement of the term of studentship.

(5) *Ganga Sahai* v. *Lekhraj*, 9 A. 253 (328) following on this point *Keerutnarain* v. *Bhoobunesree*, (1859) S.D.A. B. 161; *Ramkishore* v. *Bhoobunmoyee*, (1859) S.D.A.B., p. 229 (cited *supra*).

(6) *Ganga Sahai* v. *Lekhraj*, 9 All. 253 at p. 328.

(7) Manu, II, §§ 36-38.

(8) *Vadrevu* v. *Ryali*, 43 M. 876; *Chandeshwar* v. *Bisheshwar*, 5 Pat. 777.

(9) *Durga Devi* v. *Shambu Nath*, 5 L. 200 P.C.

(10) *See* Sakala cited in analogous law.

fellows. And amongst these last, the Privy Council have now settled that since the texts of Sakal and Saunak, cited with approval in the two Hindu treatises on adoption,[1] expressly prohibit the adoption of the sons of one's daughter, sister and mother's sister, these cannot be adopted,[2] nor can such adoption be supported by recourse to the doctrine of *factum valet*.[3]

616. There remains the question whether these texts equally prohibit the adoption of other relations with whose mother the adopter could not have at any time contracted a legal marriage. The Privy Council had not to decide, and refrained from deciding, this general question as the case before them related to the adoption of a mother's sister's son, which is expressly prohibited, and as such, their Lordships felt bound to follow the text, supported as it was by precedents and the opinion of text writers. The question, therefore, still remains whether the prohibition is specifically confined to the specified relations, or is more general, as stated in the rule. (§§ 604-609).

617. But the texts of both the Smritis and Nand Pandit, as also the reflection metaphor and the *Niyog* rules and their deductions have been overridden by the march of custom which, as was to be expected, has been more active in the matter of sonship and inheritance than in any other branch of law, and the desire of a man to yield to his natural instinct of affection, rather than to the fine disquisitions of the logician, have made the law of adoption more a customary than a textual law, which, as in the Mithila, permits the son to adopt his own father. **(Ss. 68, 69).**

618. One thing is certain that whether it be the relic of the *Niyog* rules, or its apparent incongruity, or the force of custom, the same relation may be adopted in one place, or under one school of law, though his adoption in another place, or under another school of law, is held to be invalid.

Rule Inapplicable to Shudras.

619. The rule has, in any case, no application to *Shudras*.[4] They are expressly excepted in the very texts which are held to denounce the rule.

Southern India also excepted.

620. Nor has it any force in Southern India,[5] where the adoption of a brother's son,[6] a brother's daughter's son,[7] or of a daughter's son, or a sister's son, are locally customary.[8]

Daughter's Son.

621. Even the above express text has not received universal acceptance. For while the prohibition of adoption of a daughter's son is now accepted as the general rule of Hindu Law,[9] deviation from it is permitted by custom.[10] While

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(1) *See* texts already cited § 772.
(2) *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 (420-424) P.C.; *Walbai* v. *Heerbai*, 34 B. 491.
(3) *Gopal* v. *Hanmant*, 3 B. 273 (293).
(4) *Nunkoo Singh* v. *Purm Dhun Singh*, 12 W.R. 356; *Phundo* v. *Janginath*, 15 A. 327; *Chinna* v. *Pedda*, 1 M. 62.
(5) *Minakshi* v. *Ramanada*, 11 M. 49 (54) F.B.
(6) *Soorta* v. *Kanaka*, 43 M. 867 (Kshatriyas of South Kanara).
(7) *Vadrevu* v. *Ryali*, 43 M. 876 (Brahmins of the Andhra or Telugu portion of the Madras Presidency).
(8) *Jageshwar* v. *Pandurang*, (1924) N. 73.
(9) *Gopal* v. *Hanmant*, 3 B. 273 (293).
(10) *Rup Narain* v. *Gopal Devi*, 36 C. 380 P.C.

the rule has been given effect to in the Benares school,[1] the contrary has become customary in the Southern Mahratta country,[2] the Punjab[3] and amongst the Havik Brahmins of Kanara,[4] the Nambudri Brahmins of Malabar[5] and amongst the Brahmins generally in the Tanjore, Trichinopoly and Tinnevelly districts of Southern India.[6]

Sister's Son.

622. The same view holds good in the case of a sister's son, prohibition being the rule and permission an exception, when justified by custom.[7] Such custom was proved to exist amongst the Bhora Brahmins of the United Provinces,[8] though not amongst the other Brahmins,[9] and among the agricultural Khatris of the Punjab,[10] and the Vaishyas of Bombay[11] and even the Brahmins of Nagpur,[12] and Southern India.[13] But in the Andhra country, as in Bengal, the normal rule holds good.[14] As Kayasthas are Shudras, they are free to adopt a sister's son.[15]

Sister's Son's Son.

But there is no legal prohibition against the adoption of a sister's son's son, and he may be validly adopted, even though it may amount to a breach of caste custom.[16]

Mother's Sister's Son.

623. So the prohibition of adoption of a mother's sister's son being covered by an express text, the prohibition is the rule and extended over to one though he may happen to be also his father's brother's son,[17] but an exception has been allowed in the case of Purbia Kurmis, who though they call themselves Purbia Kshatriyas, do not really belong to the regenerate caste.[18] In this case the court upheld the adoption of the father's sister's grandson.

Brother and Step-brother.

624. Valid Adoptions.—Nand Pandit expressly excludes the brother and both the paternal and maternal uncles from adoption.[19] The Noyog rules exclude both the brother and the step-brother, but their adoption, though not general, is, nevertheless, not unknown. Steele infers that a younger brother may be adopted by an elder brother because the Ramayan

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(1) *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 (418) P.C.

(2) *Bai Nani* v. *Chunilal*, 22 B. 973 (976); *Sundrabai* v. *Hanmant*, 56 B. 298.

(3) *Rup Narain* v. *Gopal Devi*, 36 C. 780 P.C.; *contra* in *Baij Nath* v. *Shamboo*, (1908) P.W.R. 53; *Parmanand* v. *Sheocharan*, 2 L. 69 (Amritsar Khatri case).

(4) *Gowri* v. *Shivaram*, (1894) B.P. J. 30.

(5) *Vishnu* v. *Krishnan*, 7 M. 3.

(6) *Vayidinada* v. *Appu*, 9 M. 44 F. B.; *Appayya* v. *Vengu*, 15 M.L.J. 211.

(7) *Mansa Ram* v. *Sundar*, 14 A. 53; *Sundar* v. *Parbati*, 12 A. 51 P.C.

(8) *Hansa Ram* v. *Sundar*, 14 A. 53.

(9) *Parbati* v. *Sundar*, 8 A. 1.

(10) *Sobha Mal* v. *Nanakchand*, (1911) P.L.R. 16: 9 I.C. 36.

(11) *Ganpatrav* v. *Vithoba*, 4 B.H.C. R. (A.C.) 138.

(12) *Jageshwar* v. *Pandurang*, (1924) N. 73.

(13) *Vayidinada* v. *Appu*, 9 M. 44 F. B.

(14) *Narasamma* v. *Balaramcharlu*, 1 M.H.C.R. 470.

(15) *Rajcoomar Lall* v. *Bissessur*, 10 C. 688; *Tira* v. *Shibhu*, 6 L.L.J. 442; but see § 308; *Rajendra* v. *Gopal*, 9 Pat. L.J. 123.

(16) *Sheopujan* v. *Kanog Cir*, 55 I.C. (A.) 652.

(17) *Walbai* v. *Heerbai*, 34 B. 491; *Bhagwan Singh* v. *Bhagwan Singh*, 21 A. 412 P.C.

(18) *Jivanlal* v. *Kallumal*, 28 A. 170.

(19) Datt. Mim. V-17 (Suth.), p. 63.

speaks of the latter as "in the place of the father."[1] But the Madras High Court condemned the adoption of a brother and a step-brother, though it held that the prohibition of the adoption of a half-brother had nothing to do with the possibility of a legal marriage between the son and his step-mother in her virgin state.[2] But such adoption was held valid in a Bombay case on the ground that he was not one of the relations expressly prohibited by Nand Pandit.[3] It will be, of course, valid amongst Shudras,[4] who are expressly exempted from the narrow texts. Whatever may be the established usage as regards the adoption of a younger brother, there can be no doubt that the latter cannot adopt his elder brother. Such a question was categorically put to the Pandit who opined that according to the doctrine of Saunaka, stated in the Dattak Mimansa, an elder brother, an uncle, etc., cannot become a son.[5]

Uncle.

625. The ineligibility of the uncle, both paternal and maternal, was incidentally declared by the Pandit in the case last cited. They stand in *loco parentis* to their nephew, who cannot turn the tables upon them by becoming their adoptive father. Moreover, the restriction as to age would in most cases prevent their adoption, except amongst the Jains in Bombay, and in the Punjab, even where the metaphor has not probably yet spent its force. Such however, appears to be the case in Bombay where the Courts have upheld the adoption of the father's first cousin, holding the rule of incongruity inapplicable.[6] For the same reason reason there is nothing to prevent a man from adopting a son older than himself.[7]

Brother's or Cousin's Son or Grand-nephew.

626. Of all relations, both the Smritis and later texts commend the adoption of a brother's son,[8] and even on the *Niyog* rule, the adoption of the latter's son is not repugnant to Hindu Law, since no rule prevented the marriage of the adopter with his nephew's wife when a virgin.[9] So there is nothing illegal in the adoption of a cousin's grandson.[10]

Wife's Brother.

627. The adoption of a wife's brother is legal, and its legality has been judicially affirmed,[11] and the legality of his son's adoption by his sister is settled by the Privy Council[12] in the case of a Brahmin family of the

(1) Steele's L.C., p. 44.

(2) *Sriramalu* v. *Ramayya*, 3 M. 15, followed in *Rajendra* v. *Gopal Prasad*, 7 Pat. 245 (250).

(3) *Gajanan* v. *Kashi Nath*, 39 B. 410 (419); *Shripad* v. *Vithal*, 49 B. 615.

(4) *Phundo* v. *Jangi Nath*, 15 A. 327.

(5) *Rumjeet Singh* v. *Narain Singh*, 2 Beng.S.R. 315, 6 I.D. (O.S.) 597.

(6) *Mallappa* v. *Gangava*, 43 B. 309.

(7) *Balabai* v. *Mahadu*, 48 B. 387.

(8) *Wooma Daee* v. *Gokulanand*, 3 C. 587 (597, 598) P.C., in which the effect of Datt. Mim., 1, 28-31, 67, 74 and Datt. Ch., 1-20-22, 27, 28, enjoining the adoption of a brother's son was held to be merely directory and not imperative, and in any case condoned by application of the maxim *Factum Valet* (*Ib.*, p. 601).

(9) *Morun* v. *Bijoy Kishto*, W.R. (S.N.) F.B. 121 (122); *Haran Chunder* v. *Hurro Mohun*, 6 C. 41; *Virayya* v. *Hanumanta*, 14 M. 459.

(10) *Morun* v. *Bijoy*, W.R. (S.N.) F.B. 121 (122), explained in *Haran Chunder* v. *Hurro Mohun*, 6 C. 41 (47).

(11) *Sriramulu* v. *Ramayya*, 3 M. 15; *Roop Shunker* v. *Shunkerjee*, 2 Borr. 662; *Kristniengar* v. *Vanammalay*, (1856) Mad. Dec. 213; *Rumganaigum* v. *Namesevoya*, (1891) Mad. Dec. 94; *Sarup Singh* v. *Jassi*, (1875) P.R. 22.

(12) *Puttu Lal* v. *Parbati*, 37 A. 359 P.C.; *Nani* v. *Chuni Lal*, 22 B. 973; *Sriramulu* v. *Ramayya*, 3 M. 51; *Jaisinghpaul* v. *Bijaypal*, 2 A.L.J. 36 (46), distinguishing *contra* in *Batas Koer* v. *Lachman Singh*, 7 N.W.P.H.C.R. 117 as *obiter*.

United Provinces. In that case, one Gandharv had authorized his widow Parbati to take in adoption her brother's son, which she did. The High Court upheld it,[1] and its decision was not only affirmed, on appeal by the Privy Council,[2] but their observations shake to its very foundation the obsolete Niyog rule; and its substituted analogue, so far as that rule was attempted to be extended to an adoption by the widow. Their Lordships further expressed their approval of two cases decided by the Bombay[3] and Madras High Court,[4] in the latter of which the adoption was by the husband, which in their Lordships' view, would have made no difference.

Wife's Brother's Son or Grandson.

629. So the adoption of a brother's daughter's son has become established as a rule in the Punjab, so that its validity is presumed,[5] while it is customary in Southern India,[6] though it is held invalid in Bengal.[7]

Brother's Daughter's Son.

630. So the adoption by a man of his wife's sister's daughter's son has been held valid in Madras as would be a marriage between him and his adoptees' mother[8]

Wife's Sister's Daughter's Son.

631. Of the rest, while the Madras and the Patna Courts hold the adoption of a brother and step brother invalid,[9] the Bombay High Court upheld it on the ground that it is not one of the relations expressly prohibited by Nand Pandit[10] and that in any case, it is valid amongst Shudras, who are expressly exempted from the narrow texts.[11] The same court upheld the adoption of the father's first cousin[12] and there is no objection to the adoption of the paternal[13] or maternal uncle's son, or even son's son[14] or the maternal aunt's daughter's son.[15]

Other Adoptions.

52. (1) No adoption is complete without the corporal delivery of the adoptee to the adopter with a declaration by the person, delivering him, that he delivers him in adoption; and of the adopter, that he so accepts him.[16]

Ceremony of Adoption.

(2) Provided, that they have also performed such other act or ceremonies as may be required by law, or are customary to that end.[17]

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(1) *Jai Singh* v. *Bijai*, 27 A. 417.
(2) *Puttu Lal* v. *Parbati*, 27 A. 359 P.C. approving *Jai Singh* v. *Bijai*, 27 A. 417; *Sriramulu* v. *Ramayya*, 3 M. 15; *Bai Nani* v. *Chunilal*, 22 B. 973, overruling *contra* in *Battas Kuar* v. *Lachman*, 7 N.W.P.H.C.R. 117.
(3) *Bai Nani* v. *Chunilal*, 22 B. 973.
(4) *Sriramulu* v. *Ramayya*, 3 M. 15.
(5) *Chuttan* v. *Ramchand*, (1904) P. R. 86.
(6) *Appayya* v. *Vengu*, 15 M.L.J. 211.
(7) *Haridas* v. *Manmotho Nath*, 41 C. W.N. 322.
(8) *Ragavendra* v. *Jayaram*, 20 M. 283.
(9) *Sriramulu* v. *Ramayya*, 3 M. 15, followed in *Rajendra* v. *Gopal Prasad*, 7 Pat. 245 (250).
(10) *Gajanan* v. *Kashi Nath*, 39 B. 410 (419); *Shripad* v. *Vithal*, 49 B. 615.
(11) *Phundo* v. *Jangi Nath*, 15 A. 327.
(12) *Balabai* v. *Mahadu*, 48 B. 387.
(13) *Buta Singh* v. *Dial Singh*, (1902) P.R. 67.
(14) *Virayya* v. *Hanumanta*, 14 M. 459 (461); *Haranchunder* v. *Hurromohun*, 6 C. 14.
(15) *Venkata* v. *Subhadra*, 7 M. 548.
(16) *Shoshinath* v. *Krishna*, 6 C. 381 (389) P.C.; *Govindayyar* v. *Dorasami*, 11 M. 5 (7) F.B.
(17) *Veerapermal* v. *Naraina*, 1 Str. Notes 117, cited in *Singamma* v. *Vinga Muri*, 4 M.H.C.R. 165 (167).

(3) Provided further, that if the parties thereto belong to any of the regenerate castes, and do not belong to the same *Gotra*, they must also perform the ceremony of *Datt Homa*.[1]

(4) But non-performance of the *Datt Homa*[2] or of the further ceremonies mentioned in clause (2)[3] will not invalidate an adoption made as provided in clause (1) unless their performance is regarded by the caste as of the essence of the ceremony of adoption.

Explanation.—No delivery and its acceptance is valid unless the parties thereto were capable of understanding the nature of the act and its effect upon their rights.[4]

Illustrations.

(*a*) Amongst Nambudris an adoption is performed by burning a pan of sacred grass. *A* is a Nambudri. He adopts *B* without burning such grass. It is a question of fact whether without such burning, the adoption is complete.

(*b*) An adoption by a widow, subject to the Oudh Estates Act (I of 1869) must be in writing attested, as in the case of a will, and registered. *A* is such widow. She performs the ceremony of giving and taking but omits to execute a registered deed of adoption. The adoption is invalid.

632. Analogous Law.—The following texts refer to the necessary ceremonies for adoption:—

Vashisth.—"He who desires to adopt a son, shall assemble his kinsmen, announce his intention to the king, make burnt offerings, in the middle of the house, reciting the *Vyahriti* and take as a son a non-remote kinsmen, and visit the nearest among his relatives."[5]

Dattak Mimansa.—"The filial relation of these five sons proceeds from adoption only, with observance of the form of either Vasisth or Saunaka, not otherwise."[6]

"It is therefore, established that the filial relation of adopted son is occasioned only by the proper ceremonies of gift, acceptance, a burnt sacrifice and so forth. Should either be wanting, the filial relation even fails."[7]

Yama.—"The *Homa* or the like ceremony is not necessary in the case of adoption of the daughter's or the brother's son; by the verbal gift and acceptance alone, that is accomplished: that is decided by Lord Yama."[8]

633. Giving and Taking.—The indispensable and irreducible ceremony necessary to complete an adoption is that of the physical giving and taking, performed as stated in clause (1).[9] It may be supplemented, but cannot be substituted, by another ceremony. As the Privy Council observed: "According to Hindu usage, which the courts should accept as governing the law, the giving and taking ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother

Clause (1).

(1) *Shoshinath* v. *Krishna*, 6 C. 381 P.C.; *Bal* v. *Shrinivas*, 39 B. 441 P.C.

(2) *Singaramma* v. *Vinjamuri*, 4 M.H.C.R. 165; *Govindayyar* v. *Dorasami*, 11 M. 5 F.B.; cited with approval in *Bal Gangadhar Tilak* v. *Shrinivas*, 39 B. 441 (445) P.C.; *Valubai* v. *Govind*, 24 B. 218.

(3) *E.g.*, *Putreshti Yag*, held not essential, *Sheo Lotan* v. *Bhirgun*, 2 Pat.L.J. 481 : 41 I.C. 875.

(4) *See* S. 50 and Comm.

(5) Vashisth, XV-6, 14 S.B.E. pp. 75, 76, cited in Datt. Mim., II-13, 14 (Suth.), pp. 19, 20; Datt. Ch. II-11 (Suth.), p. 116.

(6) Datt. Mim. V-50 (Suth.) 70.

(7) *Ib.*, V-56 (Suth.) 71; Datt. Ch. II-1-13 (Suth.), pp. 116, 117.

(8) Quoted and commented on in *Valubai* v. *Govind*, 24 B. 218 (222).

(9) *Shoshinath* v. *Krishna*, 6 C. 381 (389) P.C.; *Bireswar* v. *Ardha Chander*, 19 C. 452 (460, 461) P.C.; *Krishna* v. *Broja*, 25 C.W.N. 403; *Govindayyar* v. *Dorasami*, 11 M. 5 (7) F.B.; *Ranganayakamma* v. *Alwar Setti*, 13 M. 214 (218, 219); *Balak Ram* v. *Nannu Mal*, 11 L. 503; *Ganga Ram* v. *Amir Chand*, 50 I.C. (P.) 355; *Shankar* v. *Savitri*, 50 I.C. (N.) 599; *Ishwari Prasad* v. *Rai Hari Prasad*, (1927) Pat. 14.

declaring that she accepts the child in adoption."[1] The Madras Full Bench held this decision "as an authority for the proposition that any overt act is not sufficient but that there must be corporal delivery of the child by a person competent to give to a person competent to take, accompanied by the declaration on the one side, "I give the child in adoption," and on the other. "I take the child in adoption."[2]

634. Such gift and acceptance are not merely necessary to furnish evidence of adoption but constitute its essential ceremony. Consequently, even if the parties have executed and received a formal and duly registered deed of adoption evidencing such an intention, it is not sufficient to constitute a legal adoption, unless there is the overt act of corporal delivery of the child, and its acceptance coupled with a declaration that the one was giving and the other receiving him in adoption.[3] This is the sole operative ceremony, indispensable to all adoptions, whether of the twice-born or of the Shudras,[4] whether in the Saste-ridden Upper India, or the custom-ridden Punjab. Its absence cannot be made good by application of the doctrine of *factum valet*,[5] unless perhaps the adoptee's position has been, in consequence, altered to his disadvantage by reason of his so called adoption (§§ 863-868),[6] though amongst the Jains, amongst whom the adoption of grown-up and married men has become customary, corporal delivery would, at times, be very awkward, and is, therefore, not insisted upon.[7]

Clause (2).

635. As regards the performance of other ceremonies, they are important but not equally so. If they are customary, they will be performed as a matter of course by parties who are interested in seeing that no ceremony, customary in their caste, is omitted. But if through inadvertence or otherwise they are omitted, it would not necessarily vitiate an adoption, if the operative ceremony mentioned in clause (1) is completed. As Sir Thomas Strange observed: "The operative part of the ceremony seems to be the giving and receiving, the rest is matter of customary solemnity, of decorum, of charity and convivality varying under different circumstances in different parts of India."[8] Amongst Marwadis, one such ceremony, both customary and regarded as essential, is the tying of the turban of the adoptive father and seating the boy on his *guddi* (padded seat). Presents called tilak are also made to the newly made son by the relatives and friends of the adopter.

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(1) *Shoshinath* v. *Krishna*, 6 C. 381 (389) P.C.

(2) *Govindayyar* v. *Dorasami*, 11 M. 5 (7) F.B.

(3) *Kenchawa* v. *Ninjupa*, 10 B.H. C.R. 265-*note*; *Singamma* v. *Vinjamuri*, 4 M.H.C.R. 165 (167), following *Veeraperumal* v. *Naraina*, 1 Str. Notes 117 (quoted *ib.*, p. 167).

(4) *Indromani* v. *Behari Lal*, 5 C. 770 P.C.; *Shoshinath* v. *Krishna*, 6 C. 381 P.C. (Shudra adoption); *Bireswar* v. *Ardha Chander*, 19 C. 452 P. C. (Brahmins); *Kuppusami* v. *Venkata Lakshmi*, 18 M.L.T. 434 : 31 I.C. 855 (Shudra); *Sheolatan* v. *Bhirgaon*, 2 Pat. L.J. 481 : 41 I.C. 375; *Sukumari* v. *Ananta*, 28 C. 168; *Vishvanath* v. *Kalibai*, 55 B. 103 (adoption deed alone insufficient).

(5) *Bandaru* v. *Bandaru*, 39 M.L.J. 495; *Soni Bai* v. *Dhanraj*, 56 I.C. (N.) 620.

(6) *Vaithilingam* v. *Murugalan*, 37 M. 529 (581).

(7) *Jeoraj* v. *Sheo Kuar*, 60 I.C. (N.) 65, O.A. *Sheo Kuar* v. *Jeoraj*, 25 C.W.N. 273 P.C.; *Govinda* v. *Rindabai*, 49 B. 515.

(8) *Veerapermal* v. *Naraina*, Str. Notes 117, cited in *Singamma* v. *Vinga Muri*, 4 M.H.C.R. 165 (167).

636. One such ceremony is the *Putreshti Yag* which is usually performed by the twice-born, but it has been held to be a matter of form and not essential to an adoption.[1]

Putreshti Yag.

637. But the performance of the *Datt Homa* stands on a different footing. *Datt Homa* is the service performed by the burning of clarified butter, which is offered as a sacrifice to fire by way of religious propitiation or oblation. The Privy Council have recently affirmed the view previously maintained in several cases that the performance of this ceremony is not necessary where the two families belong to the same *Gotra*.[2] Their Lordships, however, refrained from deciding the general question as to the necessity of the ceremony of *Datt Homa* to complete an adoption, decided in the two cases of the Madras High Court, which, however, they cited with apparent approval, "being of value as containing a careful study of the authorities and affirming that the ceremony of *Datt Homa* is not essential to a valid adoption among Brahmins in Southern India."[3] In so holding they adopted both the reasons as well as the findings of Sir Lawrence Jenkins, C.J., in the undernoted case[4] in which, though a Maratha Brahmin case, the learned Judge relied, not only upon the *stare decisis* but on the text of *Yama*, already cited, which expressly dispenses with this ceremony in the case of the relations, because they are of the same Gotra and which furnishes a more general rule than that declared in the section.

Clause (3) Datt Homa.

638. There is no case in which the non-performance of *Datt Homa* has invalidated an adoption; and since the question has been canvassed by the courts for over a century, it may be safely asserted that, however necessary may be this *Homa* to a twice-born, its non-performance would not seriously shake the legality of an adoption[5] a *fortiori*, the non-performance of the *Putreshti Yag* (or sacrifice for male issue).[6]

Clause (4).

639. In the case of a Shudra, it is, of course, both inadmissible and unnecessary.[7] And in the case of the Dwijas, besides the deccan Brahmin Sagotras,[8] which include those of the Drivid country,[9] it has been held that *Datt Homa* is not necessary to complete an adoption. This exemption has been held to extend to all Brahmins,[10] and also in the case of Kshatriyas in Madras.[11] *Datt Homa* may be performed

(1) *Sheo Lotan* v. *Bhirgan*, 2 Pat. L. J. 481 : 41 I.C. 375, *contra* in *Luchmun* v. *Mohun Lall*, 16 W.R. 179, in which *Putresti Yag* is said to have been an error for *Datt Homa*.—Sarkar's Adoption, p. 383.

(2) *Bal Gangadhar Tilak* v. *Shrinivas*, 39 B. 441 (463- 467) P.C., citing *Singamma* v. *Vinjamuri*, 4 M.H.C.R. 165; *Govindayyar* v. *Dorasami*, 11 M. 5, F.B. and following *Valubai* v. *Govind*, 24 B. 218 (221).

(3) *Singamma* v. *Vinjamuri*, 4 M.H. C.R. 165; *Govindayyar* v. *Dorasami*, 11 M. 5 F.B., cited in *Bal Gangadhar Tilak* v. *Shrinivas*, 39 B. 441 (455) P.C.

(4) *Valubai* v. *Gobind*, 24 B. 218 (221).

(5) *Retki* v. *Lakpati*, 20 C.W.N. 19 (25); *Makund Deb* v. *Jagannath*, 2 Pat. 469 (482).

(6) *Asita* v. *Nirode Mohan*, 20 C.W. N. 901; *Makund Deb* v. *Jagannath*, 2 Pat. 469 (482, 483).

(7) *Thangathanni* v. *Ramu*, 5 M. 358.

(8) *Atma Ram* v. *Madho Rao*, 6 A. 276 F.B.; *Valubai* v. *Gobind*, 24 B. 218 (221), followed in *Bal Gangadhar Tilak* v. *Srinivas*, 39 B. 441 (465) P.C.

(9) *Vedavalli* v. *Mangamma*, 27 M. 538.

(10) *Singamma* v. *Vinjamuri*, 4 M.H. C.R. 165.

(11) *Chandra Mala* v. *Muktamala*, 6 M. 20.

later on[1] and by a delegate[2] while it is wholly unnecessary in the Punjab,[3] and amongst the Agarwal Banias of the United Provinces.[4]

Motive Immaterial.

53. An adoption by a woman cannot be impugned on the ground that,

(*a*) it was made from improper motives and not with a view to confer spiritual benefit upon her husband;[5]

(*b*) or that the widow had retained a part of the estate for herself, for the purpose of her own maintenance, or for that of discharging her debts;[6]

(*c*) or that it was conditional upon the adopted son discharging her debts.[7]

Factum Valet.

54. (1) No adoption may be set aside for a mere irregularity or for non-observance of a form not essential to its validity[8]

(2) In particular and without prejudice to the generality of the foregoing rule, it may not be set aside on any of the following grounds, namely:—

(*a*) That the adopted son was the eldest,[9] the youngest[10] or the only son of his father;[11]

(*b*) That he was given in adoption after his investiture with the sacred thread;[12]

(*c*) That the adoptee was older than the adopter;[13]

(*d*) That the adoption was made during pollution;[14] or

(*e*) That the adoption was made by an untonsured widow.[15]

640. Analogous Law.—As regards the adoption of an only son, the following text discourages or forbids it.

Vashisth.—"An only son should not be given nor accepted, for he is to continue the line of his ancestors."[16]

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(1) *Subbarayar* v. *Subbammal*, 21 M. 497.

(2) *Lakshmi Bai* v. *Ramachandra*, 22 B. 590.

(3) *Dunanchand* v. *Dwaruknath*, (1913) P.L.R. 271: 20 I.C. 303.

(4) *Gangabai* v. *Gopaldas*, 20 O.C. 356.

(5) *Vijaysinghji* v. *Shivsangji*, 59 B. 360 P.C.

(6) *Krishnayya* v. *Surya Rao*, (1935) P.C. 190.

(7) *Ib.*, (195) But see *Vellanki* v. *Venkata*, 1 M. 174 (190, 191); *Ramchandra* v. *Mulji*, 22 B. 558 (567) F.B.; *Maraji of Kolapur* v. *Sundaram*, 48 M. 1 (65).

(8) *Shri Balusu* v. *Shri Balusu*, 22 M. 308 (423) *See* the doctrine of *factum valet* discussed in comms.

(9) The bar stated in Manu, IX-109; Dattak Didhili cited in Sarkar on Adoption 2nd Ed., 283, *Peramaul* v. *Pottee*, (1851) M.S.D.A. 234.

(10) The prohibition is based on the story of Shunashepa but not so far covered by authority.

(11) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 P.C.

(12) *Durga Devi* v. *Shambu Nath*, 5 L. 200 P.C.; *see* this question fully discussed in S. 51 clauses (5) and (6).

(13) *Gopal* v. *Vishnu*, 23 B. 250 (257); *Balabai* v. *Mahadu*, 48 B. 387.

(14) *Thangathanni* v. *Ramu*, 5 M. 358.

(15) *Raoji* v. *Laksh Bai*, 11 B. 381 (395).

(16) 1 Str. H.L. 85; 1 W. Mac. H. L., pp. 67, 77; 2 W. Macn., pp. 178, 179 and *note*; *Seetaram* v. *Dhunock*, 1 Hay 260; *Janoke* v. *Gopaul*, 2 C. 365; *Kashi Bai* v. *Tatia*, 7 B. 221; *Jamnabai* v. *Raychand*, *Ib.*, 225. The same text repeated in Baudhayan.

There are no clear texts prohibiting the adoption of the eldest or the youngest son[1] but as regards the validity of adoption of an only son the Courts were divided till the conflict between them was settled by the Privy Council.[2]

641. Factum Valet.—"*Quod fieri non debuit factum valet*"[3] is a well known, though not well expressed,[4] maxim of civil law, which has been applied to overlook and condone mere irregularities as distinct from substantial illegalities in several transactions including that of adoption,[5] such as the adoption of the eldest, the youngest or the only son,[6] though it is condemned by the texts, or of a married man of advanced age, where such an adoption is valid[7] or likewise the adoption of one not otherwise a proper adoption.[8]

642. As already stated, the doctrine cannot cure a defect that is of the essence of adoption, *e.g.*, the ceremony of giving and taking which no one but the parents can perform. Consequently, the adoption of an orphan cannot be so legalized,[9] unless its illegality cannot be challenged by having recourse to some other overriding doctrine, such as acquiescence by all concerned or estoppel, which may create a personal equity against the adopter.[10]

643. To the same class belong an adoption by a leper[11] or by one suffering from other incurable disease, which disqualifies him from performing any religious ceremony,[12] an untonsured[13] or one unchaste[14] or under pollution,[15] but the border line is passed in when such a widow was then pregnant in concubinage.[16]

644. So while the payment of a bribe to the natural father to give his son in adoption is an act both illegal and opposed to public policy,[17] it does not vitiate an adoption already made, which effects a change in the status of the son, which is already separable from the illegal act.[18]

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(1) For such texts as exist, *see* Hindu Code (3rd Ed.) §§ 316, 317 pp. 434, 435.

(2) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 P.C.

(3) What should not be done, yet being done, shall be valid.

(4) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 (423) P.C. : 22 A. 460 (487) P.C.

(5) For a history and general application of this doctrine, *see* Author's Hindu Code, 3rd Ed., §§ 818-822 pp. 435-437.

(6) *Sri Balusu* v. *Sri Balusu*, 22 M. 398 P.C.; 22 A. 460 (487) P.C.; *Raje* v. *Jayavantrav*, 4 B.H.C.R. (A.C.) 191; *Dharma* v. *Ramakrishna*, 10 B. 80; *Lakshmappa* v. *Ramava*, 12 B.H.C.R. 364 (398).

(7) *Dharma* v. *Ramkrishna*, 10 B. 80 (86).

(8) *Nimbalkar* v. *Jayavantrav*, 4 B. H.C.R. (A.C.) 191 (195).

(9) *Vaithilingam* v. *Natesa*, 37 M. 529 (532) following *Subhaluvammal* v. *Ammakutti*, 2 M.H.C.R. 129; *Balvantrao* v. *Bayabhai*, 6 B.H.C.R. (O.C.) 83; *Bashetiappa* v. *Shivlingappa*, 10 B.H.C. R. 268; *Soni Bai* v. *Dhanraj*, 56 I.C. (N.) 620.

(10) *Ganesh* v. *Bokil*, 7 B.H.C.R. (App.) xxiii (xxiv) *Vaithilingam* v. *Natesa*, 37 M. 529 (530).

(11) *Syamalal* v. *Saudamini*, 5 B.L.R. 362 (369, 370) cited in *Keri* v. *Moneeram*, 13 B.L.R. 1 (14) F.B.

(12) Which he may perform vicariously, *Indramoni* v. *Behari Lal*, 5 C. 770 (774) P.C.

(13) *Rajvi* v. *Lakshmi Bai*, 11 B. 381 (395).

(14) *Basvant* v. *Malappa*, 45 B. 489; contra, *Duyaba* v. *Radhabai*, (1894) B. P.J. 22.

(15) *Thangathanni* v. *Ramu*, 5 M. 358; *Indromoni* v. *Behari Lal*, 5 C. 770 (774) P.C.

(16) *Syamalal* v. *Saudamini*, 5 B.L. R. 362 (370).

(17) A "son bought" is not recognized in the present age (or *Kaliyug*) —*Eshan Kishore* v. *Harish Chunder*, 21 W.R. 381.

(18) *Marugappa* v. *Nagappa*, 29 M. 161 (164); *Sitaram* v. *Harihar*, 35 B. 169 (170-180).

But the result might be different, if the adopter himself complained of a status forced on him by his father moved by mercenary motives.

55 **An adoption must be unconditional and irrevocable,[1] but the rights thereby acquired may be limited[2] or postponed[3] to any reasonable extent warranted by custom.[4]**

Conditional Adoption.

Illustrations.

(*a*) *A* adopts *B* on condition that it shall be void on the birth of a son to *A*. The condition is invalid as an adoption, when once completed, cannot be revoked.[5]

(*b*) *A*, a Hindu widow in possession of her limited estate adopts *B* on condition that *A* shall have full power of its disposal during her lifetime. The condition is invalid, for it creates in *A* an unqualified power of disposal.[6]

(*c*) *A* adopts *B* on condition that *A* shall continue to manage her estate during her lifetime. The condition being reasonable is valid.[7]

(*d*) *A* directed in his will that his wife *B* should adopt a son who should take one-third of his estate giving two-thirds to his wife and daughter. *A* adopted *C*. *C* is bound by *A's* direction.[8]

(*e*) *A* adopts *B* on condition that *B* shall not call for partition during *A's* lifetime. *B* is bound by the condition as it is reasonable.[9]

645. Analogous Law.—An adoption may be void or invalid, in which case, there is no legal adoption; but an adoption which is legal and complete cannot be revoked or cancelled at the instance of either party or by consent of both, since adoption, like marriage, creates a *status* which cannot be annulled save as provided by law.[10] As such, it is not open to the natural parents of the adoptee or the adoptee himself to renounce the legal status conferred on him on adoption, though he may give up his right of inheritance.[11]

646. Conditions: Valid and Invalid.—Before his adoption it is open to his parent to enter into a binding agreement limiting or postponing his right thereto. If his right is so qualified by the terms of the authority of the husband, which empowered his widow to receive him in adoption, then the authority being conditional, he is bound by its terms, and he cannot be heard to question its legality or justice.[12] He is also bound, though not to the same extent, by an agreement made with his natural

(1) *Basha* v. *Indar Kunwar*, 16 C. 556 (563) P.C.; *Dinkar Rao* v. *Chandan Lal*, 44 C. 201 (205) P.C.

(2) *Visalakshi* v. *Sivaramien*, 27 M. 577 F.B. & cases cited in f.-n (1), *infra*.

(3) *Bhupendra* v. *Amarendra*, 43 C. 432 (439) P.C. (a Dayabhaga case).

(4) *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 P.C.

(5) *Sant Singh* v. *Mula*, 17 I.C. (P.) 350.

(6) *Purushottam* v. *Rukhmabai*, 16 Bom.L.R. 57.

(7) *Visalakshi* v. *Sivaramien*, 27 M. 577 F.B.; *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 P.C. *contra* in *Purshottom* v. *Rakhmabai*, 16 Bom.L.R. 57.

(8) *Bachoo* v. *Mankorebai*, 31 B. 373 P.C.; *Toolsi Dass* v. *Madan*, 28 C. 499; *Surendra* v. *Kalachand*, 12 C.W.N. 668; *Lakshmi* v. *Subramanya*, 12 M. 496; *Narayanasami* v. *Ramasami*, 14 M. 172.

(9) *Korab* v. *Pancham*, 11 N.L.R. 29.

(10) 2 Dig. 111, 2 Str. H.L. 108; *Huebat Rao* v. *Govind Rao*, 2 Borr. 75; *Sukhbasi* v. *Guman Singh*, 2 A. 366; *Sadashiv* v. *Huri*, 11 B.H.C.R. 190; *Chintu* v. *Dhondu*, *Ib.*, p. 192, *note* (*a*); *Ravji* v. *Lakshmibai*, 11 B. 381 (adopter estopped); *Bhasba* v. *Indra Kunwar*, 16 C. 556 (564) P.C.; *Bhupendra* v. *Amarendra*, 43 C. 432 P.C.; *Diwakar Rao* v. *Chandan Lal*, 44 C. 201 (205) P.C.; *Lunkurn* v. *Birji*, 57 C. 1322.

(11) *Ruvee* v. *Rupshankar*, 2 Borr. 713 (729); *Balkrishna* v. *Savitribai*, 3 B. 54 (57); *Mahadu* v. *Bayaji*, 19 B. 239 (244, 245); *Chandania* v. *Saligram*, 26 A. 40; *Thaman Singh* v. *Jit Singh*, (1893) P.R. N. 9.

(12) *Lakshmi* v. *Subramanya*, 12 M. 490; *Narayanasami* v. *Ramasami*, 14 M. 172; *Ganpati* v. *Savithri*, 21 M. 10; *Challa* v. *Pallury*, 31 M. 446 (450); *Goverdhan Das* v. *Laloomal*, 13 S.L.R. 155 : 53 I.C. 546, (in which the adoptee being major had himself so agreed).

father as a condition of his adoption that his adoptive mother should continue to retain her limited estate during her own life-time, or, in other words, relegating his right as son to that of a reversioner.[1] And by parity of reasoning she may stipulate for an absolute right over a part of the estate.[2] He acquires his status because his father submitted to the agreement. He cannot have the benefit of his status without submitting to its condition, provided it is reasonable and not such as might deprive him of his entire inheritance. Such would be a stipulation giving to the mother an absolute power of disposition over the property, as distinct from a power that a guardian may stipulate for and exercise for the benefit of the infant or of the estate.[3] But since the purpose of adoption is *prima facie* to benefit spiritually the adopter, a condition depriving the adoptee of the means to discharge his spiritual obligation would be void.[4]

647. But the adoptive father may validly stipulate with the father of the adoptee that the latter shall not call for partition during his own life-time.[5] So again, he may before or at the time of adopting a son, give a portion of his ancestral property to his daughters which the adopted son cannot resume.[6] Of course, he who relies upon a condition as qualifying the legal right of the adopted son must prove it by as strong evidence as is necessary to establish a nuncupative will.[7]

648. Customary Conditions.—But while the court upholds all reasonable conditions qualifying or postponing the enjoyment of his estate by the adopted son, there is a limit beyond which it cannot go. The Privy Council go further and require that they must be supported by custom.[8] As was observed in a case: "An agreement entered into by a Hindu widow at the time of taking a son in adoption with his natural father and making a reasonable provision for her ought to be upheld as valid according to general custom modifying the strict terms of Hindu Law. This principle cannot be extended to reservations in favour of charities and religious endowments. The custom of establishing any such extension lies upon the person seeking to prove such modifications of the strict rules of Hindu Law."[9] Where therefore, the adopter had contracted with the natural father of the adoptee that the latter shall pay an annual sum for the purpose of lighting lamps in a certain temple, the

(1) *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 P.C.; *Vinayak* v. *Govindrao*, 6 B.H.C.R. (A.C.) 224; *Chitko* v. *Janki*, 11 B.H.C.R. 199; *Radhabai* v. *Ganesh*, 3 B. 1 (8); *Ravji* v. *Lakshmi Bai*, 11 B. 381 (400, 401), explaining dictum of P. C. in *Ramaswami* v. *Venkataramanaiyan*. 2 M. 91; *Vyasacharya* v. *Venkubai*, 37 B. 251 F.B.; *Venkappa* v. *Fakirgowda*, 8 Bom.L.R. 346; *per* Beaman, J., in *Pirsab* v. *Gurappa*, 38 B. 227, *contra* by the same learned Judge in *Vyasacharya* v. *Venkubai*, 37 B. 251 F.B. must be taken as corrected in supra; *Visalakshi* v. *Sivaramien*, 27 M. 577 (585) F.B., overruling *Jagannadha* v. *Papamma*, 16 M. 400; *Subbamanik* v. *Sankara*, (1931) M. 804; *Krishnayya* v. *Surya Rao*, (1935) P.C. 190.

(2) *Raju* v. *Nagammal*, 52 M. 128 (133).

(3) *Ravji* v. *Lakshmibai*, 11 B. 381 (403); *Purshottam* v. *Rakhmabai*, 16 Bom.L.R. 57 (60); *Balkrishna* v. *Uttar Narayan*, 43 B. 342.

(4) *Visalakshi* v. *Sivaramien*, 27 M. 577 (587) F.B.

(5) *Lukshmi* v. *Subramanya*, 12 M. 490; *Narayanasami* v. *Ramasami*, 14 M. 172; *Ganapathi* v. *Savithri*, 21 M. 10; *Challa* v. *Palluri*, 31 M. 446 (450); *Goverdhan Das* v. *Laloomal*, 13 S.L.R. 155 : 53 I.C. 546 : *Korat* v. *Pancham*, 12 N.L.R. 29 (34).

(6) *Basava* v. *Lingangouda*, 19 B. 428; *Durgi* v. *Kanhaiya Lal*, 25 A.L.J. 338: (1927) A. 387.

(7) *Imrit Koonwar* v. *Roop Narain*, 6 C.L.R. 76.

(8) *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 P.C.

(9) *Balkrishna* v. *Uttar Narayan*, 43 B. 542; approved in *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 P.C.

court refused to enforce it on the ground that it was unreasonable and gratuitously onerous.[1] So a will by which a testator gave part of his property to his intended adopted son, part to his widow for life, part to the kindred, and part to charity was held not binding upon the adopted son, although before the adoption took place, the natural father executed a deed by which he consented to the provisions of the will and gave his son in adoption subject thereto.[2] But this was a case of an arrangement with the widow. It leaves untouched the proposition that where the testator, being the sole owner of his estate, makes a will giving a portion of it to charity and at the same time empowering his widow to adopt, the adopted son cannot avoid the bequest, because "the adopted son, cannot, while approbating the provisions of that will under which his adoption was made, reprobate other provisions of the same will.[3] A Hindu can settle a portion of his ancestral property upon any body he likes and then take a boy in adoption. The adopted boy could not, under such circumstances, impeach an alienation made before the date of his adoption."[4] But where, at the time of adoption, the adoptive father and the natural father entered into an agreement which, in effect, gave the adoptive father absolute right to dispose of all his property, even after the adoption, in any way he pleased, the adopted son was held entitled to treat the agreement void.[5]

Dvamushyayan adoption.

56. A son may be given in adoption on condition that he shall be the son of both the natural and the adoptive fathers. Such a son is called the Dvamushyayan son.[6]

649. Analogous Law.—The Mitakshara devotes one whole section to the rights of the *Dvamushyayan* son, or the son of two fathers.[7] But the son there intended is the *Kshetraj* or the son of the wife[8] who is so defined:—

"If the husband's brother, or other person duly authorized, and being himself destitute of male issue, proceed to an intercourse with the wife of a childless man for the sake of raising issue both for himself and for the other: the son, whom he so begets is the child of two fathers and denominated *Dvamushyayan*. He is heir to both, and offers funeral oblations to their manes."[9]

650. This is the prototype of the modern *Dvamushyayan* son who owes his existence originally to the procreation by *Niyog* or appointment. As this practice became obsolete, the *Dvamushyayan* son lost his original character, giving place to his modern analogue, which was originally subdivided into a *nitya* or permanent or absolute, and *anitya, i.e.*, a temporary son of two fathers.

651. The difference between the two is thus explained in Dattak Mimamsa:—

"Sons of two fathers are of two descriptions—those absolute sons of two fathers, and those incompletely so. Of these, those are named absolute *Dvamushyayans* who are given in adoption with this stipulation: this is son of us two (the natural father and the adopter). The incomplete *Dvamushyayans* are those, who are initiated by

(1) *Balkrishna* v. *Uttar Narayan*, 43 B. 542; *approved* in *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 P.C.

(2) *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 (527, 528) P.C., reversing O. A. 49 M.L.J. 252: 85 I.C. 882 : (1925) M. 932.

(3) *Venkatanarasimha* v. *Subba Rao*, 46 M. 300 (316).

(4) *Venkatanarasimha* v. *Subba Rao*, 46 M. 300 (347).

(5) *Parvati Bai* v. *Vishvanath*, 27 Bom.L.R. 1509.

(6) Mit. Ch. 1, S. X; Manu, IX-132.

(7) Yad. I-69, 70.

(8) Mit., Ch. 1, S. X to the same effect, Manu, IX-132.

(9) Mit., Ch. 1, S. X, § 3.

their natural father in ceremonies ending with that of tonsure, and by the adoptive father, in those commencing with the investiture of the characteristic thread. Since they are initiated under the family names of both even, they are sons of two fathers; but incompletely so. Should a child, directly on being born, be adopted, as his initiation under both family names would be wanting, he would partake only of the family of the adopter.[1]

652. The author of Dattak Chandrika recommends such an adoption to remove the objection to the adoption of an only son as entailing extinction of the lineage of the natural father,[2] and this view received the sanction of the court in an old case;[3] but the validity of the adoption of an only son has been since otherwise settled, and the temporary son of the two fathers has gone with the reason, which restricted adoption within the narrow limits set out by the Dattak Mimamsa.

Even as regards the "perpetual *Dvamushyayan* son" only the term remains, but its connotations have so materially changed that there is nothing but an identity of name to connect the new *Dvamushyayan* son with his pristine prototype.

653. Conditions of a Dvamushyayan Adoption.—The *Dvamushyayan* son or son of two fathers is a modern relic of the old but now obsolete institution of *Niyog*. As such, he has passed through four stages. In the first stage, he was the *Kshetraj* son of the wife who belonged both to the begetter as well as to his mother's legitimate husband, the rule being that if any one sows on my land, he shares the crop with me. In the second stage, he was the son of *Niyog* by a relation or a priest appointed to procreate him on the wife. In the third stage, he being the only son of his father, he was permitted to be shared by his brother who would have formerly been entitled to the *Niyog* company of his wife and who, therefore, was entitled to a share in his brother's son, even though begotten by him without his assistance.[4] In the fourth and present stage, he is merely the son of two fathers, whether these be brothers or not and the only condition required for their joint paternity is that they should, before the adoption, have agreed to treat the son as the common son of both. Such an agreement may be express or implied,[5] but it cannot be presumed from the mere fact that the adopter was the full brother of the father.[6] Not only the brothers but their widows may adopt a *Dvamushyayan*.[7]

654. Though the practice of filial partnership is on the wane, the reported cases show that it is not yet dead, and amongst certain people, as in the case of Nambudri Brahmins of Malabar, it appears to be the usual form of adoption.[8] It is practised amongst Lingayats, whether the brothers are joint or divided,[9] and in the Southern districts of the

(1) Datt. Mim. VI-41 (Suth.), 85; Datt. Ch. 1-28 (Suth.), 114.

(2) Datt. Ch. 1, 28 (Suth.), 144.

(3) *Shumshere Mall* v. *Dilraj*, 2 Beng. S.R. 216 : 6 I.D. (O.S.) 523.

(4) So Manu, (IX-182): "If among several brothers of the whole blood one has son born, Manu pronounces them all fathers of male issue by means of that son." There is no such presumption now for the simple reason that there can be no partnership in a wife.

(5) *Wooma Dei* v. *Golcoolanund*, 3 C. 587 (598) P.C.; *Behari Lal* v. *Shib Lal*, 26 A. 472; *Mohna Mal* v. *Mala Mal*, 89 I.C. 688 : (1925) L. 623; *Laxmi* v. *Shrinivas*, 41 B. 315 (341, 342).

(6) *Nil Madhab* v. *Bishwambur*, 13 I.A. 85 (102); *Laxmipatrao* v. *Venkatesh*, 41 B. 315 (340, 341); *Huchrao* v. *Bhimrao*, 42 B. 277 (279), in which 41 B. 315 is followed and cited as an authority for an *express* agreement, but that case does not support the view that the agreement should be *express*.

(7) *Krishna* v. *Parameshri*, 25 B. 537.

(8) *Vasudevan* v. *Secretary of State*, 11 M. 157 (167, 179).

(9) *Basava* v. *Lingangauda*, 19 B. 455; *Chenava* v. *Basangavda*, 21 B. 105.

Bombay presidency[1] and is not unknown in Bengal,[2] the United[3] and the Central Provinces,[4] though it is held to be unknown in the Punjab.[5]

655. Though *Dvamushyayan* is, ordinarily, confined to the adoption of a brother's son, still this is not necessary, for any two persons, may agree to hold a son in common,[6] provided they follow the forms and conditions which are the same as in the Dattak adoption.[7]

656. A peculiar custom was proved to exist amongst the *Pandas* of Gaya, whose son on adoption continues to retain his rights in his natural family.[8]

Customary Dvamushyayan.

57. A Dvamushyayan son is entitled to inherit in both the families of his natural and adoptive fathers.[9]

Customary Dvamushyayan.

657. Analogous Law.—The *Dvamushyayan* son's right of inheritance to his two fathers is thus set out in the Dattak Chandrika:—

"The son given, who is a *Dvamushyayan*, if both his adoptive and natural fathers have no other male issue, takes the whole estate of both; one adopted, where legitimate issue of the adopter existed, does not participate in the estate of the adopter; but a legitimate son, being born, to the natural father subsequent to the adoption, the adopted son takes half of the share of a legitimate son. If, however, such issue be subsequently born to the adopter, the adopted son in question takes half of the share which is prescribed by law for an adopted son, exclusively related to his adoptive father, where legitimate issue may be subsequently born to that person."[10]

If both his fathers have legitimate sons, he offers no oblation to either but takes "a quarter of the share allotted to a legitimate son of his adoptive father."[11]

658. The *Dvamushyayan* son being the son of two fathers, it follows that he possesses all the rights and is equally subject to all the obligations of a son in the two families. But as regards his status in his adoptive father's household, his position is different to that of a *Dattak* son, since his own sons revert to his natural family.[12]

His own mother and his adoptive mother remain his heir and may succeed to him in the absence of nearer heirs.[13]

Proof of adoption.

58 (1) He who relies upon an adoption must prove it.[14]

(2) Where an adoption has the effect of disinheriting the natural heirs, it must be proved by such cogent evidence as is sufficient to prove its factum and validity and not merely its probability, due regard being had to all the circumstances, including—

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(1) Steele, L.C., pp. 45, 47, 183; 384; *Basava* v. *Lingangauda*, 19 B. 428 (466, 467); *Krishna* v. *Parameshri*, 25 B. 537 (543).

(2) *Nil Madhab* v. *Bishumber*, 13 M. I.A. 85 (100, 101).

(3) *Behari Lal* v. *Shib Lal*, 26 A. 472.

(4) *Laxmi Bai* v. *Shri Krishna*, (1877) C. P. L. R., Pt. 8, No. 50.

(5) *Mohana Mal* v. *Mala Mal*, 489 I.C. 688 : (1925) L. 823.

(6) Sutherland's Synopsis, 5th Head; Datt. Mim.; VI-41 (before quoted); Datt. Ch., II-36.

(7) *Krishna* v. *Parameshri*, 25 B. 537.

(8) *Luchman Lal* v. *Kanhayalal*, 22 C. 609 P.C.

(9) Datt. Chan. V-33; *Wooma Dayee* v. *Gokulanand*, 3 C. 587 (598) P.C.

(10) Datt. Chand., V-33.

(11) Mayukh, Ch. 4, S. V., §§ 24-26 citing Vashisth quoted in Mit. II-1-55, (Mandik), p. 60.

(12) *Wooma Dayee* v. *Gokoolanund*, 3 C. 587 (598) P.C.

(13) *Behari Lal* v. *Shib Lal*, 26 A. 472; *Basappa* v. *Gurlingava*, 57 B. 74 (80).

(14) *Lal Harihar* v. *Bajrang*, (1937) P.C. 242; *Kishori Lal* v. *Chunnilal*, 31 A. 116 (135) P.C.; *Lal Kuar* v. *Chiranji Lal*, 32 A. 104 (115) P.C.

(*a*) its antecedent and attendant probability,[1]

(*b*) the existence of a writing,[2]

(*c*) the conduct of the parties before and since the alleged adoption[3] and

(*d*) its publicity,[4]

and where the adopter is an illiterate widow—

(*e*) the assent, intention and inclination of her husband,[5]

(*f*) the receipt by her of independent advice,[6] and

(*g*) the effect of the adoption upon her rights.[7]

(3) Provided that where an adoption has been acted upon for a considerable time without dispute, the court may, upon proof of its factum, presume its validity.[8]

Illustration.

A, a young illiterate *pardanashin* widow, has for her adviser her husband's cousin *B*. She adopts his son *C*. *C* sues for possession. The burden is on *C* to prove that *A* has not been unduly influenced by *B* to adop him.[9]

659. **Analogous Law.**—It has been seen that both marriage and legitimacy may be conclusively presumed (§ 28 and comm.) from certain facts and that they need not then be proved. Law recognizes these relationships as natural and the institutions of marriage and sonship as common to all mankind. And consequently, it presumes what it regards as being in consonance with approved usage. But adoption stands on a different footing. It is a mere local relic of an old obsolete institution, deriving its nourishment and support from tradition and usage. When asserted, it has, therefore, to be proved like any other fact. There is no presumption in its favour,[10] and on the other hand, in the case of a sonless man there is no presumption against it, though the degree of proof required to disinherit the natural heirs is naturally very high.[11]

Standard of Proof.

660. As adoption implies the introduction of a stranger into the family and requires no writing or registration to complete it, the courts enjoin a very high degree of proof akin to that necessary to establish a nuncupative will.[12] So Lord Wynford, delivering the judgment of the Privy Council, regretted that an adoption could be proved by parol testimony of witnesses[13] and added: "But, although neither written acknowledgments,

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(1) *Huradhun* v. *Muthoranath*, 4 M. I.A. 414 (425).

(2) *Sootrugun* v. *Sabitra*, 5 W.R. 109 P.C.

(3) *Chandra Kumar* v. *Narpat Singh*, 29 A. 184 (195) P.C. and cases cited *post*.

(4) *Ajabh Singh* v. *Nanaban*, 3 C.W. N. 130 P.C.

(5) *Kishori Lal* v. *Chunni Lal*, 31 A. 116 P.C.; *Pudum Singh* v. *Ooodey Singh*, 12 M.I.A. 350 (356, 357).

(6) *Bayabai* v. *Bala*, 7 B.H.C.R. (App.) 1 (20).

(7) *Ib.*

(8) *Jagadamba* v. *Dhakhina*, 13 C. 308 (321) P.C.; *Anand Rav* v. *Ganesh*, 7 B.H.C.R. (App.) 33 (35) and cases cited *post*. *See also* S. 90 Indian Evidence Act.

(9) *Gangu* v. *Chandrabhagabai*, 32 B. 275.

(10) *Kishorilal* v. *Chunnilal*, 31 A. 116 (135) P.C.; *Lal Kunwar* v. *Chiranji Lal*, 32 A. 104 (115) P.C.; *Raja Gopala* v. *Nattu*, 34 M. 329 (332); *Venkata* v. *Papayya*, (1913) M.W.N. 828 : 22 I.C. 737.

(11) *Sutroogun* v. *Sabitra*, 5 W. R. 109 P.C., cited and followed in *Diwakar Rao* v. *Chandan Lal*, 44 C. 201 (210) P.C.; *Lal Bahadur* v. *Bijai Bahadur*, 52 A. 1 (7) P.C.; *Padmarav* v. *Fakira*, (1931) P.C. 84.

(12) *Imrit Koonwar* v. *Roop Narain*, 6 C.P.L.R. 76.

(13) *Sutroogun* v. *Sabitra*, 5 W. R. 109 P.C.

nor the performance of any religious ceremonies are essential to the validity of adoption, such acknowledgments are usually given, such ceremonies observed and notices given of the time when adoptions are to take place, in all families of distinction, such as those of Zemindars and opulent Brahmins. Wherever those have been omitted, it behoves this court to regard with extreme suspicion the proof offered in support of an adoption. I would say that in no case the rights of wives and daughters should be transferred to strangers or to more remote relations, unless the fact of adoption, by which this transfer is effected be proved, by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for a doubt of its truth.[1] In this connection it is well to note that even the sacred texts required that the adoption, before it is made, shall be intimated to the king,[2] a formality, which, though not now insisted upon, is nevertheless not wholly ignored, since one object of giving intimation to the king was to give the fact publicity, and this is now given by the registration of an adoption deed, the mutation entry and the like.

No Presumption in favour of Adoption.

661. It is, sometimes, said that a childless Hindu, anxious to be delivered from the torments of hell, is naturally anxious to adopt a son to free him therefrom,[3] and that, therefore, there is a *prima facie* presumption in favour of an adoption. But these remarks occur with reference to a second adoption, their Lordships holding that if a man felt a necessity for one adoption, there was a probability that on the death of the first adopted son, he would make another adoption, but this is very far from supporting a general presumption. As their Lordships observed in a later case: "Much has been said of the old presumption which arises from the religious duty which is upon every childless Hindu to adopt a son. Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindus die daily without having fulfilled this obligation, or made provision for its fulfilment after their death."[4] Moreover, in the written authorities that have come under the notice of courts, the reason usually assigned for an adoption is the perpetuation of the lineage and name, and not the propitiation of the forces of darkness in the next regions. The fact that adoptions are still common and customary shows that adoptions are prized and made; the fact that they are not made by all or most sonless men shows that they are not so common as to raise any presumption in their favour. Much must, moreover, depend upon the education and views of the person concerned. The advancement of Western learning has rudely shaken many an old time belief, and even those who nominally remain within the fold of Hinduism must not be too readily assumed to subscribe to its expiring dogmas, or be impressed by the hopes and fears addressed to a primitive people.

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(1) *Sutroogun* v. *Sabitra*, 5 W.R. 109 P.C., cited and followed in *Diwakar Rao* v. *Chandan Lal*, 44 C. 201 (210) P.C.; *Padmarav* v. *Fakira*, 35 C.W.N. 465 : (1931) P.C. 84.

(2) *See* the texts cited in Hindu Code 3rd Ed., § 810, p. 430.

(3) *Hurdhan* v. *Muthoranatha*, 4 M. I.A. 414 (425, 426). To the same effect, *Soondur Koomaree* v. *Gudadhur*, 7 M. I.A. 54 (64).

(4) *Nil Madhab* v. *Bishumber*, 13 M. I.A. 35 (100); *Shri Balusu* v. *Shri Balusu*, 21 A. 460 (477) P.C. : 22 M. 398 (414) P.C.

Evidence of Writing.

662. An adoption is not required by law to be in writing; and if in writing, it is not required to be registered,[1] though an authority to adopt, if conferred by any writing other than a will, must be registered.[2] But an adoption deed, even though it may reserve a portion of the estate to the adopter, need not be registered,[3] still the Privy Council have, from very early times, looked for some writing whether of an adoption deed or entries in the accounts[4] of the statements contemporaneously or almost contemporaneously made to the authorities for mutation of names, the invitations issued to kinsmen and castemen, their replies thereto, and the numerous other occasions, which such an event presents for the coming into existence of writings which are the best evidence of the transaction (§§ 663-665). As such the recital of an adoption, contained in a will, 60 years' old was held sufficient evidence not only of an adoption, but that it was presumably in the usual dattak form.[5]

Antecedent Probabilities.

663. But though a writing furnishes valuable evidence, its value would be greatly enhanced by the presence of antecedent probabilities. The facts that the alleged adopter was sixty-seven years old, and that he had two wives to whom he had long been married, that by neither of them had he ever an issue, and that both of them were past child-bearing age, all these add to the probability of an adoption,[6] as the fact that he was young and had recently married tells against it.[7] But it often happens that when a person is moribund, scheming counsellors hurry to his bedside, prepare deeds and go through a mock-adoption when his mind is inert, if not unconscious, and when he has not the bodily strength to resist such officious importunities. Such was the adoption made to "a dying man almost continually insensible, though occasionally roused to consciousness by loud tones, or by pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility and when momentarily conscious, with his mind quite inert and instantly fatigued on the slighest exertion."[8]

664. Their Lordships continued: "If the law were to countenance acts of this description (adoption and will), performed at such a time and under such circumstances without the clearest and most cogent evidence to establish their validity, relations and managers would be encouraged to advance their own private notions of what might be advisable to be done for the good of the family, and ascribe acts to a dying man in which he would have been merely passive instrument to prolong their own gain and authority."[9]

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(1) S. 17, Registration Act; *Sakharam* v. *Madan*, 5 B. 232; *Vishwanath* v. *Rahi Bai*, 55 B. 103 (109).

(2) 17 (3), Registration Act.

(3) *Contra* where it is a later deed, or creates a new right in the adopter—*Pirsab* v. *Gurappa*, 38 B. 227 (235, 236)

(4) *Sootrugun* v. *Sabitra*, 5 W.R. 109 P.C.; *Diwarkar Rao* v. *Chandan Lal*, 44 C. 201 (205) P.C.

(5) *Binda Kuar* v. *Lalita Prasad*, 1936 P.C. 304.

(6) *Huradhun* v. *Muthoranath*, 4 M. I.A. 414 (425).

(7) *Sarodasoondery* v. *Tincowry*, 1 Hyde 22 (250); *Sootrugan* v. *Sabitra*, 5 W.R. 109 P.C.; *Diwakar Rao* v. *Chandan Lal*, 44 C. 201 (205) P.C.; *Padmarav* v. *Fakira*, (1931) P.C. 84.

(8) *Tayammal* v. *Sashachalla*, 10 M. I.A. 429 (434).

(9) *Tayammal* v. *Seshachalla*, 10 M. I.A. 429 (434, 435).

Pardanashins.

665. These words spoken with reference to a dying man, apply equally to young pardanashin women,[1] who, being illiterate, are too often surrounded by such selfish advisers, and who too often fall a victim to their interested counsels. In their case, no less than in the case of a dying adopter, it devolves on the court to scrutinze all such evidence with jealous care, and if it finds that the adopter was swayed by advice, more than by his convictions, it should not be slow to set aside an adoption which appears to it improvident and involuntary,[2] though the case might be different if the adoption were admitted, or afterwards acted upon.[3]

Publicity.

666. Publicity or notoriety is another element for consideration. Where, for instance, a person was adopted and the fact noted by the Panchayat, who prepared a pedigree in which the adopted son was mentioned, the court held it to amount to sufficient proof of adoption.[4] In one of these cases the question was whether one Sujan had been duly adopted by Fateh. In connection with another dispute in the family, Panchayat was appointed who drew up a report in 1819, which was filed in the collectorate. It contained a reference to Sujan's adoption, but the words were smudged over with ink which the court suspected had been done fraudulently to destroy the force of the finding. The Privy Council considered this a sufficient evidence to establish Sujan's adoption as proved by the family pedigree prepared so far back as 1819.[5] In another case, instituted in 1891, the same high tribunal had to find on the question of one Azmat Singh's adoption, alleged to have taken place about 1681, and the evidence adduced was a copy of a village *Wajib-ul-arz,* to which was attached a pedigree, in which Azmat was described as an adopted son, added to which, the same fact was mentioned in the Oudh Gazetteer. There was no other evidence. Their Lordships held the adoption valid.[6]

The fact that upon an adoption, the adoptee's name was mutated in the Collector's books is of importance, but the fact that his name was mentioned in the income-tax receipts, power of attorney, bonds or other private instruments is of little value as these documents do not afford sufficient publicity of the fact, being only available to those who are directly interested in them.[7]

Admissions and Conduct.

667. The evidence furnished by conduct is often an invaluable guide in arriving at the truth. The facts the court has to examine in this connection are how far they are consistent or inconsistent with the adoption alleged. If they are continuously consistent only with adoption and inconsistent with non-adoption, then they add to its probability, which would be material in deciding an issue in the conflict

(1) *Kishorilal* v. *Chunilal,* 31 A. 116 (121, 122) P.C.

(2) *Bayabai* v. *Bala,* 7 B. H. C. R. (App.) 1, followed in *Somasekharaja* v. *Subhadramaji,* 6 B. 524; *Ranganayakamma* v. *Alwar,* 13 M. 214 (221); *Kishorilal* v. *Chunnilal,* 31 A. 116 (P.C.).

(3) *Chandra Kumar* v. *Narpat Singh,* 29 A. 184 (195) P.C., following *Slatterie* v. *Pooley,* 6 M. & W. 664 (669); *Heane* v. *Rogers,* 9 B. & C. 577 (586); *Newton* v. *Liddiard,* 12 Q.B. 926; In re *Simpson,* 2 Ch.D. 72 (89); *Trinidad Ashphalt Co.* v. *Coryat,* (1896) A.C. 587.

(4) *Ajabh Singh* v. *Nanaban,* 3 O.W. N. 130 P.C.

(5) *Achal Ram* v. *Hazim Husain,* 27 P. A. 271 P.C.

(6) *Achal Ram* v. *Hazim Hussain,* 27 A. 271 (290, 291) P.C.

(7) *Pudum Singh* v. *Oodey Singh,* 12 M.I.A. 350 (357-359).

of evidence. If, on the other hand, they are only at times consistent with the *factum* of adoption, being on other occasions equally opposed to it, then the court would not be right in laying undue stress upon any one set, without considering the counteracting effect of the other.[1] Such facts as the change of name usually made by the adoptee,[2] the mutation of names in the Collector's books in respect of property which the adoptive mother resigns in favour of her adopted son,[3] his statement as such for a long number of years by the adopter and his family,[4] are not the least important. If the adoptions are not followed up by the mutation of names, the mere fact that the adoptee was occasionally described as the son of his adoptive father in a private document such as a power of attorney or in the income-tax receipts or other private instruments, is of little value.[5] The acts and declarations of the widow who is alleged to have made the adoption are important.[6] So is also the conduct of the adopted son in suffering his adoptive mother to retain possession of the property after he came of age,[7] or permitting her name to remain on the revenue records conjointly with his own,[8] or performing the sapinda of his natural father—which is an evidence against his adoption.[9]

668. The court held an adoption proved where, soon after the alleged adoption, the adoptive father's name was entered in the school register under the heading "parent or guardian" against the boy's name and in a partition suit between his natural father and brothers, his rights were ignored and his name was mentioned in the genealogical tree with a bare mention of the adoption.[10] So where the adoptee renounced his rights in his natural family and commenced participating in the rents and profits of the *Vatan* lands of his adoptive family, the court held the adoption.[11]

Conduct of the Adopter.

669. Rreiterated declaration by a person of his adoption by another, extending over a number of years, if unchallenged or even if not denied, may be sufficient evidence of such adoption.[12] (§ **680**). The adopter's conduct towards the adoptee is very relevant in this connection. If the adoption was through "affection", as Manu enjoins, how was the adoptee treated by the adopter, before and since adoption? His relationship to the adopter, the natural affections felt towards him, are all facts which cannot be ignored. Indeed, where a person has for many years lived with his adopter and has been treated by her as her son, the court will not permit her afterwards to turn round and deny the adoption.[13] But the conduct must be unequivocal and only consistent with adoption. It must be naturally prolonged and continuous to

(1) *Nil Madhab* v. *Bishumber*, 13 M. I.A. 85 (97, 98).
(2) *Diwakar* v. *Chandran*, 44 C. 201 P. C.
(3) *Pudum Singh* v. *Oodey Singh*, 12 M.I.A. 350 (357, 358).
(4) *Prem Devi* v. *Shambhu*, 42 A. 382.
(5) *Pudum Singh* v. *Oodey Singh*, 12 M.I.A. 350 (358, 359).
(6) *Ib.*, p. 361.
(7) *Pudum Singh* v. *Oodey Singh*, 12 M.I.A. 350 (364); *Prem Devi* v. *Shambhu*, 42 A. 382.
(8) *Pudum Singh* v. *Oodey Singh*, 12 M.I.A. 350 (360).
(9) *Durga Baksh* v. *Brij Raj*, (1937) P.C. 512.
(10) *Soonkoro* v. *Soonkoro*, 6 M.L.T. 267.
(11) *Ram Krishna* v. *Hari*, (1888) B. P. J. 83.
(12) *Chandra Shekhar* v. *Raj Kuwar*, (1926) P.C. 91. The judgment is all too megre, but probably implies the statement in the text.
(13) *Ganga Prasad* v. *Budh Sen*, 11 I. C. (A.) 27.

give rise to such inference. Moreover, in the case of illiterate pardanashin women, such circumstances might be easily faked, as they were in a case which puzzled the Privy Council, but who eventually threw out the suit, holding that the plaintiff had not been adopted by the defendant. In so holding they animadverted on the fact that the plaintiff who knew best about his adoption had not pledged his oath in favour of his adoption, and that though the ceremony was stated to be a pompous function, no account books traced to plaintiff's possession had been produced. As for the numerous witnesses, their statements were so similarly worded as to suggest that they either possessed supernatural memory or had memorized their evidence. If the plaintiff had been adopted in 1877, then on coming to age in 1883, he did not take possession of the caste and in no way asserted his title thereto. The documents imputed to Lacho were really prepared by her managers who were the plaintiff's father and brother and it was suspicious that while they all mentioned the adoption, they omitted to mention its date. In any case, Mt. Lacho could not be held bound by such collateral recitals even though they were registered and acted upon.[1] In cases their Lordships have reiterated the same view and treated with suspicion contemporaneous applications purporting to be by the adoptive mother as being in reality inspired by the claimant's natural father.[2]

670. In still another case of an adoption to a wealthy Zemindar the same Board, even more emphatically, commented on the absence of any writing which they regarded as a matter of great suspicion, added to which they commented on the fact that the ceremonies were of the briefest character, that the child's name was not changed and that he was never taken to live with his adoptive father or recognized by him in any way. They rejected the evidence of the natural father, despite his high position, on the ground of its improbability and concurred with the court below in holding the alleged adoption not proved.[3] Another case decided by the same high tribunal supports the same view, namely, that the court should be guided not so much by the spoken word as by the inherent probabilities and when these are evenly balanced, the safest course is to rely upon an undoubted admission. (§ **662.**)

Admission Shifts Burden.

671. Such admission may be contained in a registered adoption deed, or be the sworn statement in a mutation proceeding, but whatever its form, it is sufficient to shift the burden of proof. So their Lorships held, citing Baron Parke;[4] "What a party himself admits to be true may be presumed to be so." In this case, Makund Singh was alleged to have adopted Kishan Singh. Deeds were filed in which Makund Singh and his father had admitted the fact, as to which the Privy Council said that while a party remains free to explain his own admission, if they remained unexplained, the court could not but use them as proving the fact against the party.

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(1) *Kishorilal* v. *Chunnilal*, 31 A. 116 P.C.

(2) *Lal Kunwar* v. *Chiranji Lal*, 32 A. 104 (115) P.C., followed in *Diwakar Rao* v. *Chandan Lal*, 44 C. 201 (208) P.C.

(3) *Diwakar Rao* v. *Chandan Lal*, 44 C. 201 P.C.

(4) *Slatterie* v. *Pooley*, 6 M. & W. 664 (669), followed in *Chandra Kunwar* v. *Nirpat Singh*, 29 A. 184 (194, 195) P.C.

672. **Proof of Adoption by a Widow.**—Where the adoption is alleged to have been made by a wife or widow, the proof of adoption must not only comprise proof of its *factum*, but also of its validity.[1] In that case, it is not only the authority, whenever necessary, but its exact erms must be strictly proved, since the validity of an adoption, made in pursuance of an authority from the husband, depends upon its terms which must be strictly followed.[2] Even where the widow is possessed of such authority, it may still be a question how far she was inclined to carry it out. If she has, for instance, waited for a considerable period without adoption, the court will require some explanation of the delay, or will doubt the authority.[3] Even where, as in the case of a departed husband in Bombay, the widow has the power to adopt without her husband's authority, evidence of his intention and inclination should afford strong proof of the probability of an adoption, while on the other hand, his disinclination, or refusal, to adopt should equally tend the other way. So it has been held that where there is a permission to adopt, the court will exact slight proof of the performance of ceremonies.[4]

Assent of the Husband.

673. The court looks askance at the adoption by young widows at the suggestion of their managers, relatives or even strangers. In the case of widows of tender years fifteen[5] or seventeen,[6] the conscience of the court has to be satisfied on the question that she was acting as a free agent, and further that she understood, and was made to realize, what difference it would make upon her own rights if she made an adoption. (§§ **684-690.**)

Receipt of Independent Advice.

674. The fact that the adopter was an illiterate pardanashin adds to the burden of those upon whom lies the duty of supporting her adoption.[7] It is sometimes said that an adoption once completed must not be viewed with undue severity. But the question of severity does not arise, till the adoption is proved, and is a part of the *res gestae* of the widow, in which the court seeks for the exercise of that discretion and reflection, without which the form and ceremony are but a tinkling cymbal.[8]

675. It must also be remembered that an adoption is enjoined by law to be made for the benefit of the husband by redeeming his soul and preserving his estate. It is not intended for the benefit of the adoptee. If, therefore, the former purpose had become too remote and no extraneous assistance could achieve the latter purpose, it devolves on the court to enquire why an adoption long delayed had become suddenly so urgent.

Cl. (3) Proviso.

676. **Ancient Adoptions.**—The rule stated in the proviso is supported by ample authority,[9] and is based on the

(1) *Pudam Singh* v. *Oodey Singh*, 12 M.I.A. 350 (356, 357).
(2) *Ib.*, p. 356.
(3) *Dal Bahadur* v. *Bijai Bahadur*, 52 A. 1 (7) P.C.
(4) *Radhamadhab* v. *Radhabullub*, 1 Hay 311; *Mohendro* v. *Rookinny*, 1 Croyton 42 (45, 46).
(5) *Mallan* v. *Dundapa*, (1932) B. 529.
(6) *Bayabai* v. *Bala*, 7 B. H. C. R. (App.) 1 (20).
(7) *Bayabai* v. *Bala*, 7 B. H. C. R. (App.) 1 (20, 21); *Soondur* v. *Kishoree Lal*, 5 W.R. 246.
(8) *Kishorilal* v. *Chunnilal*, 31 A. 116 (121, 122) P.C.
(9) *Anand Rav* v. *Ganesh*, 7 B.H.C. R. (App.) 33 (35); *Kishen Monee* v. *Kashee Soonduree*, W.R. (F.B.) 106; *Rajendro Nath* v. *Jogendranath*, 14 M. I.A. 67 (76, 77); *Jagadamba* v. *Dakhina*, 13 C. 308 (321) P.C.; *Rupnarain* v. *Gopal*, 36 C. 780 (795) P.C.; *Retki* v. *Lakpati*, 20 C.W.N. 19; *Mullangi* v. *Venkatasubbammah*, 25 M. L. J. 373; 19 I.C. 740.

impossibility of proving it by any living witness. The same principle runs through S. 90 of the Evidence Act which, in the case therein mentioned, dispenses with their formal proof. Any other rule would penalize an adoption, however old, and howmuchsoever it may have been acquiesced in, or acted upon, by those very persons, who might have been most interested in challenging it. But since there is a danger of inventing an adoption and placing it past challenge, by investing it with imaginary antiquity, law requires that the adoption should have been acted upon without dispute by those who would be most interested in challenging its authenticity. It would then presume that they had either admitted or acquisced in it. From these facts the court may hold its *factum* proved, and it may then presume its validity. In other words, the question whether an adoption did or did not take place is a pure question of fact which may be proved by evidence, either direct or circumstantial. Where the direct evidence is unobtainable, the court may hold it proved upon a consideration of circumstantial evidence. Such evidence may consist of the admissions and conduct of the parties, some old pedigree[1] or even only a strong and persistent tradition.[2] The *factum* being thus proved, the court will presume its validity, holding that if the adoption was in fact made, it must have been attended by the performance of all the requisite ceremonies.[3]

677. Adoption by Estoppel.—A party, relying upon an adoption, may hold his adversary estopped from denying it. This plea is, however, only a valuable to a party, if it is shown that, by reason of the adoption, the position of the adopted son has been affected owing to some act or omission on the part of his alleged adopter. If the latter is a man, the adoptee stands on firm ground, but if she be a woman, or a minor, than the court is slow to apply it when it finds her conduct involuntary, or swayed by other influences.

Estoppel by Representation.

678. But where a Mitakshara widow, one Dharam Kunwar, took a boy in adoption, declaring that she had her husband's authority to adopt, and about 18 months afterwards her reversioner sued for a declaration of the invalidity of the adoption, the court held that inasmuch as the boy was given in adoption on Dharam Kunwar's declaration of her husband's authority and married on that footing, she was estopped from disputing the adoption, but the estoppel was held personal to her and did not bind the reversioners.[4] In another case, a young widow, aged 19, had adopted the plaintiff alleging the husband's authority and had his *Upanayan* performed. She professed to manage the property for him for 18 months, after which she repudiated his adoption, and the court held that since the adoption was in fact invalid, its invalidity could not be cured by any misrepresentation of the widow, and that she was not even estopped from impeaching it on that ground.[5] But this case was distinguished in a later case on the ground that there repudia-

(1) *Ajab Singh* v. *Nanabhan*, 25 B. 1 P.C.

(2) *Rajendro Nath* v. *Jogendra Nath*, 14 M.I.A. 67.

(3) *Har Sankar* v. *Lal Raghuraj Singh*, 29 A. 519 P.C.; *Anandrav* v. *Ganesh*, 7 B. H. C. R. (App.) 33.

(4) *Dharam Kunwar* v. *Balwant Singh*, 30 A. 549; *Kannammal* v. *Virasami*, 15 M. 486; *Parvatibayamma* v. *Ramkrishna*, 18 M. 145; *Parasuramayya* v. *Venkata*, (1927) M.W.N. 311.

(5) *Parvathibayamma* v. *Rama Krishna*, 18 M. 145.

tion followed the adoption. If, however, it had been acquiesced in for say 20 or 25 years, then the case would have been quite different.[1] It would thus appear that the court allows an adopter a certain degree of *locus penitentiae*.

679. Time has a curative effect upon all adoptions, a principle recognized in the law of limitation (§ 684) which permits "only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute."[2] It is sometimes said that no lapse of time can make an invalid adoption valid. This is true. But after a lapse of time, the door of inquiry is closed. And where there has been acquiescence, the court presumes that the adoption must be valid, otherwise the party interested in challenging it would not have suffered it to stand so long. Of course, no estoppel can prevent an enquiry into the truth where an adoption is tainted by fraud, misrepresentation, corruption or collusion.

Estoppel by Acquiescence.

680. But excepting such cases and taking only a normal case, the law is clear, and it was so stated by the Privy Council, that, although the adopted son is bound to prove his title as a fact, if challenged, still where it had been acquiesced in for a long period, say 27 years, every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant in order to defend his status is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family; and that the case of a Hindu, long recognized as an adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted into another family.[3] So as regards the adoption of the plaintiff which took place twenty years back, the defendant's father was shown to have been present at the ceremony and afterwards joined with the plaintiff, *qua* adopted son, in recovering the land from the Patel, obtaining a decree, in execution of which the plaintiff was on the security of the defendant's father put in possession, the court held, the defendant estopped from disputing the adoption by his father's conduct and acquiescence in the plaintiff's title.[4]

681. So as regards the adopter, where it is admitted or proved that the plaintiff was adopted by the defendant, who pleaded her own incapacity as an untonsured widow to invalidate the plaintiff's adoption, the court held her estopped from denying the validity of her own act, after having adopted and acknowledged the plaintiff as her own son, and when the latter might have lost all right in his natural family. "It may be,

(1) *Santappayya* v. *Rangappaya*, 18 M. 397 (399).

(2) *Jagadamba* v. *Dakhina*, 13 C. 308 (321) P.C., followed in *Mohesh Narain* v. *Taruck Nath*, 20 C. 487 (495) P.C.; *Kailash Chandra* v. *Bijay Chandra*, 72 I.C. (C.) 680: (1923) C. 18; *Ravaji* v. *Lakshmibai*, 11 B. 381 (396); *Kannammal* v. *Virasami*, 15 M. 486; *Parvatibaiamma* v. *Rama Krishna*, 18 M. 145 (152); *Chhote Lal* v. *Chandrabhan*, 45 A. 59 (unchallenged for 48 years); *Kanhaya* v. *Naurang*, (1923) L. 374.

(3) *Rajendra Nath* v. *Jogendra Nath*, 14 M.I.A. 67 (76, 77); *cf. Chandra Shekhar* v. *Raj Kunwar*, (1926) P.C. 91; *Sabo Bewa* v. *Napasun*, 2 B.L.R. (App.) 51; *Vyas* v. *Vyas*, 24 B. 473; *Yamuna* v. *Dhanna Lal*, 114 I.C. (N.) 616.

(4) *Chintu* v. *Dhondu*, 11 B.H.C.R. 192 *notes*; *Sadashiv* v. *Hari*, *Ib.*, 190.

that an adoption is not effectual to confer all spiritual benefit upon the manes of the deceased husband, and yet it is effectual to give the boy the civil status of a son to the adopting widow, a status which, like the status of the impotent party to a marriage, voidable on that ground, the widow is by her act estopped from denying."[1] In another case, the plaintiff, a Rani adopted one Balwant Singh in 1899, executed a deed of adoption and got him married, after which she sued him for a declaration of the invalidity of her act, whereupon the Privy Council said: "She has asserted her authority in the most solemn manner under her hand and seal, and her conduct, both before and after that assertion, has been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family; he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of the privileges with which the Rani purported to endow him. He married on the faith of his adoptive mother's word, and no doubt has creditors who have sold him goods or lent him money in like reliance on her good faith. Under these circumstances, the Rani's argument that the doctrine of estoppel does not apply, because the defendant could show no loss or detriment, is without any substance whatever, and she must be held to her word and to the results of her conduct."[2] The same view was taken in another case in which the plaintiff's adoption had been acknowledged and acted upon by his adoptive mother for twenty years, which was held to create an estoppel against her who could not challenge it on the ground of its invalidity,[3] Where the adoptee has his *Upanayan* performed, or was married in his adopter's family, it involves a definite change of status in law upon which the adopter may be estopped.[4] So also where third parties advance money upon the faith of his adoption. But it is not necessary to formulate a precise plea on the altered position of the adoptee.

Limits of the Rule.

682. There can be no estoppel, unless a party acts with the knowledge of his right and in a manner inconsistent with them. He does not impair his right by merely consenting to a deed which, with or without his consent, was invalid.[5]

683. Estoppel merely creates a personal disqualification affecting only one and one's legal representative. It does not affect the validity of the adoption which may yet be challenged by others (**S. 65**), claiming by an independent title, though not by the reversioner, if the widow represented the estate.[6]

684. Limitation.—Closely associated with the question of acquiescence is the subject of limitation which limits a party suing for declaring

(1) *Ravji* v. *Lakshmibai*, 11 B. 381 (396).

(2) *Dharam Kuar* v. *Balwant Singh*, 34 A. 398 (404) P.C., affirming O.A. 30 A. 549; *Dharam Prakash* v. *Kalawati*, 50 A. 885.

(3) *Santappayya* v. *Rangappayya*, 18 M. 397; *Parvatibayamma* v. *Ram Krishna*, 18 M. 145; *Dharam Kunwar* v. *Balwant Singh*, 34 A. 398 (404) P.C.

(4) *Ib.*

(5) *Rup Narain* v. *Gopal*, 36 C. 780, (796, 797) P.C.

(6) *Risal Singh* v. *Balwant Singh*, 40 A. 593 P.C.; *Parvatibayamma* v. *Rama Krishna*, 18 M. 145 (146).

an adoption valid or non-existent and invalid, to six years, calculated, in the former case, from the time "when the rights of the adopted son, as such, are interfered with," and in the latter case, from when the adoption becomes known to the plaintiff.[1] In the first place, it should be added that these articles merely prescribe a period for obtaining a declaration, a relief which is optional to those whose rights are infringed. Consequently, the mere omission to obtain such declaration does not preclude a party from challenging or supporting an adoption in a suit for possession of property.[2]

For Challenging an Adoption.

685. Assuming, however, that a person resorts to the optional remedy here contemplated, and taking first only the case of those who challenge the *factum* or the validity of an adoption, in will be seen that the starting point for limitation is the knowledge of adoption. It is also the starting point for estoppel and acquiescence. Such knowledge must not necessarily be first hand, though it must be of necessity something more than a floating rumour. The question is one of fact[3] which he who wishes to bring his suit within limitation has to prove. The persons who are interested in maintaining such suits are the adopter and his heirs, and where the adoption is by a widow, her reversioners. Third parties who have become interested in the estate, such as transferees from the alleged adopter, may equally maintain such a suit.[4]

Burden of Proof.

686. The question of the burden of proof in such suits is one of some nicety, and one upon which the courts are not agreed. The Allahabad court holds that the plaintiff who seeks a declaration must establish the invalidity of the defendant's adoption,[5] while the Madras High court maintains the contrary, holding that if the estate had fallen into possession and the plaintiff had to sue for its recovery and the defendant resisted his claim on the ground of his adoption, the burden would unquestionably be on him. Why should then the rule be different if he merely sues for a declaration?[6] But it is submitted, that the two cases are distinguishable, since when the reversioner sues for possession, the title has already become vested in him by law which the defendant has to displace, but till then his interest is merely a *spes successionis*, and he must follow the ordinary

(1) Lim. Act (IX of 1908), Art. 119.

(2) *Ib.*, Art. 118.

(3) *Tirbhuvan* v. *Rameshar*, 28 A. 727 P. C.; *Muhammad Umar Khan* v. *Muhammad Naizuddin*, 39 C. 418 (432) P. C.; *Velaga* v. *Bandlamudi*, 30 M. 308. There was at one time a conflict between the High Courts on the effect of these articles on a suit for possession, the Bombay and Madras High Courts, holding that it became barred; *Parvathi* v. *Saminathan*, 20 M. 40; *Ratnamasari* v. *Akilandammal*, 26 M. 291; *Shrinivas* v. *Balwant*, 37 B. 513; *Ramchandra* v. *Narayan*, 27 B. 614; *Barot* v. *Barot*, 25 B. 26; *Shrinivas* v. *Hanmant*, 24 B. 260, overruling *contra* in *Hari Lal* v. *Bai Rewa*, 21 B. 376; *Fannyamma* v. *Manjayya*, 21 B. 159; *Padorjirar* v. *Ramrav*, 13 B. 160 also *Inda* v. *Jehangira*, (1890) A.W.N. 242. But the Calcutta and Allahabad High Courts held *contra* in *Ramchandra* v. *Ranjit Singh*, 27 C. 242 (253-255); *Parbhu Lal* v. *Mylne*, 14 C. 401; *Baikunta* v. *Kali Charan*, 9 C.W.N. 222; *Basudeo* v. *Gopal*, 8 A. 644; *Ganga Sahai* v. *Lekhraj*, 9 A. 253 (267-269); *Nathu Singh* v. *Gulab Singh*, 17 A. 167; *Lali* v. *Murlidhar*, 24 A. 195. The latter view is (it is submitted) correct, though the Bombay High Court still maintains its previous view (*Srinivas* v. *Balwant*, 37 B. 513), a view upon grounds sufficiently met even by the language of the article.

(4) *Yamunabai* v. *Balshet*, 5 Bom. L. R. 584 (587).

(5) S. 3, Lim. Act (IX of 1908); *Ayyadorai* v. *Solai Ammal*, 24 M. 405.

(6) *Ashrafi* v. *Rupchand*, 30 A. 197.

rule, and would not be entitled to a decree as a matter of course, if the defendant refused to give any evidence.

For Supporting an Adoption.

687. The person primarily entitled to obtain a declaration as to the validity of a person's adoption is the adoptee himself, though others, such as his heirs, and transferees may equally maintain such a suit. The right to sue commences as soon as the adoptee's rights are interfered with, and not merely denied.[1] Again, such a suit, to quote the language of Art. 119 of the Limitation Act, may be brought only "to obtain a declaration that an adoption is valid," that is to say, it must not be a suit to establish the *factum* but merely its validity.[2] The subject of limitation for possession calls for no reference here, since it follows the general law.

Adoption by Fraud.

688. Again, no estoppel can shut out an enquiry into an adoption, if it was brought about by fraud, corruption, etc., mentioned in Section 46.[3] No person is estopped for merely expressing an opinion which may or may not be correct. An erroneous opinion, given by a person as to the law of adoption, or even that an adoption was valid in law, does not estop him from afterwards disputing its validity.[4] It is only a misrepresentation on a matter of fact that creates an estoppel, though such misrepresentation may have been made innocently under a mistake or misrepresentation.[5] There is no estoppel unless one person causes or permits another to believe in an adoption. If, therefore, *A* claimed an adopted son of *B*, and *B's* true heir, *C*, did nothing to oppose him, but on the other hand, supported him, *A* could not hold *C* estopped, because *C* had done nothing to alter *A's* position to his prejudice[6] The facts might be relied upon as an admission, but where *C* had admitted or denied *A's* adoption as it suited him, the Privy Council were not prepared to attach any value to them, apart from creating an estoppel which they did not create.[7] Such act may also amount to an acquiescence, but mere acquiescence does not create an estoppel,[8] though it sets limitation in motion,[9] and may, apart from limitation, let in the rule stated in the proviso.

689. **Working Rules.**—From the foregoing discussion it will be observed that the highest judicial minds are agreed upon the following working rules in determining the question of adoption:—

(1) First and foremost, they require, and look for documentary evidence. If it is wanting, they demand to know why. Its absence leaves a serious hiatus in the case. (§ **663.**)

(2) Next to writing, the court pays regard to the admitted facts and circumstances. (§§ **669-671.**)

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(1) *Rajagopala* v. *Nattu*, 34 M. 329.

(2) *Ningawa* v. *Ramappa*, 28 B. 94.

(3) *Sukhbasi Lal* v. *Guman Singh*, 2 A. 366; *Dharam Kunwar* v. *Balwant Singh*, 34 A. 398; *Chintu* v. *Dhondu*, 11 B.H.C.R. 192-*note*; *Chaitko* v. *Janaki*, 11 B.H.C.R. 199; *Ravji* v. *Lakshmi Bai*, 11 B. 381 (396).

(4) *Gopee Lall* v. *Chandrabolee*, 19 W. R. 12 (13); *Raj Narain* v. *Universal Life Assurance Co.*, 7 C. 594; *Kuverji* v. *Babai*, 19 B. 374 (390, 391).

(5) *Sarat Chunder* v. *Gopal Chunder*, 20 C. 296 (310) P.C., overruling *contra* in *Ganga Sahai* v. *Hira Singh*, 2 A. 809; *Vishnu* v. *Krishnan*, 7 M. 3.

(6) *Har Shankar* v. *Lal Raghuraj Singh*, 29 A. 519 (533, 534) P.C.

(7) *Ib.*, p. 534; *Peddamuthulaty* v. *Timma*, 2 M. H. C. R. 270 (278); *Rajan* v. *Basuva*, *ib.*, p. 428; *Uda* v. *Imamuddin*, 1 A. 82; *Taruck Chunder* v. *Hurro Sunker*, 22 W.R. 267.

(8) *Papamma* v. *Appa Rao*, 16 M. 384 (391); *Gurulingaswami* v. *Ramalakshmammal*, 18 M. 53 (60); *Vaithilingam* v. *Murugaian*, 37 M. 529.

(9) *Ram Rau* v. *Raja Rau*, 2 M. H. C.R. 114.

(3) An admission of adoption is very strong evidence of it against the person admitting it; but it may be explained away.

(4) In the fourth place, they consider the trend of antecedent probabilities.

(5) Believing or disbelieving oral evidence according as it is supported by facts mentioned in the preceding paragraphs.

(6) Failing which, they require clear, cogent, and consistent evidence in support of a right which disappoints the natural heirs.

(7) Where, however, an adoption has been acted upon for a length of time, say at least for twenty or thirty years, without any opposition, the court considers it a sufficient proof of adoption, presuming its validity from its long continuance, and the impossibility of proving its details.

(8) In appraising oral evidence, while regard must necessarily be had to the education, position and character of the witness, his testimony must be judged in the light of probability.

(9) In the case of young ignorant women and those recently afflicted by the death of their husbands, the court must be satisfied that the adoption was not only a voluntary but also a deliberate act justified by the antecedent probabilities, and in the case of pardanashin widows even stronger evidence is necessary.

690. Pleading of Adoption.—It is, of course, an ordinary rule of pleading that no party can be permitted to spring upon his adversary a new plea at the close of the evidence. Where a party generally denied an adoption and it was put in issue and tried, he could not at the close of the evidence be permitted to raise a new plea that the adoption was invalid in law, on the ground that under Hindu Law, there could be no valid adoption of a daughter's son. This is not a pure question of law, for though the prohibition is the general rule, it may be varied by custom, and it was, therefore, held, that a party challenging an adoption could not raise such a mixed plea at a late stage.[1] So following this case, the Madras court declined to entertain a plea on appeal impeaching an adoption on the ground that the adoptee was the younger brother of the adopter.[2]

59. Effect of void adoption. **(1) A person whose adoption is for any reason void, acquires no right as an adopted son.**[3]

(2) And where a gift is made to such person, described as an adopted son, the adoption failing, the gift also fails,[4] **unless it was intended as a gift to a personal designata, and the adoption was not a condition of the gift.**[5]

Illustrations.

(*a*) *A* bequeathes a legacy "to *B* whom I have adopted." *A* directs his wife *C* to perform the ceremonies and bring up *B*. *C* fails to perform the ceremonies and the adoption is invalid. *A's* bequest takes effect for he had intended to benefit *B* as a *persona designata*.[6]

(1) *Rup Narain* v. *Gopal*, 36 C. 780 (795) P.C.

(2) *Sindigi* v. *Sindigi*, 32 M.L.J. 47: 38 I.C. 164.

(3) *Rup Narain* v. *Gopal*, 36 C. 780 (795) P.C.

(4) *Fanindra* v. *Rajeshwar*, 11 C. 463 (485) P.C.

(5) *Nidhomoni* v. *Saroda Pershad*, 26 W.R. 91 P.C.

(6) *Ibid.*

(*b*) But if in the last case, *A* bequeaths a legacy to *B* by virtue of *B* being his adopted son, then on the failure of *B's* adoption, *A's* bequest would also fail as *A* intended to benefit *B qua* his adopted son.[1]

691. Analogous Law.—The first clause of this section declares the general rule,[2] while the second clause is really a rule of construction. The question whether a gift is intended to benefit a person irrespective of, or on account of, his adoption is a question of intention to be collected from the wording of the instrument. In this respect, the rule follows the English Law.

692. Effect of Invalid Adoption.—Where an adoption is for any reason invalid, the adoptee acquires no right in the family of his adopter. He is as good as if he had never been adopted. His natural rights remain. If there is no adoption, nothing could have been acquired and nothing lost. He has not even the right of maintenance in the family of his adopter.[3] So much is clear. Nor can he claim anything by estoppel. So where a dancing girl adopted a girl for purposes of prostitution, and the adoption failed on the ground of its immoral purpose, the court overruled the plea of estoppel holding that estoppel could not be relied upon to defeat a prohibition on the ground of public policy.[4]

693. Construction of Bequest.—But where a gift or a bequest is made to an adoptee whose adoption fails, the question whether the gift or bequest will, nevertheless, hold good depends upon the donor's intention, the question in such cases being whether the donor intended to benefit the adoptee by reason of his adoption or even independently of it. So where the testator declared in his will that he had loved and brought up one Ardha as his son, who was very much attached to him and his wife, and that he had a mind to give him a share of his estate, but that he had taken him in adoption, and as such bequeathed to him his property, but the adoption failed as there had been no ceremony of giving and taking, the Privy Council held the gift, nevertheless, valid as made to a *persona designata,* whom the donor intended to take for reasons independent of adoption.[5] Such was also held to be the case where a will was to the following effect: "I declare that I give my property to *K,* whom I have adopted," followed by the direction, "My wives shall perform the ceremonies according to the Shastras, and bring him up."[6] This case was distinguished by the same Board in a case where the testator declared that he had secretly adopted one Jagadindra whom he authorized to offer oblations of water and pinda, "to me and my ancestors after my death by virtue of your being my adopted son." The adoption being held invalid, their Lordships held, the gift also failed, as the testator had made his gift by virtue of the adoption and not independently of it.[7] Their Lordships followed this case in another case, in which the testator had similarly declared that he had adopted his sister's son seven years ago, adding: "He is my heir and successor (or *malik*). If, after this agreement, a son is born to me, half the property would be received by him and half by my adopted son." The

(1) *Fanindra* v. *Rajeshwar,* 11 C. 463 (485) P.C.

(2) *Bawani* v. *Ambabay,* 1 M. H. C. R. 363.

(3) *Bawani* v. *Ambabay,* 1 M. H. C. R. 363 (367, 368), followed in *Lakshmappa* v. *Ramava,* 12 B.H.C.R. 364 (395); *Rajcoomaree* v. *Nobocoomar,* 2 Borr. 137; *Kandaiya* v. *Chokhammal,* 28 M.L.T. 106.

(4) *Kandaiya* v. *Chokkammal,* 28 M. L.J. 106.

(5) *Biraswar* v. *Ardha Chander,* 19 C. 452 (461) P.C.

(6) *Nidhoomoni* v. *Saroda Pershad,* 26 W.R. 91 P.C.

(7) *Fanindra* v. *Rajeswar,* 11 C. 463 (485) P.C.

adoption of a sister's son being held invalid, the Privy Council construed the gift as dependent upon the adoption, since it was declared liable to variation on the birth of a legitimate son.[1] The result would of course have been different if the gift had not been liable to variation.[2]

694. These are comparatively easy cases. But their Lordships were not quite so sure as to what was intended by a will in which the testator had directed the widow of his deceased son to adopt the son of his nephew, to whom he had bequeathed his residuary estate in the following words: "My property which may remain as a residue after all the things in my will have been done, I give to this lad as his inheritance." The controversy centred on the construction of the words, "after all things mentioned in my will have been done," whether they were to be read as qualifying the preceding word "residue," or the following words, "I give," in which case, the gift would be conditional on the adoption which was one of the things mentioned in the will, which was the construction placed on them by the High court, and which their Lordships affirmed, holding the words "very obscure" and the other construction not so clear as to justify disturbance of the decree appealed against.[3] This case illustrates the truth of what was said in another case: "The distinction between what is a description only, and what is the reason or motive of a gift or bequest, may often be very fine, but it is a distinction which must be drawn from the consideration of the language and the surrounding circumstances.[4] A party may implement a construction by his own conduct. Such was the case where a Zemindar, *A*, with the consent of his wife adopted a son *B*, and appointed him his heir, after which he married a second wife and made another adoption of *C*, when his first adopted son *B* was still alive. He divided the estate between them, and *B* managed *C's* estate during his minority. On the adopter's death, *B*, however, laid claim to the entire estate, alleging that *A* could not have legally alienated his estate in favour of *C* or legally adopted him. The Privy Council held *C's* adoption during *B's* lifetime invalid. They also held that *B's* acquiescence in *A's* partition and in *C's* possession and his own management of his estate for him during *A's* life in no way prejudiced his claim, but inasmuch as *A* could have given a portion of his estate to *C*, during his lifetime without *B's* consent, *B* was bound to deliver to *C* that portion of *A's* estate which *A* could have given to *C*, if the gift had been *inter vivos*.[5]

60. **(1) The adoption of a person has, from the date of his adoption, the effect of determining all his rights and liabilities in the natural family,[6] but not so as to divest him of any property which may have vested in him prior to that date;[7] provided that in territories subject to the Mayukh school of law, he must relinquish any estate he may have inherited from his natural father.[8]**

Effect on natural family.

(1) *Lali* v. *Murlidhar*, 28 A. 488 (495, 496) P.C.

(2) *Murari Lal* v. *Kundan Lal*, 31 A. 339.

(3) *Karamsi* v. *Karsondas*, 23 B. 271 (277-279) P.C.

(4) *Fanindra* v. *Rajeswar*, 11 C. 463 (484) P.C., cited in *Lali* v. *Murlidhar*, 28 A. 495 P.C.

(5) *Rungama* v. *Atchama*, 4 M.I.A. 1.

(6) Manu, IX-142, cited in Mit. I-XI-32.

(7) *Behari Lal* v. *Kailash Chunder*, 56 C. 1135; *Sri Raja Venkata* v. *Sri Raja Rangayya*, 29 M. 437.

(8) *Lal Harihar* v. *Bajrang*, (1937) P. C. 242. *Dattatraya* v. *Govind*, 40 B. 428.

(2) But no adoption severs the natural relationship of the adopted son with his natural family so as to exempt him from the prohibition which would otherwise bind him as regards marriage and adoption.[1]

695. Analogous Law.—The two rules here stated are the outcome of the view partly embodied in the following texts:—

Manu.—"A given son must never claim[2] the family and estate of his natural father: the funeral cake follows the family and the estate; but of him, who has given away his son, the funeral oblation is extinct."[3]

Vrihat Manu.—"Sons given, purchased and the rest, retain the relation of Sapinda to the natural father as extending to the fifth and seventh degree; like this, their general family, which is also that of their adopted."[4]

The rule that an adopted son cannot be divested of the estate which had already vested in him follows the general rule that an estate once vested cannot be divested.[5] Nor does it disqualify one for adoption.[6]

696. Adoptee's Position in the Natural Family.—An adoption effects a complete severance of the adopted son from his natural family. His adoption is said to operate as a civil death of the adoptee in the natural family and his re-birth in the family of his adopter. But this is scarcely correct. For although adopted into another family, the adopted still retains the property which had vested in him prior to his adoption, which, of course, he could not be permitted to do if he were civilly dead. The question is what property he can retain and what he must forego depends upon the text of Manu already quoted (§ **695**) in which occurs a word and a phrase which have given rise to some conflict of views between some cases of the Bombay and the other High Courts. That text declares that upon his adoption, the adopted son shall not "*haret*" an estate of his natural father. The word "*haret*" may mean "take" or "claim" and the estate of the natural father may mean, not only such estate over which he has complete disposing power, or merely a coparcenary right, over which his power of disposal is limited. This difficulty does not arise under the Dayabhag law, which recognizes no coparcenary between the father and his sons, and since the word "take" points to futurity and eludes the retention of an estate already taken, it has been held that, since the disqualification to take anything from the estate of the natural father only arises upon his adoption, it follows that both under the Dayabhag as well as under the Mitakshara, the son would retain the estate that has become vested in him either by survivorship, inheritance, gift, devise or otherwise;[7] but the Bombay High Court

(1) Vrihat Manu, cited in Datt. Mim., VI-9 (Suth.) 73; *Mootia* v. *Uppea*, (1858) M.S.D.A. 117; *Dhanna Mal* v. *Parmeshri Lal*, (1928) L. 9.

(2) Skr. "*haret*" lit. "take"—25 S. B. E. p. 355. See *Kesarbai* v. *Shivasangji*, (1932) B. 654 (658).

(3) IX-142, cited in Mit., I-XI-32; Mayukh, IV-V-21 (Mandlik), 59; Datt. Mim., VI-§6; Datt. Ch. II-8 (Suth.), 72, 119.

(4) Cited in Datt. Mim., VI § 9 (Suth.) 73.

(5) *Moniram* v. *Keri*, 5 C. 776 (788) P.C.; *Annamah* v. *Mabbu*, 8 M.H.C.R. 108; *Venkata* v. *Rangayya*, 29 M. 437 (447-451) (Mitakshara cases), in which the rule here stated and the texts bearing thereon have been fully discussed. O.A. *Narasimha* v. *Parthasarathy*, 37 M. 199 P.C. (decided on a different point); *Behari Lal* v. *Kailas Chander*, 1 C.W.N. 121 (Dayabhag case); *Maroti* v. *Laxman*, 5 N.L.J. 58: 65 I.C. 362; *contra* in *Dattatraya* v. *Gobind*, 40 B. 429 (438), distinguished in *Mahableshwar* v. *Subramanya*, 47 B. 542.

(6) *Papamma* v. *Appa Rau*, 16 M. 384 (396, 397).

(7) *Beharilal* v. *Kailash Chunder*, 1 C.W.N. 121; *Shyamcharan* v. *Sricharan*, 56 C. 1135; *Sri Raja Venkatta* v. *Sri Raja Rangayya*, 29 M. 437; *Ramachandra* v. *Harischandra*, 25 N. 139 (property acquired by partition).

reading the text in the light of Mayukh,[1] have, in some cases, held that such son cannot be permitted to retain an estate not acquired by survivorship or partition,[2] since an estate which he had inherited or which he had succeeded after his father who had died as the sole surviving coparcener was the estate of his natural father which he must surrender up to his father's natural heirs upon his adoption.[3]

697. In Bombay, where the adoption of a married man having a son is permitted, it is held that on the adoption of such father, though the wife as part of him follows into the new family, and though she was then *enciente*, the son born to her would be the son of the adopted family,[4] still the ante-adoption son does not pass with his father into the new family; but remains a member of, and retains his rights in his own family.[5]

698. Apart from the effect of adoption upon vested rights, it is unquestionable that, from the moment of his adoption, the adoptee loses all future interest he may acquire in his own family and *vice versa*.[6] His severance from his natural family is so complete that no mutual rights as to succession to property can arise between them, so that, while he cannot inherit to any of his natural relations, the latter equally cannot inherit to him. His heirs are his new sapindas of the adoptive family, his own relations of his natural family being placed outside the catena of his heirs as such,[7] so that on his adoption, the persons who inherit to him are naturally his own heirs and not those of his father.[8]

699. An adopted son, on adoption, ceases to be liable for the debts or other obligations for which he would have been liable as a member of his natural family, except, of course, such debts and obligations for which he may be liable by reason of the property which he may have inherited or acquired before his adoption.[9]

Marriage and Adoption.

700. The adopted son is a mere substitute for a real son, and as such, he has, by usage, acquired a filial status and rights in his adoptive family. The creation of such a jural relationship does not sever the tie of blood which binds him to his natural family. He cannot, therefore, marry in his natural family within the prohibited degrees, nor can he adopt from that family a boy whom he would not have adopted if he had remained in that family.[10] But on this question usage may have something to say.

(1) Ch. IV S. 5, Pl. 22, 23 quoted in *Kesarbai* v. *Shivsangji*, (1932) B. 654 (659). There is nothing special in these texts to support the Bombay view.

(2) *Mahableshwar* v. *Subramanya*, 47 B. 542; *Manikbai* v. *Gokuldas*, 49 B. 520.

(3) *Dattatraya* v. *Govind*, 40 B. 428; *Mahableshwar* v. *Subramanya*, 47 B. 542; *Kesarbai* v. *Shivsangji*, (1932) B. 654 (661, 662) dissenting from *Ramchandra* v. *Manubai*, 43 B. 774, in which Scott, C.J. and Hayward, J. would divest him of all estate howsoever and whensoever acquired on the ground that adoption should be treated as the adoptee's civil death in the natural and rebirth in the adopted family.

(4) *Kalgavda* v. *Somappa*, 33 B. 669.

(5) *Advi* v. *Fakirappa*, 42 B. 547; *Kesarbai* v. *Shivsangji*, (1932) B. 654.

(6) *Duttnaraen* v. *Ajeet Singh*, 1 Beng. S. R. 26; 6 I.D. (O. S.) 20; *Srinivasa* v. *Kuppan*, 1 M.H.C.R. 180; *Muthayya* v. *Minakshi*, 25 M. 394; *Venkata* v. *Rangayya*, 29 M. 437; *Mahableshwar* v. *Subramanya*, 47 B. 542; *Maroti* v. *Laxman*, 5 N.L.J. 58: 65 I.C. 362, cf. *Moni Ram* v. *Keri Kolitani*, 5 C. 776 P.C.

(7) *Tewari Raghunath* v. *Subhadra*, 3 Luck. 76 P.C. : (1928) P.C. 87 : 55 I.A. 139, *Muthayya* v. *Minakshi*, 25 M. 394; *Bhau Saheb* v. *Ramgauda*, 25 Bom. L.R. 813.

(8) *Manik Bai* v. *Gokul Das*, 49 B. 520.

(9) *Pranvullubh* v. *Dookritu*, (1824) Beng. S. R. 4; *Kashee Pershad* v. *Bunseedhur*, 4 N.W.P.S.D.A. 343.

(10) *Mootia* v. *Uppea*, (1858) M.S.D. A. 117; *Dhanna Mal* v. *Parmeshri Lal*, (1928) L. 9.

61. Rights in the adopted family. **In the absence of a natural son, an adopted son acquires all the rights and is subject to all the liabilities of a natural son in the family of his adoptive father, including the right of lineal and collateral inheritance.**[1]

701. **Analogous Law.**—The theory of adoption implies a complete change of paternity, and an adopted son must, in all respects, be considered as having been begotten by his adoptive father.[2] It is now settled that the adopted son possesses in the family of his adopter the same status and rights as an *auras* (or lawfully begotten) son,[3] being as such, entitled to enforce a partition against his adoptive father of his coparceners, and to inherit both lineally and collaterally to his adoptive relations,[4] except in a few instances to be presently considered. As Mitter, J. observed: "According to Hindu Law, an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family, in which he is born, both in respect of the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it."[5]

702. The property inherited by the adopted son from his adoptive father would be ancestral or self-acquired according to the nature of the property inherited by him. It is not in the nature of a gift to the son, but is his inheritance.[6]

703. He is the adopted son of both his adoptive father and of his wife whether she consented to his adoption or not. Consequently, he succeeds both to him and to her[7] because a son adopted by the father becomes also the son of his wife, even though the adoption might have been made when the wife was dead[8] or she being then living, without her consent or in spite of her opposition, the reason being the identity of such son's rights with those of the real son. As such, he would inherit to her

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(1) *Pratab Singh* v. *Agar Singh*, 43 B. 778 P.C.

(2) *Narasammal* v. *Balaramacharlu*, 1 M.H.C.R. 420; *Pratab Singh* v. *Agar Singh*, 43 B. 778 P.C.

(3) *Sumboo Chunder* v. *Narain*, 3 Knapp 55; *Pudmacoomari* v. *Court of Wards*, 8 C. 302 P.C.; *Kali Komul* v. *Uma Shunker*, 6 C. 256 (259, 260) F. B. O. A. *Uma Shunker* v. *Kali Komul*, 10 C. 232 P.C.; *Nagindas* v. *Bachoo*, 40 B. 270 (287, 288) P.C., reversing *Bachoo* v. *Nagindas*, 16 Bom.L.R. 263; *Pratab Singh* v. *Agar Singh*, 43 B. 778 P.C.

(4) *Sumboo Chunder* v. *Narain*, 8 C. 302 P.C.; *Uma Shunker* v. *Kali Komul*, 6 C. 256 (259, 260) F.B., O.A. *Kali Komul* v. *Uma Shunker*, 10 C. 232 P. C.; *Nagindas* v. *Bachoo*, 40 B. 270 (287, 288) P.C., reversing *Bachoo* v. *Nagindas*, 16 Bom.L.R. 263.

(5) *Uma Shunker* v. *Kali Komul*, 6 C. 256 (259, 260) F.B., affirmed O.A. *Kali Komul* v. *Uma Shunker*, 10 C. 232 P.C., approved in *Nagindas* v. *Bachoo*, 40 B. 270 (288) P.C.

(6) *Heera Singh* v. *Buryar Singh*, 1 Agra 256.

(7) *Sham Kuar* v. *Gaya Din*, 1 A. 255 F.B.; *Gunga Mya* v. *Kishen Kishore*, 3 Beng. S.R. 128; *Gunga Pershad* v. *Brijessuree*, (1859) S.D.A.B. 109; *Puddo Kumara* v. *Juggut Kishore*, 5 C. 615; *Uma Sunker* v. *Kali Komul*, 6 C. 256 (263) F.B.O.A. *Kali Komul* v. *Uma Shunker*, 10 C. 232 P.C., approved in *Nagindas* v. *Bachoo*, 40 B. 270 (288) P. C., overruling *contra* in *Morun Mose* v. *Bejoy*, W.R. (A. N.) 121; *Chinarama Krishna* v. *Minatchi*, 7 M. H.C.R. 245; *Sundarammal* v. *Venkatasubba*, 49 M. 941.

(8) *Sundaramma* v. *Venkatasubba*, 49 M. 941; *Sowntharapandian* v. *Peria Veeru*, 56 M. 759 (765) F.B.

own *stridhan* and to her other relations.[1] The case, however, is different where there are more than one wife, in which case, the son becomes only the son of the wife who had conjoined in the adoption.[2] So when one *S*, a Hindu governed by the Mitakshara school, married four wives in succession, and in conjunction with his first wife, by whom he had no issue he adopted a son *H*, after which he had a son *G* by his second wife: *S* predeceased his fourth wife, *M* having had no issue by her. On *M* dying intestate, both *H* and *G* were held equally entitled to inherit *M's stridhan* as the sapindas of *S*.[3]

704. **Adoptee's Rights in his Adopter's Family.**—It has now been settled by a series of rulings of the Privy Council, that except in the cases and to the extent expressly limited by the texts, the rights and liabilities of an adopted son are exactly identical with those of a natural born son, that is to say, so far as regards rights, he is entitled to inherit to his adoptive father, and the latter's natural or adoptive father, grandfather and his other more distant lineal ancestors. He is equally entitled to inherit to his father's wife who is treated as his adoptive mother, whether she took part in his adoption or not, and to her relations, such as her father and brothers.[4] And conversely, both the adoptive father and mother and their relations are entitled to inherit to him.[5]

Collateral Succession.

705. Similarly, he is entitled to inherit to their relations collaterally, such as their brothers, sons, and other collateral relations.[6] So where a legitimate and adopted son survive a father and the legitimate son afterwards dies the adopted son takes the whole property by survivorship.[7] So he is entitled to succeed to his father's daughter's son[8] his father's brother's son,[9] paternal uncle,[10] father's first[11] or third cousin[12] and grandfather's first cousin.[13] So an adopted son of one daughter will share equally with the natural son of another daughter in the inheritance left by his natural grandfather.[14]

706. Where a man takes a son in adoption after the death of his first wife, the adopted son becomes a step-brother of a daughter by the first wife. The adopted son becomes the full son of the wife, joining in

(1) *Sundaramma* v. *Venkatasubba*, 49 M. 941; *Sowntharapandian* v. *Peria Veeru*, 56 M. 759 F.B.

(2) *Venkata* v. *Parthasarathy*, 37 M. 199 (220) P.C.; *Annapurni* v. *Forbes*, 23 M. 1 (9) P.C., approving *Kasheeaburee* v. *Greeshchunder*, (1864) W.R. (Sup. Vol.) 71.

(3) *Gangadhar* v. *Hiralal*, 43 C. 944; *Joy Kishore* v. *Panchoon*, 4 C.L.R. 531; *Surjokant* v. *Mohesh*, 9 C. 70.

(4) Datt. Mim., 1-§-22; *Sundaramma* v. *Venkatasubba*, 49 M. 941 (945).

(5) *Kali Komul* v. *Uma Shunker*, 10 C. 232 P.C.; *Radha Prasad* v. *Ranee Moni*, 33 C. 947; *Gangadhar* v. *Hiralal*, 43 C. 944; *Partab Singh* v. *Agarsingh*, 43 B. 778 P.C.; *Nagindas* v. *Bachoo*, 40 B. 270, distinguished in *Vankamamidi* v. *Vankamamidi*, 38 M.L.T. 86 (89), in which *contra* in *Narasimappa* v. *Chinnakeanchappa*, 38 I.C. (M.) 244, dissented from.

(6) *Padma Kumari* v. *Court of Wards*, 8 C. 302 P.C.; Mithila law the same, *Chandeshwar* v. *Bisheswar*, 5 Pat. 777 (850); *contra* in the Punjab, *Tirath Ram* v. *Kahan Devi*, 1 L. 588; 60 I.C. 101.

(7) *Rungamma* v. *Atchamma*, 4 M. I. A. 1 (103); *Sudanund* v. *Bonomallee*, Marsh 317.

(8) *Padma Kumari* v. *Court of Wards*, 8 C. 302 P.C.

(9) *Bamundoss* v. *Tarinee*, 7 M.I.A. 169; *Harekchand* v. *Bejoy Chand*, 9 C.W. N. 795.

(10) *Lokenath* v. *Shamasoondaree*, (1858) S.D.A.B. 1863.

(11) *Sumbhoochunder* v. *Narain*, 5 W. R. 100 P.C.

(12) *Dino Nath* v. *Gopal*, 6 C. L. R. 379.

(13) *Mokundo* v. *Bykunt*, 6 C. 289.

(14) *Tara Mohun* v. *Kripa Moyee*, 9 W.R. 423; *Uma Shankker* v. *Kali Komal*, 6 C. 256 (259, 260) F. B. followed in *Surjokant* v. *Mohesh Chunder*, 9 C. 70.

the adoption, and the stepson of the other.[1] And so an adopted son by one wife is entitled to inherit the *stridhan* of another wife equally with the legitimate son of a third wife as his predeceased father's sapindas,[2] So an adopted son of the maternal grandfather of a deceased man, though the *gotra* into which he was adopted was not the same as the latter's was an heir nearer to him than such maternal grandfather's grandnephew.[3]

Rights commence with Adoption.

707. Such rights, however only arise on adoption. Even in the case of an adoption by the widow, though the adoption by her is to her husband, still the adoptee's rights do not relate back to the death of the husband[4] except, it is said, in the case of a trading partnership where the adopted son takes the place of the deceased as from the date of his death,[5] thus preventing its automatic dissolution.[6]

Time when the Rights arise.

62. (1) Save as otherwise provided in clause (3), the rights of an adopted son arise at adoption.[7]

(2) An adopted son cannot dispute an alienation made by the adoptive father before his adoption; and on his adoption he would be bound by an alienation or contracts made by his adoptive father or any other manager of the family to the same extent as a natural son.[8]

Relating back of rights, when adopter a woman.

(3) The rights of a son adopted by a widow do not relate back to the death of her husband,[9] except in the following cases, and to the following extent, namely:—

(*a*) His adoption relates back to the death of her husband for the purpose of continuing a family trading partnership of which he was a member;[10]

(*b*) He divests the coparcenary interest of the husband which has become vested in another by survivorship;[11]

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(1) *Gunomani* v. *Devi*, 54 I. C. (C.) 897.

(2) *Surjokant* v. *Mohesh Chunder*, 9 C. 70; *Raja* v. *Subbaraya*, 7 M. 253.

(3) *Joy Kashore* v. *Penchooi*, 4 C. L.R. 538; *Gangadhar* v. *Hiralal*, 43 C. 944.

(4) *Pudma Kumari* v. *Court of Wards*, 8 C. 302 P.C.

(5) *Bamundoss* v. *Tarinee*, 7 M.I.A. 169; *Harekchand* v. *Bejoychand*, 9 C.W. N. 795.

(6) S. 253 (10), Contract Act (IX of 1872); *Kopurchand* v. *Narainjainall*, (1897) P.R. 20.

(7) *Collector of Madura* v. *Motoo Ramalinga*, 12 M.I.A. 397 (443); *Bamundoss* v. *Tarinee*, 7 M.I.A. 169 (180) *Girdharilall* v. *Kantoo Lal*, 22 W.R. 56 P.C.; *Raghunadha (Sri)* v. *Brozo Kishore*, 1 M. 69 P.C.; *Krishnarav* v. *Rangrav*, 4 B. H. C. R. (A.C.) 1 (4); *Kustur Bhavani* v. *Appa*, 5 B. 621 (628, 629); *Rambhat* v. *Lakshman*, 5 B. 630 (637); *Goura* v. *Chummun*, W.R. (S. N.) 340; *Lakshman* v. *Radhabai*, 11 B. 609; *Moro Narayan* v. *Balaji*, 19 B. 809 (815); *Ramakrishna* v. *Tripurabai*, 33 B. 88 (92).

(8) *Rangamma* v. *Atchama*, 4 M.I.A. 1; *Raghunada (Sri)* v. *Brozo Kishore*, 1 M. 69 P.C.; *Venkata* v. *Court of Wards*, 22 M. 383 P.C.; *Surendra* v. *Kala*, 12 C.W.N. 668; *Sudanand* v. *Bonomalee*, 2 Hay 205; *Purshotam* v. *Vasudev*, 8 B.H. C. R. (O. C.) 196.

(9) *Kishenmunee* v. *Oodwant*, 3 H. S.D. 220 (304); 6 I.D. (O. S.) 902; *Ramkishen* v. *Srimuttee*, 3 B.S.R. 367 (489); 6 I.D. (O. S.) 1038; *Bamundoss* v. *Mt. Tarinee*, (1850) B.S.D. 533 F. B. affirmed O.A. 7 M.I.A. 169; *Narain Mal* v. *Kooer Narain*, 5 C. 251; *Rambhat* v. *Lakshman*, 5 B. 630; *Lakshman* v. *Radhabai*, 11 B. 609; *Antaji* v. *Dattaji*, 19 B. 36; *Narayen* v. *Balaji*, 19 B. 809; *Ramkrishna* v. *Tripurabai*, 33 B. 88; *Ambika* v. *Dwarka*, 30 A. 95.

(10) *Haroor Mohomed*, (*In re*), 14 B. 189.

(11) *Bachoo* v. *Mankorebai*, 29 B. 51, O.A. 31 B. 373 P.C.

(*c*) **He may set aside an antecedent gift of her husband's property made by her, and in the case of other alienations, he may dispute their propriety if unsupported by legal necessity or benefit.**[1]

Clause (1).

708. **Analogous Law.**—The rules here stated are really illustrative of the general rule declaratory of the rights of an adopted son. (§ **50.**) As he is the image of the natural son, his rights and liabilities are also identical. This is so as regards clause (1) which is amply supported by authorities. And so are the other clauses.

709. So far as regards the adoptive father, it is now settled that the adopted son only acquires his right as son from the moment of his adoption. What those rights are must depend upon the personal law to which the family is subject. For instance, since there is no distinction between ancestral and self-acquired property in Bengal, where the father possesses the absolute right of disposal, and since the same right is possessed by the Mitakshara father in respect of his self-acquired property, it follows that an adoptive father may dispose of all such property by a gift *inter vivos*[2] or by will,[3] even if it should have the effect of completely disinheriting his adopted son with whom he makes no implied contract that he will not make a will[4] or refrain from exercising his legal right of disposing of his property at his pleasure.[5] But if there has been a previous express agreement restricting his right, made in consideration of the adoption with the parent of the adopted son, he would be bound by it. But he is then bound because of the contract and not because of the adoption. In this view, it is, of course, clear that an adopted son in a Mitakshara family becomes a coparcener in the joint family property of his adoptive father from the moment of his adoption.[6] And if the property be his father's ancestral property, it becomes his ancestral property in which he takes the same vested interest from his adoption as a natural son would, from his birth.[7] (§§ **701-702.**)

Clause (2).

710. Consequently, he cannot, any more than the *auras* son, question the propriety of his father's prior alienation, or the subsequent alienation of his property, which his natural son could not question. Hence the Bengal father may dispose of all his property,[8] and the Mitakshara father his self-acquired property by an act *inter vivos*[9] or by will,[10] and thus disinherit his adopted son. The adopted son is, of course, equally bound by the contracts and other obligations of his adoptive father to which his natural son would be subject. But he is not bound by any condition that his natural father may have acceded to as contingent upon

(1) *See* foot-note (9) at p. 255.

(2) *Rungama* v. *Atchama*, 4 M.I.A. 1.

(3) *Sadanund* v. *Bonomalee*, 2 Hay 205; *Purshotam* v. *Vasudev*, 8 B.H.C. R. (O.C.) 196.

(4) *Venkata* v. *Court of Wards*, 22 M. 383 P.C.

(5) *Surendra* v. *Kala*, 12 C. W. N. 668.

(6) *Sumboo Chunder* v. *Naraini*, 5 W. R. 100 P.C., followed in *Pudma Coomari* v. *Court of Wards*, 8 C. 302 P.C.; *Kali Komul* v. *Uma Shunder*, 10 C. 232 P.C.; *Nagindas* v. *Bachoo*, 40 B. 270 (287) P. C.; *Gangadhar* v. *Hiralal*, 43 C. 944.

(7) *Bambhat* v. *Lakshman*, 5 B. 630 (635).

(8) *Venkata* v. *Court of Wards*, 22 M. 383 P.C.; *Surendra* v. *Kala*, 12 C.W.N. 668.

(9) *Rungama* v. *Atchama*, 4 M.I.A. 1.

(10) *Purshotam* v. *Vasudev*, 8 B.H.C. R. (O.C.) 196; *Sudanand* v. *Bonomalee*, 2 Hay. 205; *Venkata Narasimha* v. *Subba Rao*, 46 M. 300 (316).

his adoption, unless it is sanctioned by custom; otherwise an arrangement by which the right of the adopted son is curtailed after adoption is ineffectual to defeat his legal right. Where, therefore, in consequence of an agreement made with his natural father, the adoptive father made certain dispositions of property to take effect after his adoption, the Privy Council held the dispositions invalid as contrary to Hindu Law.[1]

Clause (3).

711. Retrospective Rights.—Except in the cases mentioned in this clause the adopted son acquires rights only as from the moment of his adoption. Where, therefore, the widow had made an adoption after surrendering her estate to her daughter, the adopted son cannot avoid the surrender.[2]

Mother's Alienations.

712. In such cases, the adopted son cannot question the propriety of his adoptive father's previous alienations; he is held to possess that right when the adoption is by the widow.[3] And where there have been two adoptions, the fact that the first adopted son had failed to question an alienation does not preclude him from so doing, because he, as the second adoptee, is in no way the representative of the first.[4]

713. It follows from the fact that adoption to a person by his widow does not relate back to his death, except for certain purposes mentioned in the last section, that an adopted son, no more than an after-born son S. 162 (2) can question the propriety of a prior alienation of his adoptive father. Consequently, where he bequeathed full rights in his ancestral estate to his wife and by the same will authorised her to make an adoption, whereupon she adopted a boy, providing, however, in the adoption that the adopted boy shall only succeed to the estate on her death, the court held that the adoptive son could not challenge the bequest on the ground that his adoption related back to the testator's demise, and that on his death the bequest being void the estate became vested in him.[5] But, of course, in such a case, apart from the husband's bequest, the condition imposed by the widow would be void.[6]

Clause (3) (a).

714. Effect on Trading Partnership.—Under the ordinary law a firm of partnership dissolves upon the death of a partner and his heir does not *ipso facto* become its member, since the continuance of a partnership depends upon mutual consent and confidence of the partners.[7] These incidents, however, do not apply to an ancient family trade in which the partnership continues unaffected by the deaths of old members and the births of new once.[8] As such, a partnership, of which the father was a member, would

(1) *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 (528) P.C.

(2) *Rama* v. *Dhondi*, 47 B. 678.

(3) *Hanmant* v. *Krishna*, 49 B. 604 (606, 607), distinguishing *Bhoobun Moyee* v. *Ram Kishore*, 10 M.I.A. 279.

(4) *Ib.*, 607, 608.

(5) *Durji* v. *Kanhaiya Lal*, 49 A. 579 (586, 587), following *Vinayak* v. *Govindrao*, 6 B.H.C.R. 224; *Lakshmi* v. *Subramanya*, 12 M. 490; *Narayansami* v. *Ramasami*, 14 M. 172; *Ganpati* v. *Savitri*, 21 M. 10; *G. V. Narasimha Rao* v. *Nyapathi Subba Rao*, 46 M. 300; *Harendra*, v. *Shibo*, 3 I.C. (C.) 378.

(6) *Krishnamurthi* v. *Krishnamurthi*, 50 M. 508 (527, 528) P.C., reversing O. A. 49 M.L.J. 252: 85 I. C. 882 (1925) M. 932.

(7) *Sokkanadha* v. *Sokkanadha*, 28 M. 344; *Ramanathan* v. *Yegappa*, 30 M.L.J. 241.

(8) *Haroon Mahomed*, (*In re*), 14 B. 189; in *Lutchmanen* v. *Siva*, 26 C. 349 (354), Sale, J., observed that a member by birth can only become a member of such partnership by a consentient act on the part of himself and the partners. But these remarks were *obiter* and made with reference to the joinder of parties, as such, followed in *Lalji* v. *Keshowji*, 37 B. 340; *Anant Ram* v. *Channulal*, 25 A. 378.

continue in spite of his death, his son taking his father's place, whether then living or posthumous. As such, if a son was afterwards adopted, his adoption relates back to the death of the father, so that the partnership is deemed to continue with him added as a partner from the date of the father's demise.[1]

715. Right of Survivorship.—In a Mitakshara family, an adoption is deemed to be a new birth of the adopted son in the family of his adoptive father with this difference that his right of survivorship in coparcenary property relates back to the death of his adoptive father.

Clause (3) (b).

716. Right to Challenge Prior Alienations.—In a joint Mitakshara family, an adoption by the widow has necessarily the effect of divesting the coparceners of her husband's interest which had devolved on them by survivorship.[2] So, where an impartiable Zemindari had devolved on the undivided brother of the deceased holder, an adoption by the latter's widow was held to divest the brother in favour of the adopted son.[3] A *fortiori*, the widow may, by her adoption, prevent a maintenance grant made to the male descendants of a junior line from lapsing to the grantor.[4] But here the adoption was made immediately after the death of the grantor, and the Privy Council were careful to point out that the case might be different, "if a Hindu widow lies by for a considerable time and makes no adoption, and the property comes into the possession of some one who would take it in the absence of a son, natural or adopted, and such person were to create rights in such property within his competency whilst in possession."[5] The adopted son is as much bound by the contracts made, and the obligations incurred, by his adoptive father as an *auras* son. So where the deceased had died after agreeing to sell his property to defendant and his widow executed the conveyance, after which she adopted the plaintiff who sued to eject the defendant, it was held that the plaintiff was no better off than the deceased to whom he had been adopted, and that he could not do what his adopter was incompetent to do, *viz.*, to set aside her own conveyance.[6]

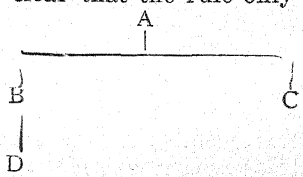
717. But since a widow's estate is limited and controlled by the reversioners, she cannot be permitted to make an adoption to defeat her reversioner's expectancy while remaining irresponsible for her waste and improper alienation to her adopted son. If the law were otherwise, adoption would be an effective camouflage to mask her misdeeds. The rule was admitted as far back as 1858 by the Privy Council who observed: "The son when adopted became the undoubted heir; and it was, of course, correct doctrine that no sale made by a widow, who possesses only a very restricted life interest in the estate could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under certain circumstances of strict necessity."[7]

718. His Rights against his Adoptive Mother.—The adopted son acquires no larger rights against his adoptive mother. In point of time

(1) *Kapurchand* v. *Narainjan Lal*, (1897) P.R. 20.
(2) *Chandra* v. *Gojarabai*, 14 B. 463.
(3) *Sri Viranda* v. *Sri Brojo*, 1 M. 69 P.C.; *Bachoo* v. *Mankorebai*, 29 B. 51 O.A. 31 B. 373 P.C.
(4) *Pratab Singh* v. *Agar Singh*, 43 B. 778 (794) P.C.
(5) *Ib.*, pp. 794, 795.
(6) *Laxman* v. *Bhavan Singh*, 23 Bom.L.R. 55.
(7) *Bamundoss* v. *Tarinee*, 7 M.I.A. 169 (180); *Lakshman* v. *Radhabai*, 11 B. 609; *Moro* v. *Balaji*, 19 B. 809; *Ramkrishna* v. *Tripurabai*, 33 B. 88 (95); *Vaidyanatha* v. *Savithri*, 41 M. 75 F. B., overruling *contra* in *Sreeramulu* v. *Kristamma*, 26 M. 143.

he is deemed to be born into his adoptive father's family at the moment of his adoption. But since the female owner's power of alienation is limited, and might be challenged by a reversioner who has merely a contingency, the adopted son, who acquires a vested estate with his adoption, is equally entitled to challenge it. But neither one nor the other can challenge a transaction within the competency of the widow. In other words, the adopted son can only attack a prior alienation made by his adoptive mother, if it is unsupported by legal necessity. In an old case, it was suggested that the widow, possessing the power to adopt must be deemed to be *enceinte* so that the right of the adopted son would relate back to the death of his adoptive father.[1] But the Privy Council held, that there was no justification for ante-dating an adoption and that the right of the adopted son only accrued upon his adoption.[2] Except in the cases mentioned in this clause, the adopted son acquires right only as from the moment of his adoption. Where, therefore, the widow had made an adoption after surrendering her estate to her daughter, the adopted son cannot avoid the surrender.[3]

719. From what has been stated above it is clear that the rule only applies to a case where the adopted son is in competition with the after-born son of the same father. If, therefore, of two brothers, one adopts a son and another has a natural son, the two being the sons of two brothers will share equally on partition.[4] The same rule of equality would extend to their sons, son's sons, and son's son's sons, that is to say, it will extend to all and every relation except an adopted son of the adopted. So in a competition between an adopted son *D*, of a natural born son *B* and the latter's brother *C*, that is to say the adopted son *D*, and his uncle *C*, the two share equally both on partition and inheritance, because since the adopted son's father *B* was a natural son of his father *A*, and so was his uncle *C* the two would take equally and so would the adopted son *D* as representing his father *B*. But if his father *B* was himself an adopted son, then since *B* could not have taken a share equal to *C's*, it follows that his adopted son *D* cannot take more than his father *B*. In other words in such a competition, *D's* share is only liable to reduction if his father was himself an adopted son, but not otherwise.[5] Since the rights of an adopted son, are settled to be those of a natural son, it follows that like a natural son, the adopted son becomes a member of the joint family, taking therein a vested interest as if he had been born therein from the moment of his adoption.



63. (1) **Except in the case of a Shudra,[6] the rights of an adopted son are, on the birth of an *aurus* son, limited as follows:—**

Adoptee's rights limited by auras son.

(2) He loses all rights to the performance of religious ceremonies;

(1) *Kishen Munee* v. *Oodwunt*, 3 B. S.D. 220 (304): 6 I.D. (O.C.) 902; *Ramkishen* v. *Srimutee*, 3 B.S.D. 367 (489): 6 I.D. (O.S.) 1038.

(2) *Tarinee* v. *Bamun Das*, 6 B.S. D.A. 533 F.B.: 10 I.D. (O.S.) 435 affirmed O. A. *Bamun Doss* v. *Tarinee*, 7 M.I.A. 169 (206).

(3) *Rama* v. *Dhondi*, 47 B. 678.

(4) *Nagindas* v. *Bachoo*, 40 B. 270 P. C.; overruling *Raghubanund* v. *Sodhu Churn*, 4 C. 425 and following *Tara Mohun* v. *Kripa Moyee*, 9 W.R. 423; *Dinonath* v. *Gopal Churn*, 8 C.L.R. 57.

(5) *Nagindas* v. *Bachoo*, 40 B. 270 (284, 285) P.C.

(6) *Arumilli* v. *Arumilli*, 44 M. 656 P.C.

(3) He is not entitled to succeed to an impartible estate in preference to the *auras* son;

(4) His right of inheritance, in other cases, is reduced to a fourth share of the natural son.[1]

720. **Analogous Law.**—The reduction of the rights of an adopted son, in competition with an after-born legitimate son, is based on the following textual authority:—

Vashisth.—"When a son has been adopted, if a legitimate son is afterwards born, the son given shares a fourth part."[2]

The difference between the Bengal and the Benares school on the share of the adopted son arises from a difference in the reading of the above text of Vashisth.[3]

Reason for different views.

721. All the schools proceed upon the text of Vashisth, before quoted. The difference of opinion between them arises from the different readings of the same text, and the meaning of the ambiguous expression "shares a fourth part," which may mean either (*a*) a fourth of the whole, or (*b*) a fourth part of what he would have received if he were a natural son, or (*c*) a fourth part of the natural son's share. According to the first view the *dattak* gets one-fourth of the whole estate, leaving the remainder to be appropriated by the natural son or if there be more than one son, to be divided amongst them.[4] According to the second view, the *dattak* takes one-fourth of what he would have taken if a legitimate son, *i.e.*, 1|4 of 1|2=1|8; while, according to the last view, he takes 1|4 of a legitimate son's share, *i.e.*, if the latter gets 4 the former gets 1 or 1|5 of the whole. Thus if the property be valued at 40, the *dattak's* share according to each view will be 10, 5 or 8 respectively. Each of these views has found its supporters. Sir Thomas Strange and the early writers favoured the first view,[5] while Nand Pandit argues in favour of the second view,[6] but recent opinion[7] inclines to the third view. It is contended that the first view cannot be correct, because in that case the adopted son would get a fourth of the estate while the remaining three-fourths may have to be divided amongst as many or more natural sons, which would be inconsistent with the spirit of Hindu Law, which places the secondary son in a lower position than the *auras* son. Both the Bombay and the Calcutta Courts, therefore, agree in rejecting the first interpretation.[8] They equally reject the

(1) Vashisth, XV-9, 14 S. B. E. 76. *See* the conflict of opinion in comm. *post.*

(2) XV-9, 14 S. B. E. 76; quoted in Mit., 1-XI-24, with the following comment on a "son given": "Here the mention of a son given is intended for an indication of others also, as the son bought, son made by adoption, and son self-given and the rest; for they are equally adopted as sons." Vashisth's verse is cited, without comment, in Datt. Mim., X-1 (Suth.), 106; Datt. Ch., II-II (Suth.) II-II-118.

(3) "Shares a fourth part" being read as "Shares of third part" in Dayabhag, X-13. The other text is followed in Madan Parijat, Vir Mitrodaya and others; Cole. Note to Mit., 1-XI-25.

(4) So held in *Parmanand* v. *Sheo Charndas*, 2 L. 69.

(5) 1 Str. H.L. 99; Wilson's Works, V. 52; 1 Wm. Macn. 70; 2 Wm. Macn. 184; F. Macn. 137; Madhaviya Dayavibhag (Burnell's Tr.) 28; *Taramohun* v. *Kripa Moyee*, 9 W.R. 423; *Rukhal* v. *Chunilal*, 16 B. 347; *Preag Singh* v. *Ajoodya*, 4 M.S.R. 96: 1 Mor. Dig. 306

(6) Datt. Mim., V-40.

(7) *Birbhadra* v. *Kalpataru*, 1 C. L. J. 388 (392, 393), following *Giriappa* v. *Ningapa*, 17 B. 100; *Ayyavu* v. *Niladatchi*, 1 M.H.C.R. 45; *Venkatamidi* v. *Venkatamidi*, 38 M.L.J. 86 (89).

(8) *Birbhadra* v. *Kalpataru*, 1 C.L. J. 388 (392); *Giriapa* v. *Ningapa*, 17 B. 100 dissenting from *Raghubanund* v. *Sadhu Churn*, 4 C. 425 since overruled in *Nagindas* v. *Bachoo*, 40 B. 270 P.C.; *Tukaram* v. *Ramchandra*, 49 B. 672.

second interpretation as strained and unnatural; but now agree on the third which is also supported by some cases of the other courts.[1] And except in the case of Shudra[2] where the adopted son shares equally with an *auras* son subsequently born, the same rule governs partition between an adopted and an *auras* son.[3]

722. So again where a person was a member of a partnership at the time of his death, such partnership is not dissolved by reason of his death, if his widow makes a valid adoption, in which case, his adoption would relate back to the death of her husband.[4]

Shudra Son Excepted.

723. The rule stated excepts the case of a Shudra in whose cases the rule of *Dattak Chandrika* that on a partition of the joint family property of a Shudra family, an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to an adoption applies and has been upheld by the Privy Council.[5]

Agreement not to adopt is invalid.

64. (1) An agreement by a person not to exercise his spiritual right of adoption is invalid.[6]

No specific relief in adoption.

(2) No suit lies for the specific performance of an agreement to adopt, the breach of which may, however, be redressed by damages.[7]

724. **Agreement against Adoption.**—The question whether a man can make a lawful agreement against exercising his spiritual right of adoption has been raised, but not yet decided, though if the question had to be decided, it is evident that it would have been decided in the negative. For it seems obvious that, since adoption is a spiritual act, it cannot be surrendered from secular motive. In one case, the holder of an impartible estate, subject to the Mitakshara law, who had a son, entered into an agreement with his undivided brother that neither he nor his son should make an adoption and that, in order that the estate should remain in possession of blood-relations, the brother too should never adopt a son. The zemindar had no occasion to adopt, but his son did, whereupon the Privy Council held that the agreement against any adoption by the son was invalid and that the further clause that if the

(1) *Dhondo* v. *Appaji*, (1893) B. P. J. 398; *Giriapa* v. *Ningapa*, 17 B. 100, without reference to the earlier decisions in *Hanmant* v. *Bhimacharaya*, 12 B. 105; *Rukhab* v. *Chunilal*, 16 B. 347, in which the Court allotted him one-third of the share of a natural son; *Ayyavu* v. *Niladatchi*, 1 M.H.C.R. 45.

(2) *Arumilli* v. *Arumilli*, 44 M. 656 P. C., overruling *Gopalam* v. *Gopalaraghavulu*, 40 M. 632; *Nagindas* v. *Bachoo*, 40 B. 270, following *Tara Kolmu* v. *Kripa Moyee*, 9 W.R. 423; *Dinonath* v. *Gopal*, 8 C.L.R. 57; *Sumboo* v. *Narain*, 5 W.R. 100 P.C.; *Kali Komul* v. *Uma Sunker*, 6 C. 256 (259, 260) F.B. O.A. 10 C. 232 P.C., overruling *contra* in *Raghubanund* v. *Sadhu Charn*, 4 C. 425. To the same effect, *Raja* v. *Subbraya*, 7 M. 253, followed in *Baramanund* v. *Krishna Charan*, 14 C.L.J. 183 (187); *Asita* v. *Nirode Mohan*, 20 C. W.N. 901; *Pratab Singh* v. *Agarsingji*, 43 B. 778 (792) P. C.

(3) *Raja* v. *Subbraya*, 7 M. 253 followed in *Baramanund* v. *Krishna Charan*, 14 C.L.J. 183 (187); *Asita* v. *Nirode Mohan*, 20 C.W.N. 901, approved in *Arumilli* v. *Arumilli*, 44 M. 656 P.C., *overruling Gopalam* v. *Venkataraghavulu*, 40 M. 632; *Raghubanund* v. *Sadhu Charan*, 4 C. 425.

(4) *Kapur Chand* v. *Narainjan Lal*, (1897) P.R. 20.

(5) *Arumilli* v. *Arumilli*, 44 M. 656 P.C., approving *Raja* v. *Subbraya*, 7 M. 253; *Baramanund* v. *Krishna*, 14 C. L.J. 183; *Asita* v. *Nirode*, 20 C.W.N. 901, overruling *contra* in *Karuturi* v. *Karuturi*, 40 M. 632; *Venkamamidi* v. *Venkamamidi*, 43 M. 398.

(6) *Suria Rau* v. *Raja of Pittapur*, 9 M. 499 P.C.

(7) S. 21 (*b*) Specific Relief Act (I of 1877).

son should adopt, the son so adopted should not inherit was equally invalid in that it purported to alter the law of descent.[1] But this does not mean that the father has no power to make a reasonable stipulation controlling his right of adoption. For example, where the father in a Dayabhaga case had devised his estate to his son on condition that he does not make an adoption before he attains the age of eighteenth year, upto which period he was to remain in charge of his testamentary guardian, the condition was upheld, not because it was a prohibition against adoption, but because the father had thereby merely postponed the Hindu age of minority for a period of two years. In other words, while the father could not alter the son's general right of adoption, he was well within his right to guide and control his discretion.[2] An agreement by the widow not to adopt in consideration of her receiving two villages for herself is naturally void as being a sale of her spiritual duty for mercenary motive.[3]

725. In one case the parties had agreed not to adopt, against which agreement the defendant was about to make an adoption. The plaintiff sued her for an injunction restraining her from making an adoption and prayed for an *interim* injunction as the adoption was to take place the next day. The court, however, refused it, holding that the court should be cautious in restraining an adoption, the result of which might be serious to the party restrained.[4] The fact that the breach of such contract is redressable in pecuniary compensation is sufficient to prevent a party from obtaining an injunction.[5]

Clause (2).

726. There can be no suit for the specific performance of a contract to marry, or to adopt,[6] as both depend upon the volition of the parties, and its breach may be otherwise redressed.[7]

Effect of acquiescence on an invalid adoption.

65. (1) An invalid adoption cannot be validated by a subsequent consent,[8] though the person so consenting may be estopped from denying it; but there can be no estoppel unless there is such a course of acquiescence in treating the adopted boy as a member of the adopted family that it will be impossible to restore him to his original position in the natural family.[9]

(2) Mere acquiescence or even presence at the adoption does not necessarily amount to an estoppel.[10]

727. **Analogous Law.**—This section involves three propositions: (*i*) that the invalidity of an adoption cannot be cured by the subsequent consent of those whose consent was pre-requisite to its validity,[11] (*ii*) that no acquiescence in an invalid adoption can make an invalid adoption

(1) *Suria Rau* v. *Raja of Pittapur*, 9 M. 499 (505) P.C. *cf. Assur* v. *Ratan bai*, 13 M. 56.

(2) *Harrosoondery* v. *Cowar*, 1 Fulton 393 (396) 1 I.D. (O.S.) 877 (879).

(3) *Jagannath* v. *Kunj Behari*, 49 I. C. (M.) 929 (936).

(4) *Assur* v. *Ratan Bai*, 13 B. 56.

(5) S. 54 (*c*), Specific Relief Act (I of 1877).

(6) S. 21 (*b*), Spec. Rel. Act (I of 1877).

(7) The contrary stated in *Sreenarayan* v. *Kishen Soondery*, (1873) 11 B.L. R. 171 (188) P.C., must be taken as overruled by the statute law.

(8) *Konvidi* v. *Venkataswami*, 32 M. L.J. 119; *Adivi* v. *Nidamarty*, 33 M. 228; *Babanna* v. *Parava*, 50 B. 815.

(9) *Vaithilingam* v. *Murugaian*, 37 M. 529.

(10) *Papamma* v. *Appa Rau*, 16 M. 388 (391); *Shyam Charan* v. *Prafulla*, 19 C.W.N. 882.

(11) *Konvidi* v. *Venkataswami*, 32 M. L.J. 119; *Adivi* v. *Nidamarty*, 33 M. 228; *Babanna* v. *Parava*, 50 B. 815.

valid, and (*iii*) no acquiescence short of estoppel, precludes one from disputing it.[1]

728. Effect of Consent on Adoption.—It is an established rule that consent cannot cure the invalidity of an adoption. So where the consent of the husband's kinsmen is necessary to empower the widow to adopt, an adoption made by her without such consent cannot be validated by their subsequent ratification. Even if the kinsmen whose consent was a pre-requisite were present at the adoption it does not amount to either consent or acquiescence.[2] Even where the acquiescence has continued for even as long as 50 years, it would not validate the adoption, though it may estop the party if his acquiescence had led the adoptee to abandon his rights to the property in his natural family and render his service in that of his quasi-adoptive father.[3] The equitable doctrine of laches and acquiescence does not apply to suits for which the Legislature has prescribed a limitation.[4] A legal title cannot be displaced by mere acquiescence, laches or delay. The fact that a person did not protest does not prove his acquiescence.[5]

Acquiescence No Bar.

729. In any case, acquiescence is never a ground for depriving a person of his legal rights unless the acquiescence amounts to estoppel. Silence is not acquiescence, unless one was under a legal duty to speak.[6] There is a difference between acquiescence before the act and after it is completed. In the first case, it affords evidence of consent,[7] but in the other case, it may amount to waiver of a right, but a waiver must be an intentional act done with the knowledge of one's right.[8] Mere delay is not waiver, and apart from limitation, it does not deprive one of his rights.[9] There can be no acquiescence unless one is cognizant of one's right to dispute it.[10] and where both parties equally knew the facts, there is neither estoppel nor acquiescence.[11]

730. Estoppel.—But where for a long series of years a person has acquiesced in the adoption of another, and the latter has in consequence lost all rights in his natural family, it may then be a case in which, while the adoption remains invalid, the court may hold a party estopped from showing its invalidity on the ground that it would be inequitable to permit him to show the contrary when he has by his own conduct induced another to alter his position to his disadvantage to which he can no longer be restored.[12] Such a case must, however, be brought within the principle stated in S. 115 of the Evidence Act (§§ 677-682).

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(1) *Vaithilingam* v. *Murugaian*, 37 M. 529.

(2) *Papamma* v. *Appa Rau*, 16 M. 388 (391); *Gurulingaswami* v. *Ramalakshamma*, 14 M. 53 (58); *Parvatibayamma* v. *Ramakrishna Rau*, *ib.*, p. 145.

(3) *Gopalayyan* v. *Raghupatiayyan*, 7 M.H.C.R. 250; *Parvatibayamma* v. *Ramakrishna Rau*, 18 M. 145 (151, 152).

(4) *Rama Rau* v. *Raja Rau*, 2 M. H. C.R. 114; *Peddamuthlaty* v. *Timma Reddy*, *ib.*, p. 270 (273); *Baruck Chunder* v. *Huro Sunkur*, 22 W.R. 267; *Rahmatullah* v. *Secretary of State*, (1913) P.R. 63: 18 I.C. 799.

(5) *Rajan* v. *Basuva*, 2 M. H. C. R. 428.

(6) *Chadwick* v. *Manning*, (1896) A. C. 231 (238); *Bindu* v. *Bugli*, (1909) P. R. 73: 2 I.C. 814; *Shyama Charan* v. *Prafulla*, 19 C.W.N. 882.

(7) *Duke of Leeds* v. *Amherst*, 2 Phillips, 117: 78 R.R. 47.

(8) *Darnby* v. *L. C. & D. Ry. Co.*, L. R. 2 H. L. 43 (60); *Shyama Charan* v. *Prafulla*, 19 C.W.N. 882 (886).

(9) *Shyama Charan* v. *Prafulla*, 19 C. W.N. 882 (886).

(10) *Papamma* v. *Appa Rau*, 16 M. 384 (391); *Shyama Charan* v. *Prafulla*, 19 C.W.N. 882 (886).

(11) *Prosonna Kumar* v. *Srikantha*, 40 C. 173.

(12) *Vaithilingam* v. *Murugaian*, 37 M. 529.

Customary adoptions.

Jain adoption.

66. (1) A Jain adoption requires no other ceremony beyond that of the gift and its acceptance,[1]

(2) The Jain widow is entitled to make an adoption without the express or implied authority of her husband;[2] or of his kinsmen, and irrespective of whether the property she has inherited from her husband was his self-acquired or ancestral property.[3]

(3) A person of any age,[4] whether he is an orphan,[5] or is, married and has children of his own,[6] and irrespective of his relationship to the adopter,[7] is eligible for adoption.

Jain Ceremony.

731. **Analogous Law.**—The Jains acknowledge the authority of a Digest of their laws contained in a work known as the "Bhadrababu Samhita", stated to have been compiled in the third century B.C., which gives elaborate ceremonies attending a Jain adoption, but they were never regarded as indispensable, and the only necessary formality required is that stated in the section. But it does not preclude the Jains from adopting in the Dattak form.[8]

Members of the Jain community are to be found scattered all over India. As such, they have naturally assimilated local customs as regards the ceremonies and rituals of adoption. But as a rule, the two ceremonies, which this community everywhere regards as essential, are the giving and taking and the tying of the father's turban on to the son-to-be. This is intended to symbolize the transfer of paternal authority from the one head to another. The ceremony of the giving and taking is, of course, indispensible in all adoptions, and these ceremonies are concluded with the distribution of cocoanuts and the other tokens of rejoicing.

732. **Jain Adoption.**—It has already been seen that the Jains, though forming a sect of dissenters, are classed as Hindus (§§ 203-204). But though this important community is nominally classed as Hindu, its law of adoption has, nevertheless, none of the religious associations of the orthodox faith; adoption in this case, is a purely secular institution.[9] and signifies nothing more than the appointment of an heir.[10] For instance, a Jain widow is entitled to adopt without any authority, express or implied, of her husband.[11] And as regards the adopted son, she is free to adopt even one who is married, and has children of his

(1) *Asharfi Kunwar* v. *Rup Chand*, 30 A. 197, O.A., *Rup Chand* v. *Jambu Prasad*, 32 A. 247 P.C.

(2) *Sheo Singh Rai* v. *Dakho*, 1 A. 688 P.C.

(3) *Banarsi Das* v. *Sumat Prasad*, 58 A. 1019; *Sunder Das* v. *Baldeo Singh*. 14 L. 78.

(4) *Rup Chand* v. *Jambu Parsad*, 32 A. 247 P.C.; *Dhamraj* v. *Soni Bai*, 52 C. 482 P.C.; *Sheo Kuar Bai* v. *Jeoraj*, (1921) P.C. 77.

(5) *Parshotam* v. *Venichand*, 45 B. 751; *Chimanlal* v. *Harichand*, 40 C. 879 P.C.; *Dhomraj* v. *Soni Bai*, 30 C.W.N. 601 P.C.

(6) *Padmacoomari* v. *Court of Wards*, 8 C. 302 P.C.; *Rup Chand* v. *Jambu Prasad*, *Ib.*

(7) *Sheo Singh* v. *Dakho*, 1 A. 688 P.C.

(8) *Gopimal* v. *Pannalal*, 72 I.C. (L.) 424.

(9) *Ashrafi Kunwar* v. *Rupchand*, 30 A. 197, O.A. *Rupchand* v. *Jambu Prasad*, 32 A. 247 P.C.

(10) *Bhagwan Das* v. *Rajmul*, 10 B.H. C.R. 241 (262); *Ashrafi Kunwar* v. *Rupchand*, 30 A. 197, O.A. *Rupchand* v. *Jambu Prasad*, 32 A. 247 P.C.

(11) Bhadrabahu Samhita (J. L. Jain) pp. 40, 41; *Gobindan* v. *Camahchand*, (1833) S.D.A.B. 276; *Sheo Singh* v. *Dakho*, 6 N.W.P.H.C.R. 382; O. A. 1 A. 688 P.C.; *Ashrafi Kunwar* v. *Rupchand*, 30 A. 197 O.A. *Rupchand* v. *Jambu Prasad*, 32 A. 247 P.C.; *Sheo Kuar* v. *Jeoraj*, 25 C.W.N. 273 P. C.

own.[1] The Jains are subject to no prohibition as regards the relationship of the adoptee,[2] being free to adopt a sister's son,[3] a daughter's son,[4] or the husband's brother,[5] and there seems no objection to the adoption of even an orphan, if permitted by local usage.[6] And even as regards the ceremony of giving and taking, it has been held that if this is not possible, it would suffice, if there is such symbolical delivery, as is sufficient to indicate the change of status,[7] which may be effected by the mere tying of a turban round the head of the person to be adopted, in the presence of the *punchas* and the invited guests.[8] But this does not mean that there should be no giving and taking, which still remains the indispensable ceremony in this, as in all other, adoptions.[9]

733. A Jain retains his custom of adoption even upon his conversion to Vaishnavism,[10] and the same custom applies equally to Jains of all sects whether Agarwal, Churiwal, Khandewal or Oswal.[11] But in Bombay, the Hindu rule that the husband's power of adoption cannot be delegated to any one else except his widow, holds good.[12] And the rule that, as between two or more co-widows, the right to adopt belongs to the senior widow, applies equally everywhere to them.[13]

734. **Agarwals.**—The Agarwal Banias would also seem to treat an affiliation as adoption. Such was held to be the case of the Agarwal Bania of Zira in the Punjab, in which the adoption of an orphan and a married man was upheld on the ground that the caste was, as regards adoption, not subject to Hindu Law, and that an unequivocal declaration by the adopting father that a boy had been adopted, and the subsequent treatment of that boy as the adopted son, sufficed to constitute a valid adoption.[14]

No right to collateral succession.

67. In the absence of custom to the contrary, a Jain adoption, as such, confers on the adoptee no right to collateral succession.[15]

affirming O.A. *Jeoraj* v. *Sheo Kuar*, 66 I.C. (N.) 65; *Manikchand* v. *Jagat Sattani*, 17 C. 518; *contra* in *Bobbaldi* v. *Eramma*, 50 M. 228 (*held*, custom must be proved; but, submitted, it is notorious).

(1) *Pudmacoomari* v. *Court of Wards*, 8 C. 302 P.C.; *Ashrafi Kunwar* v. *Rupchand*, 30 A. 197 O.A. *Rupchand* v. *Jambu Prasad*, 32 A. 247 P.C.; *Hasan Ali* v. *Naga Mal*, 1 A. 288; *Jamuna Bai* v. *Juhar Mal*, 56 I.C. (N.) 81.

(2) *Sheo Singh* v. *Dakho*, 1 A. 688 P.C.; *Hassan Ali* v. *Nagamal*, 1 A. 288; *Lakhmichand* v. *Gatto Bai*, 8 A. 319; *Ashrafi Kuar* v. *Rupchand*, 30 A. 127 O.A. *Rupchand* v. *Jambu Prasad*, 32 A. 247 P.C.

(3) *Hassan Ali* v. *Nagammal*, 1 A. 288; *Lakhmichand* v. *Gatto*, 8 A. 319.

(4) *Sheo Singh* v. *Dakho*, 6 N.W.P. H.C.R. 382; O. A. 7 A. 688 (704) P. C.

(5) *Nanakchand* v. *Munnalal*, (1909) P.R. 95.

(6) *Parshotam* v. *Venichand*, 45 B. 751 *Basant Singh* v. *Brij Raj*, 57 A. 494 P. C.

(7) *Sheo Kuar* v. *Jeoraj*, 25 C.W.N. 273 P.C. affirming O.A. *Jeoraj* v. *Sheo Kuar*, 66 I.C. (N.) 65.

(8) *Dhanraj* v. *Soni Bai*, 52 C. 482 P. C.

(9) *Jamunabai* v. *Juarmal*, 56 I.C. (N.) 81; *Sheo Kuar* v. *Jeoraj*, 25 C.W. N. 273 P.C. affirming O.A. *Jeoraj* v. *Sheo Kuar*, 66 I.C. (N.) 65.

(10) *Manikchand* v. *Jagat Sattani*, 17 C. 518.

(11) *Harnath Pershad* v. *Mandil Dass*, 27 C. 379; *Manikchand* v. *Jagat Sattani*, 17 C. 518; *Sheo Singh* v. *Dakho*, 1 A. 688 P.C.; *Govind Nath* v. *Gulal*, 5 S. D. A. B. 276.

(12) *Bhagwan Das* v. *Romul*, 10 B.H. C.R. 241; *Amava* v. *Mahadganda*, 22 B. 416.

(13) *Ashrafi Kunwar* v. *Rupchand*, 30 A. 297, O. A. *Rupchand* v. *Jambu Pershad*, 32 A. 147 P.C.

(14) *Chiman Lal* v. *Harichand*, 40 C. 879 P.C.; *Dhomraj* v. *Soni Bai*, 30 C. W. N. 601 P.C.; (1925) P.C. 118.

(15) *Semble* in *Dhanraj* v. *Soni Bai*, 52 C. 482 (495) P.C.

735. **Analogous Law.**—Since a Jain adoption amounts to the mere appointment of an heir, he is *prima facie* not entitled to collateral succession, unless so authorised by custom.[1] The fact is that the custom which sanctions such adoption, being a departure from the normal law, must equally define the extent of the departure.

Kritrim adoption.

68. (1) The husband or the wife may adopt a Kritrim son to himself or herself, either jointly or separately[2] in accordance with the following rules:—

(*a*) The adopter must have no son, grandson or great grandson living at the time of adoption;[3]

(*b*) The adoptee may be adult and married;[4]

(*c*) Both the adoptee and his parents must consent to the adoption;[5]

(*d*) The husband or the wife may adopt jointly, or they may each adopt a separate son;[6]

(*e*) The son so adopted is the son of the adopter, even if she be the wife or the widow;[7]

(*f*) Any relation, or a stranger may be so adopted;[8]

(*g*) The wife or the widow may adopt a son in her own right, and without the assent of her husband or his kinsmen.

(2) Such an adoption can only be made in the Mithila Province and the districts adjoining it and elsewhere if permitted by custom.

Illustration

A is the father of *B*. *B* adopts *A* as his *Kritrim* son. The adoption is valid.

736. **Analogous Law.**—"*Kritrim*"[9] means "artificial" "fictitious," "acquired and not natural," and a *Kritrim* son is, therefore, an artificial or an adopted son, and is one of the twelve kinds of sons once recognized by Hindu Law. (§ 56). Formerly, he was a grown-up man adopted without the consent of his natural parents. The *Kritrim*, or a son made, was one destitute of his parents, but capable of discriminating between right and wrong, who being attracted by another's wealth accepted his proposal to be his son. As such, a *Kritrim* is scarcely distinguished from another classic son, the "*Svayamdatt*," or the son self-given, since they were both orphans, and the only difference between them was that, in the one case, the proposal to adopt proceeded from the adopter,

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(1) *Semble* in *Dhanraj* v. *Sonni Bai*, 52 C. 482 (495) P.C.

(2) *Ooman Dutt* v. *Kunhia Singh*, (1822) 3 B.S.R. 192: 6 I.D. (O.S.) 820 (828).

(3) *Ooman Dut* v. *Kunhia Singh*, (1822) 3 B.S.R. 192 (199): 6 I.C. (O.S.) 820 (826).

(4) *Ooman Dut* v. *Kunhia Singh*, (1822) 3 B.S.R. 192: 6 I.D. (O.S.) 820.

(5) *Chowdree Parmessur* v. *Hanooman*, 6 B.S.R. 235 : 7 I.D. (O.S.) 843; *Luchmun Lall* v. *Mohun Lall*, 16 W.R. 179.

(6) *Collector of Tirhoot* v. *Huropershad*, 7 W.R. 500.

(7) *Chowdhree Purmessur* v. *Hanooman*, 6 B.S.R. 235 : 7 I.D. (O.S.) 843.

(8) *Ib.*

(9) Also called *karta* for short; to be distinguished from a *krecta* son, which means a purchased son.

in the other from the adoptee. But the *Svayamdatt* son is now obsolete,[1] and the *Kritrim* has become confined to the narrow limits of Mithila. It is unknown in the Punjab.[2] Another son, the "*Kreeta,*" one acquired by purchase, has entirely fallen into disfavour as savouring of slavery.[3]

737. There remains only the *Kritrim* son, and the sphere of his influence is, as already stated, limited, but the rules governing him are simple, and are those enumerated in the section, which is drawn from the undernoted authorities.[4] In this respect, usage has overridden the Shastras which fettered the creation of a *Kritrim* with the same restrictions as applied to the *Dattak* son.[5] But in his adoption, the *Kritrim* has lost his status, since, as will be presently seen, he can no longer inherit to any one except his adoptive father, though he is given the solatium of retaining his own right of inheritance in his natural family.

738. A question arises whether in Mithila, where the practice prevails, the *Kritrim* has superseded the *Dattak,* or it merely supplements it. It would seem that a Mithila woman has no right to adopt in the usual form even with the previous sanction of her husband,[6] and while there appear no reasons why a man may not make a *Dattak* adoption in Mithila,[7] the simplicity of the *Kritrim* has probably made the regular adoption a weak competitor.

739. But a *Kritrim* son must not be supposed to be a secular adoption, since he is adopted to perform the obsequies of his adoptive parents, and suffers from the sin of omitting them,[8] although no ceremony is required to make a *Kritrim.* All that the adopter need say or imply is, "Be thou my son," to which the *Kritrim* son replies, "I am become son."[9] And there is no prohibition of any kind as to the relationship. Even a father or brother may be so adopted.[10] The only essential qualification is that the adopter and the adoptee must be of the same caste.[11]

740. A Mithila widow has no power of adoption to her husband with or without his consent. Any authority given by him will not, therefore, confer on her any power of adoption as it would be illegal. She can, however, adopt a boy to herself. But as already stated the son so adopted becomes her own son and not the son of her husband. He has no right to inherit her husband's estate, and a *fortiori* has no right of collateral succession. Even where the father adopts him in the *Kritrim* and not in the *Dattak* form, it merely creates a personal relationship between

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(1) *Bashetiappa* v. *Shivlingappa,* 10 B.H.C.R. 268.

(2) *Shev Deo* v. *Dwarka Das,* (1933) L. 1050.

(3) *Eshan Kishore* v. *Hurish Chunder,* 21 W.R. 381.

(4) *Ooman Dutt* v. *Kunhia Singh,* 3 B.S.R. 192 : 6 I.D. (O.S.) 820 (828); *Chorodree Parmessur* v. *Hanooman,* 6 B.S.R. 235: 7 I.D. (O.S.) 843; *Luchman Lal* v. *Mahan Lall,* 16 W.R. 179; *Collector of Tirhoot* v. *Huro Pershad,* 7 W. R. 500.

(5) Mit., I-11-15; Virmitroday, 177; Datt. Mim., V-41-50; Vivad Ratnakar, (B.A.S. Ed.), 541; Vivad Chintamani, pp. 278-288.

(6) 1 Macnanghten's H.L., 95-100; Vivad-Chint., 74-75; *Chandreshwar* v. *Bisheshwar,* 5 Pat. 737 (746).

(7) *Chandreshwar* v. *Bisheshwar,* 5 Pat. 737 (746, 747); *Binda Kuwar* v. *Lalita Prasad,* (1936) P.C. 304.

(8) *Ooman Dut* v. *Kunhia Singh,* 3 B.S.R. 192: 6 I.D. (O.S.) 820 (823).

(9) *Ib.,* p. 824.

(10) *Ib.,* 825; *contra* in *Runjeet Singh* v. *Narain Singh,* 2 B.S.R. 315 (316) : 6 I.D. (O.S.) 597 (598). An elder brother cannot be adopted, but the authority cited in *Datt. Mim.* which states the general law).

(11) *Purmessur* v. *Hanooman Chowdhree,* 6 B.S.R. 234 : 7 I.D. (O.S.) 843 (852).

him and his adoptive father and the adopted son succeeds only to his estate.[1]

Incidence of a Kritrim Adoption.

69. A Kritrim adoption is subject to the following incidents:—

(1) The adoption is concluded by contract, no ceremony being necessary;[2]

(2) There is no restriction as to the qualification of the adoptee except that he should be of the same caste as the adopter;[3]

(3) For the purpose of marriage his sapinda relationship in the family of his adopter extends only to three degrees;[4]

(4) He does not assume the surname of his adoptive father.[5]

741. **Analogous Law.**—The *Kritrim*[6] son of old was recognized subsidiary son like the "*Swayamdatt*" or "self-given" son, from whom he was scarcely distinguishable except that the *Kritrim* was an orphan and was hired by the wealth of his adopter to accept his proposal to become his son, while a *Swayamdatt* was one who, being abandoned by his parents, did the same. Both these sons have long since become obsolete; and the *Kritrim* son whose adoption is recognized in Tirhut is quite a modern institution engrafted on the old texts and said to flow from the absolute incompetency of a widow to adopt to her deceased husband.[7] "The practice (says Mr. Colebrooke) of adopting sons given by their parents was there abolished by Shridutt and Pratihast, although the latter had been himself adopted in that manner. Their motive was lest a child already recognized in one family, being again registered in another, a confusion of families should thence ensue."[8]

742. The *Dattak* adoption, having thus become obsolete[9] a substitute had to be found, and it is thus justified by Vachaspati Misra,[10] an author of paramount authority in the Mithila country, in his *Dwaita Nirnai* as follows:—

"Its purpose, for the man that he may be excluded from the hell denominated 'put'; for the woman, that some one may exist, capable of performing her right of *Sapindas*, or association with departed ancestors. Should individuals, capable of promoting these objects exist, a son must not be adopted."[11]

The right of the widow to adopt a son of her own is justified on the ground that he is necessary for the performance of her *Sapindi Karan* or the rite of association with departed ancestors, the observance of which on the 11th day from her death exempts the other relatives, who are unable to celebrate such ceremony, from observing in her honour (as otherwise they would have to do) twelve monthly funeral repasts.

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(1) *Jiwan Mal* v. *Jamna Das*, (1911) P.L.R. 67 : 10 I.C. 822.

(2) 2 W. Macn. H.L. Case 16, pp. 173, 174.

(3) *Purmessur* v. *Hanooman*, 6 B.S.R. 235 : 7 I.D. (O.S.) 843.

(4) Suth. Note, p. 162.

(5) *Srenarain* v. *Lallut Narain*, 2 Beng. S.R. 29 : 6 I.D. (O.S.) 380 (381).

(6) *Skt. Krit.*, Made; a son made.

(7) Datt. Mim. 1-16 (Suth.), 4.

(8) Mr. Sutherland questions the correctness of Mr. Colebrooke's statement.—*See* Note 15 to his Datt. Mim. (Suth.) pp. 160, 161.

(9) *Nund Ram* v. *Kashee Pande*, 3 Beng. S.R. 310 : 6 I.D. (O.S.) 906. It is still permissible; *Chandreshwar* v. *Bisheswar*, 5 Pat. 777.

(10) 2 W. Macn. H.L., Case 26 pp. 173, 174, in which the Pandits hold the *Kritrim* adoption to be "in consonance to the doctrines of the learned Vachaspati Misra and others, whose works are current in Mithila."

(11) Suth. Note 5 to Datt. Mim., pp. 156, 157.

743. The ceremony of *Kritrim* (vulgarly called *Karta*) *putra* is thus described by Rudradhar in his *Sudhvivek*, a treatise on *Kritrim* adoption: "At an auspicious time, the adopter of a son, having bathed, addressing the person to be adopted, who has bathed, and to whom he has given some acceptable chattel, says. 'Be my son.' He replies, 'I am become your son.' This giving some chattel to him arises merely from custom. It is not necessary to the adoption. The assent of both parties is only requisite, and a set form of speech is not essential."[1]

Ceremony.

744. **Incidents of Kritrim Adoption.**—There can be no adoption in any but the *Kritrim* form in Mithila. The leading features of this adoption present such a striking contrast with the orthodox *Dattak* adoption, in vogue in the rest of the country, that it is apt to be looked upon as no adoption at all, but a kind of affiliation which persists everywhere in spite of the law against it.

745. The first essential feature of *Kritrim* adoption is that the Hindu widow may adopt a son to herself with or without the consent of her husband, but in either case, she can only adopt to herself and in no case does her adoptee succeed to any but her exclusive property. The consent of the husband does not make his wife's adoptee his own. Similarly, the husband may adopt a son to himself, and in that case he remains his own son, the relationship so created being in such case personal to the contracting parties:[2] the son so adopted will not be considered the grandson of his adopter's father, nor will his own son be considered as the grandson of his adopter.

Widow may Adopt.

746. No relationship obtains between the *Kritrim* son and the father of the adopter, from which it may be inferred that such adopted son is not entitled to inherit to him, and *a fortiori* to his adopter's collaterals. The adoptee is not considered a member of the adopter's family. He does not assume the surname of his adopter, or forfeit his claim to his own family.[3]

Relationship Personal.

747. No ceremonies are necessary to complete this adoption which is completed by contract, the adopter agreeing to take the adoptee and the latter offering himself in adoption.[4] If he is a minor and cannot give him away, then the consent of his parents is necessary.[5] (§ 743).

Adoption Completed by Contract.

748. There is no restriction on account of age,[6] or the previous marriage,[7] or relationship of the candidate for *Kritrim* adoption, the only condition necessary being that the adopter and the adoptee must

Age and Relationship Immaterial.

(1) Sutherland's Note 16 to Datt. Mim., p. 161.

(2) *Srenarain* v. *Lallut Narain*, 2 Ben. S.R. 29 : 6 I.D. (O.S.) 380 (381); *Collector of Tirhut* v. *Huropershad*, 7 W. R. 500; *Shiboo Koeree* v. *Jogun Singh*, 8 W.R. 155.

(3) *Ib.*, p. 158.

(4) 1 W. Macn. H.L., p. 83; *Luchmun* v. *Mohunlall*, 16 W.R. 179 (180).

(5) 2 W. Mac. H.L., Case 16, pp. 173, 174.

(6) *Ooman Dutt* v. *Kunhia*, 3 Beng. S. R. 192 : 6 I.D. (O.S.) 820; *Shibkore* v. *Joogun*, 8 W.R. 155 (158).

(7) *Ooman Dutt* v. *Kunhia*, 3 Beng. S. R. 192 (199): 6 I.D. (O.S.) 800 (825): 1 W. Macn. p. 64. The fact that a man may adopt his own father shows that age, relationship and marriage are equally immaterial.

belong to the same caste;[1] otherwise, his previous marriage, or the fact, that he is the only son or the sister's[2] or daughter's son of the adopter is no obstacle in the way of his eligibility. In fact, according to the "Dwaita Parishisth" of Keshab Misra a man is free to adopt his own brother and even his own father,[3] and this is not merely a Pandit's fancy for, he says: "When a father, a brother, or the like has been adopted as a son, the invocation to the adopter at solemn obsequies is by his new relation of father, not by that of son or brother."[4]

70. A Kritrim son becomes entitled to the following rights in consequence of his adoption:—

Rights of Kritrim son.

(1) He succeeds both to his father and the adopter;[5]

(2) He acquires no relationship with his adopter's father;[6]

(3) He does not succeed to his adopter's collaterals;[7]

(4) If adopted by the wife or the widow, he succeeds to her exclusive property having no right in her husband's estate.[8]

749. **Analogous Law.**—All the incidents enumerated in the section and supported by authorities, flow from the fact that this form of adoption creates only a personal relationship between the contracting parties. A *Kritrim*, like a *Dvamushyayan* son, is really a son of two fathers. When he contracts himself to be the son of his brother, he does not cease to belong to his natural family, in which he continues to enjoy his ordinary rights. And being the son of two fathers, he inherits to both and is entitled to perform the obsequies of both his natural and adoptive parents. But his relationship is personal to his adopter. Consequently, he acquires no right of inheritance to the adopter's father, wife or husband,[9] even though the latter may have permitted the adoption.[10] The case is, of course, different where they jointly make the adoption, in which case he stands in the relation of son to both, and is heir to the estate of both.[11]

71. Nothing in this chapter shall be deemed to invalidate an adoption otherwise authorised by custom.[12]

Saving of other adoption.

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(1) *Parmessur* v. *Hunooman*, 6 B.S.R. 234 : 7 I.D. (O.S.) 843 (852).

(2) *Purmessur* v. *Hanooman*, 6 Beng. S.R. 234 : 7 I.D. (O.S.) 843.

(3)1 W. Macn. H.L., p. 64; *Ooman Dut* v. *Kunhia*, 3 Beng.S.R. 192 (199): 6 I.D. (O.S.) 820 (825). In *Ranjeet Singh* v. *Obhya Narain*, 2 Beng. S.R. 315: 6 I.D. (O.S.) 597, the Pandit in the Mithila case erroneously relying on Boudhyayan opined against the adoption of an elder brother. The case being an adoption recognized by law, and not merely an affiliation extant in spite of the law, a *Kritrim* adoption once completed is as irrevocable as any other adoption.

(4) Cited in *Ooman Dut* v. *Kunhia*, 3 Beng.S.R. 192 (199) : 6 I.D. (O.S.) 820 (825).

(5) 1 Macnaughten's Hindu Law, Ch. VI, 76; *Collector of Tirhoot* v. *Huro Pershad*, 7 W.R. 500; *Andale* v. *Secretary of State*, 3 M.L.J. 242.

(6) *Juswant Singh* v. *Dooleechand*, 25 W.R. 255 (258); cf. *Mela Singh* v. *Gurdas*, 3 L. 362 F.B.

(7) *Boolee Singh* v. *Bussunt*, 8 W.R. 155; *Sree Narain* v. *Bhya Jha*, 2 B.S.R. 29 : 6 I.D. (O.S.) 380; *Baij Nath* v. *Shamboo*, (1908) P.L.R. 113.

(8) *Sree Narain* v. *Bhya Jha*, 2 B.S.R. 29 (34) : 6 I.D. (O.S.) 380 (384); *Collector of Tirhoot* v. *Huro Pershad*, 7 W.R. 500; *Boolee Singh* v. *Bussunt*, 8 W.R. 155 (Authorities reviewed).

(9) *Collector of Tirhoot* v. *Huro Pershad*, 7 W.R. 500; *Boolee Singh* v. *Bussant*, 8 W.R. 155.

(10) *Sree Narayan* v. *Bhya Jha*, 2 B.S.R. 29 : I.D. (O.S.) 380.

(11) *Sree Narain* v. *Bhya Jha*, 2 S.R.B. 29 (34) : 6 I.C. (O.S.) 380 (384).

(12) *Mhd. Umar Khan* v. *M. Niazuddin*, 39 C. 418 (432) P.C.; *Elahya* v. *Kunha*, (1871) P.R. No. 12; *Abdulla* v. *Sunda*, 11 I.C. (Ajmere) 670; *Machh Bai* v. *Hirbai*, 35 B. 264.

750. **Analogous Law.**—Adoption is an ancient institution not merely confined to the Hindus. (§ 11-12.) As such, it still survives amongst the various races as a part of their customary law, and, as such, it is still practised by the Hindu converts to Mahomedanism in the Punjab and elsewhere.[1] But Mahomedan Law, as such, recognizes no adoption, and consequently, apart from custom, an adoption, if made in fact, carries with it no right of inheritance.[2]

The Parsis[3] and the Burmese Buddhists still retain their institutions of adoption, the former being more allied to the *Dattak*, while the latter is merely an affiliation of a child of either sex.[4]

But both these instances are those of adoptions by non-Hindus not subject to Hindu Law. They have been here mentioned, as adoption is now essentially a Hindu institution, and in their case, as in the case of Hindu converts, it is the prototype of their present-day customs. Apart from them, however, custom has varied the normal incidents of adoption in the case of the Jains and the residents of Mithila, while in Southern India, it has taken the form of *Illatom* adoption or the adoption of a son-in-law; and elsewhere, especially amongst the dancing women, the adoption of a daughter has become customary.

Adoption of Daughters and of Illatom Sons-in-Law.

751. The custom of the adoption of daughters by dancing girls has long been customary in India and is recognized by Hindu Law. The fact that the girls so adopted are brought up to a life of prostitution does not appear to have stood in the way of legalizing the custom,[5] though it may amount to abuse of authority, and may, as such, be punishable under S. 366 of the Indian Penal Code.[6] As far back as 1864 Holloway, J., followed the rule laid down by Sir Thomas Strange that a dancing girl could adopt a daughter,[7] and in the earlier cases in which she was held entitled to succeed to her mother,[8] he said: "Precedents not indeed numerous but uniform have recognized rights of property and of inheritance between the prostitute and her offspring." He went on to hold that the gains of a prostitute were gains of her "Science", and so constituted her self-acquisition, if she had not learnt dancing at the expense of her family.[9] The ethical objection was no doubt raised, but it was met with the reply that prostitution was recognized and regulated by Hindu Law.[10] The adoption of the *Illatom* son-in-law in Madras[11] and amongst the Mahomedan agricultural classes of the Punjab (§ 750) is equally validated by custom, though in that case the adoption is virtually an appointment

(1) *Vide* foot-note 12 at p. 270.
(2) *Mhd. Umar Khan* v. *M. Niazuddin*, 39 C. 418 (432) P.C.
(3) *Hemabaee* v. *Punjeabhaee*, 5 W.R. 102 P.C.; *Jehangir* v. *Kaikhusru*, 13 Bom.L.R. 141.
(4) *Ma Me Gale* v. *Ma Sa Yi*, 32 C. 219 P.C.
(5) *Venku* v. *Mahalinga*, 11 M. 393 (396); *Ghasiti* v. *Umras Jan*, 21 C. 149 (156) P.C.; *Veeranna* v. *Sarasiratnam*, (1936) M. 639.
(6) This amendment of the Penal Code was introduced by the present writer to suppress the practice of Devadasis—*See* 2 Penal Law, (5th Ed.) § 4168, p. 1207.
(7) Manual §§ 98, 99.
(8) *Tara Manee* v. *Motee*, 7 S.D.A. R. 273; Strange, Manual, § 363.
(9) *Chalakonda* v. *Chalakonda*, 2 M. H.C.R. 56 (75, 77).
(10) *Ib.*, explained in *Venku* v. *Mahalinga*, 11 M. 393 (396, 397).
(11) *Nalluri* v. *Kamepalli*, 42 M. 805 P. C.; *Chenchamma* v. *Subbayya*, 9 M. 114 (116); *Gangayya* v. *Mahalakshmi*, 10 M. 90 (92).

of the heir, which need not be attended by any ceremony.[1] Such quasi-adoptions are customary in the Punjab; but their effect is to create a purely personal relationship, resembling the *Kritrim* form of adoption, with the result that it does not affect any one beyond the immediate parties concerned. The appointed heir does not succeed as the grandson of the appointer's father, nor his son as the grandson of the appointer, unless, of course, there is a special custom to this effect."[2]

752. Local Variations.—Hindus, otherwise subject to the orthodox law of adoption, are found to have adopted variations which relate to (*a*) the relationship created by adoption; (*b*) removal of the *Niyog* and other restrictions as to the previous relationship of the adoptee, his age and marriage; (*c*) the ceremonies; (*d*) and the rights created by the adoption. As to (*a*), custom has restored the adoption of daughter and legalised that of a son-in-law; as to (*b*), custom has removed the orthodox restrictions against the adoption of the sister's and daughter's son, that of a married man and one whose ceremony of *Upanayan* has been performed; as to (*c*), custom has dispensed with all ceremonies except only that of the giving and taking, and even that has been held to be in some cases unnecessary; as to (*d*), the local variations, ordinarily, limit the rights created by adoptions to those personal between the adopter and adoptee, the latter being ineligible to lineal or collateral succession. But amongst the Jains, though the restrictions have been removed, the adoptee retains all the rights of a *Dattak* son. And yet they differ even upon the essential ceremony of the giving and taking. The adoption of a *chela* amongst Gharbari (house-holder) *Gosavis* as an alternative to the *Dattak* adoption is customary,[3] while the adoption of a son-in-law is customary both in certain districts of the Madras Presidency (§§ **750, 751**), and in the Punjab amongst Mahomedan converts. The former, known as *Illatom*, will be more fully dealt with in the sequal. A son-in-law so adopted takes the place of a son for inheritance from the adopter; but otherwise he does not acquire any right of lineal or collateral succession. The adoption of daughter was anciently customary but has now become obsolete, and remains only extant with the unfortunate class of women popularly known as the dancing girls. (§ **751**). Custom has broadened the base of no other relationship by adoption.

753. As regards the ceremonies, apart from those superseded by customs, the general tendency is to reduce them to the modicum of simplicity, so much so that even the giving and taking is at times held to be unnecessary. The ceremony was absent in the case of the Agarwal Banias of Zira (Punjab), amongst whom an unequivocal declaration of adoption, followed by the treatment of that boy as an adopted son, was held to suffice to constitute a valid adoption.[4] These Agarwals may have been Jains, but the same rule is said to apply to the Brahmins and *Khatris* of the Punjab.[5] In fact, the non-observance of the usual custom does not vitiate any adoption in the Punjab,[6] and amongst Jats[7] and

(1) *Buta* v. *Nur Muhammad*, (1878) P.R. 70; *Jewa* v. *Karm Buksh*, (1878) P.R. 80; *Najibulla* v. *Nadir*, (1881) P.R. 120; *Ghulam Hussain* v. *Fatteh*, (1884) P.R. 102; *Niaz Ali* v. *Ahmad Din*, (1882) P.R. 109.

(2) *Mela Singh* v. *Gurdas*, 3 L. 362 F.B.

(3) *Harigir* v. *Anand Bharti*, (1925) P.C. 127: 88 I.C. 343: 21 N.L.R. 127.

(4) *Chiman Lal* v. *Hari Chand*, 40 C. 879 (889, 890) P.C.

(5) *Ib.*, p. 885.

(6) *Ichnu* v. *Saudagor*, (1894) P.R. No. 138; *Kharak Singh* v. *Rupa Singh*, (1883) P.R. No. 96.

(7) *Jeeram* v. *Manphal*, (1892) P.R. No. 4.

Lahore[1] any person, regardless of kinship and age, might be adopted by a mere expression of an intention accompanied by treatment,[2] but the relationship so created is merely personal and entitles the adopted son to succeed only to the estate of his adoptive father.[3] Many of the Punjab tribes, *e.g.*, the Jats, retain the option of adopting in the *dattak* form, which gives the son the unfettered right of lineal and collateral succession, or in the customary form, when the relationship it creates is merely personal and limited to the adopter.[4]

753. But while there is a considerable laxity regarding the requisite ceremony constituting adoption amongst the various tribes in the *Punjab*, there are tribes, such as the Hindu Rajputs of Laddu *gotra*, inhabiting the Una tahsil of Hoshiarpur,[5] amongst whom adoption itself is forbidden, and a similar custom was set up as applicable to the Chandasama Gameti Garasias of the Bombay Presidency.[6]

So again, in the Punjab,[7] and elsewhere,[8] the adoption of the sister's[9] and daughter's son[10] is legalized by tribal customs, and in the Punjab, its legality is even presumed.[11]

From all this it will be seen that there is not a single rule of an orthodox adoption, which may not be, and has not been, varied by tribal and local customs. But it is doubtful if a mere family custom would suffice to defeat the general law.

754. As regards proof of such variations, the evidence must be evidence that proves the custom at variance with the general law; but such evidence may be supplemented or treated as sufficient, as it was, where an entry in the wajib-ul-arz had contained the records of the custom of widow's adoption even in the absence of the authority of their husband.[12] Such right of adoption was found proved in the case of *Maheshri* widows of their separate husbands.[13]

Adoption of a Daughter.

755. Though possessing ample sacred authority in support of the custom,[14] the adoption of a daughter does not appear to have been ever popular with the Hindus and in course of time, it fell into desuetude, till it now survives only in the case of

(1) *Chanda* v. *Akbar*, (1909) P.R. No. 49: 2 I.C. 91.

(2) *Gurbacha* v. *Bujha*, (1911) P.L.R. 99.

(3) *Jiwan Mal* v. *Jamna Das*, (1911) P.L.R. 67; *Bhuggat Singh* v. *Boodho*, (1867) P.R. No. 51.

(4) *Bhagwan Singh* v. *Gurdial Singh*, (1906) P.L.R. 80.

(5) *Bishen Singh* v. *Amir Chand*, (1894) P.R. No. 13.

(6) *Verabhai* v. *Hiraba*, 27 B. 492 P. C.

(7) *Lalu* v. *Fetteh Singh*, (1899) P. R. No. 18.

(8) *Chainsukh* v. *Parbati*, 14 A. 53.

(9) *Mootsuddee* v. *Lajwantee*, (1867) P.R. No. 24; *Mya Dass* v. *Saw Un*, (1867) P.R. No. 83; *Harri Singh* v. *Gulaba*, (1874) P.R.No. 50.

(10) *Harri Singh* v. *Gulaba*, (1874) P. R.No. 50; *Hira* v. *Dharmo*, (1872) P.R. No. 26; *Dhami Ram* v. *Man Kour*, (1873) P.R.No. 13.

(11) *Manga* v. *Sihan*, (1881) P. R. No. 66; *Hoshnaqi* v. *Jaimal Singh*, (1881) P.R. No. 57.

(12) *Bishwanath Singh* v. *Jugal Kishore*, 50 I.A. 179: 1923 P. C. 90.

(13) *Mathura Das* v. *Srikissen*, 27 C. L.J. 517: 44 I.C. (C.) 5 distinguishing *Gopi Kishen* v. *Gopi Kishen*, 27 I. C. (L.) 79 in which the custom was not pleaded; *Kalu Ram* v. *Piari Lal*, 1 L. 92.

(14) "The daughter given resembling the legitimate daughter is a substitute for a son." Datt. Mim., VII-31 (Suth.) p. 98. Nand Pandit supports his view by citing a considerable array of authorities favouring her adoption—*See* Sec. VII devoted to that topic. (Suth.), pp. 91-100. *Nowab Ray* v. *Bhuguttee*, 6 Beng. S.R. 4: 7 I.D. (O. S.) 669 (*see* authorities in support cited at pp. 675-678); daughter cannot be adopted in the Punjab, *Jamadar* (In re), (1931) L. 399. *See* General introduction, § 11.

women of an unfortunate class who are suffered to take daughters in adoption. (§ 751.) But the present tendency of the law is to discourage such adoption. In Bombay, the court refused to uphold such an adoption by a Brahmin, holding it to be opposed to Mayukh,[1] and the Madras court has held it equally inapplicable to a family man,[2] while even as regards prostitutes and dancing girls, the courts differ as to the legality of their adoptions of daughters. Both in Calcutta and in some cases in Bombay, such adoptions are held illegal on the ground that an adoption by a woman can only be to her husband and as these adopters have no husbands, they cannot adopt to themselves.[3] But the Madras High Court upheld such adoptions as sanctioned by usage,[4] though if their purpose be immoral, they cannot be tolerated.[5] And this view has also prevailed in some cases in Bombay.[6]

Illatom Adoption.

756. No other relationship, except that of a son or in very limited cases, of a daughter, can be ordinarily created by adoption. One cannot, for instance, adopt a person to be one's grandson, great grandson, brother or a nephew. The only deviation from this rule is the adoption of a son-in-law which has become rooted in the districts of Bellary, Cuddapah, Kurnool, Nellore, and the North and South Arcot Districts of the Madras Presidency.[7] This is locally known as the custom of *illatom*, and is quite independent of the adoption of a son, since its object is merely secular, and the rules of Hindu Law do not apply to it,[8] though such adoption is also ordinarily made by a person who has no son living at the time, though he may have any number of daughters.[9] But amongst certain families, such as those belonging to the Kumma and Reddi castes, the existence of a natural son to an undivided brother would appear to offer no obstacle to such adoption.[10] and it does not prevent the subsequent adoption of a *dattak* son.[11] The *illatom* son-in-law counts as a son, and has the same rights as the *aurus* son, sharing equally with him on partition.[12] Among the Reddis or the Kapu caste of Nellore he is allowed even to continue his connection with his natural family, being a preferential heir to his natural father's divided brother[13] while the members of his natural family continue their right of succession to him.[14] The *illatom* father-in-law may, during his life-time, deal with the property as he chooses, and his sons have no right by birth in such property.[15] On his death it passes to his heirs in the

(1) *Ganga Bai* v. *Ananta*, 13 B. 690.
(2) *Guddati* v. *Ganapati*, 23 M.L.J. 493.
(3) *Hancower* v. *Hancower*, 2 Mor. Dig. 133; *Narendra* v. *Dinanalli*, 36 C. 824; *Mathura* v. *Esu*, 4 B. 545; *Tara* v. *Nana*, 14 B. 90 (92); *Hira* v. *Radha*, 37 B. 116.
(4) *Venku* v. *Mahalinga*, 11 M. 393; *Muttukannu* v. *Paramasami*, 12 M. 214; *Sivasangu* v. *Minal*, *Ib.*, 277.
(5) *Kamakshi* v. *Ramasami*, 19 M. 127; *Kandaiya* v. *Chokkammal*, 28 M.L.T. 106: 59 I.C. (M.) 214; *contra* where purpose not immoral, *Shanmugam* v. *Krishnaveni*, (1931) M.W.N. 288.
(6) *Manjamma* v. *Seshagiri Rao*, 26 B. 491 (496).
(7) *Hanumantamma* v. *Rami*, 4 M. 272 (283).
(8) *Nalluri* v. *Kamepalli*, 42 M. 805 P.C.; *Subba Rao* v. *Mahalakshmamma*, 54 M. 27 (55).
(9) *Hanumantamma* v. *Rami*, 4 M. 272 (283); *contra* in *Nalluri* v. *Kamepalli*, 26 I.C. (M.) 54 (the existence of a natural son is no bar to *Illatom adoption*).
(10) *Nalluri* v. *Kamepalli*, 42 M. 805 (811, 812) P.C.
(11) *Chanchamma* v. *Subbaya*, 9 M. 114 (115).
(12) *Hanumantamma* v. *Rami*, 4 M. 272 (283); *Chanchamma* v. *Subbaya*, 9 M. 114 (116).
(13) *Balarami* v. *Pera*, 6 M. 267.
(14) *Balarami* v. *Pera*, 6 M. 267; *Ramkrishna* v. *Subbakka*, 12 M. 442.
(15) *Challa* v. *Challa*, 7 M.H.C.R. 25.

same way as self-acquired property, the heirs of the adopter having no right to it.[1] Where he lives with the adopted son, there may be any coparcenership between the two and there is no right of survivorship.[2] The relationship of *illatom* commences as soon as a person is admitted into the family, with a view to marrying him to the daughter of the taker, though the marriage may take place after the latter's death.[3] Since an *illatom* adoption though recognized, is based on custom, it follows that the claim founded on that relationship cannot be made good unless the relationship itself is strictly proved.[4]

Kritrim Adoption in the Punjab and Burma.

757. The simplified *Kritrim* which merely created a personal relationship between the adopter and adoptee has become customary both in the Punjab[5] and Burma[6] where its incidents are mainly those of the *Mithila Kritrim, viz,* the adoptee becomes the son of the adopter but can claim no relationship beyond him, and cannot succeed to any one save his own adopter. He has no right of collateral succession. Similar adoptions are practised by the Gayawal[7] and the Nambudri Brahmins.[8]

758. **Punjab Adoptions.**—For the rest, though adoptions in the Punjab are not outside the reach of the Mitakshara, still, in the matter of adoption, as indeed, in several other matters, elsewhere reserved for decision by the personal law, it is almost entirely controlled by customs, both tribal and territorial, many of which are recorded in the *Riwaz-i-am,* which is followed in preference to the Shastric law.[9] As such, the Jats of the Delhi District can adopt an orphan.[10]

759. In the Punjab, where the appointment of an heir is customary, it is held to create a purely personal relationship resembling the *Kritrim* form of adoption with the result that it does not affect any one beyond the parties thereto. The appointed heir does not succeed as the grandson of the appointer's father, nor his son as the grandson of the appointer, unless, of course, there is a special custom to this effect.[11]

760. **Burmese and Parsi Adoptions.**—Both the Burmese and the Parsi laws of adoption still maintain some relic of the Dattak adoption, but otherwise they are indistinguishable from secular affiliation.[12]

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(1) *Challa* v. *Challa,* 7 M.H.C.R. 25; *Ramkrishna* v. *Subbakka,* 12 M. 442 (444).

(2) *Chanchamma* v. *Subbaya,* 9 M. 114 (116).

(3) *Venkoyalapati* v. *Nagendla,* (1911) 2 M.W.N. 193: 11 I. C. 25; *Vachoora* v. *Vachoora,* 13 M.L.T. 113: 18 I.C. 698.

(4) *Pattya* v. *Venkamma,* 17 M.L.T. 393: 29 I.C. 54.

(5) *Baijnath* v. *Shamboo,* (1908) P. W.R. 53; *Jiwanmal* v. *Jamna Das,* (1913) P.W.R. 232: 10 I.C. 822.

(6) *Mashwe* v. *Mashwe,* (1910) 4 Bur. L.R. 158: 11 I.C. 776.

(7) *Lachman* v. *Kanhaya,* 22 C. 609 P. C.

(8) *Subramanyan* v. *Parameswaram,* 11 M. 116 (124).

(9) *Basant Singh* v. *Brij Raj,* 57 A. 494 (509) P.C.

(10) *Ib.*

(11) *Mela Singh* v. *Gurudas,* 3 L. 362 F.B.

(12) For fuller details, *see* Hindu Code (3rd Ed.), §§ 932, 933, pp. 489, 490.

CHAPTER VI.

MINORITY AND GUARDIANSHIP.

761. Topical Introduction.—The law of guardianship is a branch of the law of trusts[1] and is based on the principle that infants, being of immature intellect and imperfect discretion, are incapable of exercising any civil right or performing civil duties, and their interests, consequently, require to be protected by the recognition and appointment of a guardian to their person or property, or both.

762. All laws recognize this incapacity, and the necessity for protection. And all laws accept the parents as the natural guardians of their offspring. Of these, however, the father has an almost absolute right to the guardianship of his children of both sexes. This is the relic of his old *patria potestas*, which enabled him to own, sell, or kill his own offspring. But this can only be by analogy, for when the father exercised his *patria potestas*, his minor children had no individual rights or property. They were merely his chattels. Their individual rights are of later growth. Consequently, the Hindu law givers do not recognize any absolute rights of guardianship in any one, the sovereign being entrusted with the guardianship of all minors,[2] and entitled to appoint any person as their guardian.[3] But, nevertheless, the parental power and authority was a fact which the Courts could not ignore, and following the broad analogy of their pristine rights, their claim to guardianship of their children was never contested. And as between them, the father, as the head of the family and its breadwinner, was held to possess an absolute right. But his present power, though nominally absolute, is limited by his capacity of which the court, as representative of the sovereign, is the sole judge. Next to the father stands the mother. Other things being equal, she has a preferable claim and, according to a decision, even a better claim for the guardianship of her minor daughter than the father.[4] But as will be presently seen, this was the exceptional case of a Kulin father with his numerous wives. In normal cases, the courts recognize the father's right as stronger than that of any other relation, and in a competition between the father and the mother, the former starts with a clear advantage which the latter has to meet. Apart from the parents no other relation has any right in the same degree. Hindu Law, no doubt, favours the paternal over the maternal relations, and this is never left out of account. But the welfare and wishes of the minor are then accounted as of a greater moment.

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(1) *Beanfort (Duke)* v. *Berty*, 1 P. Wms. 703 (705); *Mathew* v. *Brise*, 14 Beav. 341 (345); *aliter*—agency; *Cave* v. *Mackenzie*, 46 L.J.Ch. 564.

(2) Manu, VIII-27; Dig., 574, 575; *Ram Bunse* v. *Soobh Koonwaree*, 7 W. R. 321 (325); *Bunseedhur* v. *Bindeseree*, 10 M.I.A. 454; *Besant* v. *Narayaniah*, 38 M. 807 (819) P.C.; *Jago* v. *Oodal*, 4 N.L.R. 20.

(3) *Muthu Veerappa* v. *Ponnuswami*, (1911) M.W.N. 561: 13 I.C. 16.

(4) *Modhoosoodun* v. *Jadub Chunder*, 3 W.R. 194.

763. The law of guardianship is now codified in an Act,[1] which, however, does not affect the personal law of the Hindus so far as it relates to the power of appointing a guardian, but otherwise it controls his appointment.

Of Minority.

Age of majority.

72. (1) In matters relating to marriage, divorce, dower, and adoption, a person attains the age of majority at the commencement on completion of his sixteenth year;[2] otherwise, except in the cases hereinafter provided, he attains it on completion of the eighteenth year.[3]

(2) Every minor of whose person or property a guardian has been appointed or declared under the Guardians and Wards Act, and every minor whose property is under the superintendence of a Court of Wards, attains his majority on completion of his twenty-first year.[4]

764. **Analogous Law.**—This section is a summary of the Hindu Law as codified and saved by the Indian Majority Act. Clause (1) reproduces the saving clause (2) of the Act[5] and states what is now regarded as the age of majority under Hindu Law.

765. The saving clause in the Indian Majority Act was, of course, inserted out of respect to the personal laws of the Hindus and Mahomedans, which it has been the policy of the Government to leave unmolested.

Hindu Law of Majority.

The only textual rule to be found on the subject of Hindu majority is the following:—

Manu.—"The property of a student and of an infant, whether by descent or otherwise, let the King hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year."[6]

According to this rule, the infancy of a minor "ceases in his sixteenth year." But the phrase is vague and might mean either upon entering the sixteenth year,[7] or upon its completion,[8] and there is authority for either view. The Dayabhag school favouring the former and the Mitakshara school the latter.[9] When Manu enacted the rule, women were incapable of holding property or entering upon a course of studentship.

No doubt a period has been prescribed for the termination of the age of studentship and infancy, but as has been pointed out before, that period is strictly speaking inapplicable to women who are declared ineligible for religious studies, and whose perpetual dependence upon men is consistenly insisted upon.

These are the inherent defects of the Hindu system, and failing a direct

(1) VII of 1890.

(2) *Jamoona* v. *Bamasoondari*, 1 C. 289 (295) P.C.; *Amarendra* v. *Sanatan*, 12 Pat. 642 (660) P.C.; *Mothoomohan* v. *Soorendro*, 1 C. 108 F.B.; *Venkataswami* v. *Sathiraju*, 40 M. 925 (928, 929).

(3) S. 2, Indian Majority Act (IX of 1875).

(4) S. 3, *Ib.*

(5) IX of 1875.

(6) Manu, VIII-27; IX-146; 190, 191.

(7) 1 Dig. 293; 1 Dig. 115; Dayabhag, III-1-17-*Note;* Datt. Mim., IV-47; 1 W. Macn. 103; 2 W. Macn. 220, 288-*Note;* *Lachman* v. *Rupchand*, (1831) 5 B.S.D. R. 136: 7 I.D. (O.C.) 436; *Luckheenarain* v. *Mudhoosoodun*, (1853) 9 B.S.D.A. 505: 13 I.D. (O.S.) 382; *Sheebsunker* v. *Manakchunder*, (1859) B.S.D.A. 885; *Dehomoyee* v. *Juggessur*, 1 W.R. 75; *Monsoor Ali* v. *Ramdayal*, 3 W.R. 50; *Callychurn* v. *Bunggobutty*, 19 W.R. 110 F.B.

(8) 1 W.Macn.H.L., 103: 1 Str.H.L. 72: 2 Str. H.L. 76, 77, 80; *Lachman* v. *Rupchand*, 5 S.D.A.B. 136; *Govind Nath* v. *Gulalchand*, 5 B.S.R. 322; *Shivji* v. *Datu*, 12 B.H.C.R. 281 (290).

(9) *Ramesh Chandra* v. *Maharaja Birendra*, (1925) C. 513 (514, 515).

rule, some limitation had to be fixed, which the courts have, in several cases, fixed as stated in clause (1).

766. Clause (1) of this section is saved in section 2, and clause (2) is abstracted from section 3 of the Majority Act, which prescribes a uniform age of majority applicable to all minors including Hindus who are, however, declared exempt from that Act in matters affecting marriage, divorce, dower and adoption, thereby impliedly reserving to them for those purposes their own personal law of majority, if any. Now, since the Majority Act applies to other cases including guardianship, it follows that a person may be still a minor under the Majority Act, and yet a major under his personal law, and therefore, free to enter into the four excepted transactions, *viz.*, marriage, divorce, dower and adoption. Since the saving clause does not exempt guardianship and wills, it follows that a minor under the Act can neither make a will nor can he act as a guardian. Under section 3 of the Majority Act, the normal age of majority for every person, irrespective of nationality or religion, is reached on completion of the eighteenth year, except (*a*) where before completion of that age, a guardian is appointed or declared under the Guardians and Wards Act; or (*b*) the management of his estate is assumed by the Court of Wards, in which cases, the age of majority is extended by another three years. It will be seen that this extended nonage does not continue where a guardian is appointed otherwise than by a court of Justice. Consequently, where a guardian is appointed by the will of the father, it does not extend that period, nor, of course, is it extended by the existence of a natural guardian. This may sometimes lead to awkward results. Since a guardian may be younger than his ward, and while the former may be a major, the latter may still be a minor. It has been held that if the guardian is "appointed" or "declared by the court," the period of majority is postponed even if the guardian should resign or cease to act.[1] Such appointment or declaration must be under section 7 (1) of the Guardians and Wards Act.[2] Where, therefore, the Court merely granted letters of administration to the *de facto* guardian of a minor in respect of an estate under section 13 of the Probate and Administration Act,[3] or appoints merely a guardian *ad litem* for the purpose of a suit, the period of majority is not postponed.

Hindu Age of Majority.

767. In calculating the age of a minor, the day on which a person is born and the day on which he completes his eighteenth year, or twenty-first year, as the case may be, are both counted in computing his age of majority. So if *A* be born a minute before midnight of 1st January 1900 and die a minute after the 31st December 1918 he would have died a major, for he had attained eighteen years of age at midnight of the 31st December, although really 48 hours short of two minutes will be wanting from the instant of his birth. This is in accordance with the rule that law generally ignores fractions of a day.

Mode of Calculation.

73. Guardian means a person having the care of the person of another, or of his property, or of both.[4]

"Guardian" defined.

768. **Analogous Law.**—This definition is adopted from Section 4 (2) of the Guardians and Wards Act[5] where it is limited to a minor. But

(1) *Sadholal* v. *Murlidhar*, 29 A. 672 F.B.
(2) VIII of 1890.
(3) V of 1881; *Ganeshilal* v. *Surajmal*, (1906) P.R. 89.
(4) S. 4 (a), Guardians and Wards Act (VIII of 1890).
(5) VIII of 1890.

since a Hindu husband is the natural guardian of his wife, the definition here has been enlarged to include such guardianship.

769. **Guardian and Trustee.**—A guardianship is, sometimes, spoken of as a sacred trust, but this is only so as regards the nature of the obligations necessary for the discharge of the two offices, but the powers of the guardian and the trustee are not co-extensive, those of the guardian being more limited than those of the latter. A guardian can alienate only in cases of necessity or for an evident advantage of his ward, while the trustee is empowered to deal with the property in any case he considers reasonable and proper.[1]

74. (1) **A guardian may be natural, *de facto*, testamentary, or one appointed by the court.**

Four classes of guardians.

(2) A natural guardian is one who is entitled, under the personal law, to which he is subject, to act as the guardian by virtue of his relationship to the minor.[2]

(3) A *de facto* guardian is one who, though not entitled to act as the lawful guardian, nevertheless so acts, and who, thereupon, acquires all the rights, and is subject to all the liabilities, of a legal guardian.[3]

(4) A testamentary guardian is one so appointed by the father in his will for his children.

(5) The court may appoint or declare a guardian in accordance with the provisions of the Guardians and Wards Act,[4] **or the High Court might do so in the exercise of its inherent power. The guardian so appointed may be called the certificated guardian.**

(1) Of Natural Guardians.

75. The following relations are the natural guardians of the person and property of a minor in the order mentioned below, namely:—

Natural Guardian.

(a) **The father;**[5]
(b) **The mother;**[6]
(c) **The paternal relations;**[7]
(d) **The maternal relations.**[8]

770. **Analogous Law.**—The term "Natural Guardian" has already been defined in the previous section. The father is, by reason of his *patria potestas*, unquestionably the most preferential guardian of all his minor children legitimate or illegitimate,[9] male and unmarried female, and is, as such, entitled both to the custody of their person and property. This right, now clearly crystallized by the case-law, was but faintly adumbrated in the sacred terts.[10]

Natural Guardian.

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(1) *Subbiah* v. *Rangia*, 7 M.L.J. 191; Trusts Act (II of 1882), S. 36.

(2) *Thayammal* v. *Kuppanna*, 38 M. 1125; *Purushottam* v. *Brindavana*, (1931) M. 597.

(3) *Hunooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (412, 413).

(4) VIII of 1890.

(5) *Kalidas* v. *Subbamma*, 7 M. 29; *Nanabhai* v. *Janardan*, 12 B. 110; *Shamlal* v. *Bindo*, 26 A. 594.

(6) *Bhiko* v. *Chamela*, 2 C.W.N. 191.

(7) *Kristo Kissore* v. *Kader Moye*, 2 C.L.R. 583.

(8) 1 Macn. H.L. 103, 104; 1 Str. H. L. 71; *Kristo Kissore* v. *Kader Moye*, 2 C.L.R. 583; *Bhiko* v. *Chamela*, 2 C.W. N. 191; *Thayammal* v. *Kuppanna*, 38 M. 1125.

(9) *Premkuar* v. *Banarai Das*, 15 L. 630.

(10) Manu, VIII-299; IX-3, 4.

771. In all *Smritis* the position of the father as the head and guardian of his minor children is taken for granted. But the mother's right to the guardianship of her minor children is of later growth, since the absolute dependence of woman in the ancient Hindu household, left no room for assigning her any duties for the protection of her own children, which was left to other male members. Her right may be said to have sprung into being by force of the *jus naturale* given effect to by the courts[1] and under the Mithila Law, her right is in this respect even superior to that of the father.[2] But, ordinarily, the father has the right paramount to the custody of his minor children,[3] after whom the mother,[4] the paternal relations,[5] and the maternal relations[6] come in varying degrees of right. But there is no Shastric authority in support of their claim, which rests on the nearness of their relationship to the minor, and their presumed regard for him.

772. **Father's Rights.**—Of all relations the father is by right the best entitled to the guardianship of his minor children both male and female, subject only to two conditions, namely, that the children must be his, though not legitimate[7] and the female child unmarried; since upon her marriage his *patria potestas* passes from him to her husband. But until her actual marriage, the authority remains with the father, even though she is betrothed,[8] and on her childless widowhood the court in one case preferred her own father to her husband's relations to be her guardian.[9] The father does not lose his right to the guardianship of his children by his loss of caste,[10] though he might perhaps forfeit his right by permanently renouncing the world by entering a holy order.[11] But the facts that he is indigent, diseased or leading an immoral life,[12] do not suffice to vacate his authority, though these facts may qualify fitness in a case in which the court has to declare or appoint a guardian.

Clause (a).

773. With these necessary qualifications the father may be said to possess the best claim to act as guardian of his minor children;[13] and con-

(1) *Danappa*, In re, 1 B.H.C.R. 134; *Chanvirapa* v. *Danava*, 19 B. 593; *Bhikuo* v. *Chamela*, 2 C.W.N. 191; *Sundar* v. *Bennud Ram*, 4 C. 76.

(2) *Jussoda* v. *Netyalall*, 5 C. 43.

(3) *Hemnanth* (Re), 1 Hyde 111; *Soobh Piarthee Lal* v. *Soobah*, 7 W.R. 73; *Kalidas* v. *Subbamma*, 7 M. 29; *Nanabhai* v. *Janardhan*, 12 B. 110; *Shamlal* v. *Bindo*, 26 A. 594.

(4) *Bhikoo* v. *Chamela*, 2 C.W.N. 191.

(5) *Kristo Kissore* v. *Kader Moye*, 2 C.L.R. 583.

(6) 1 Macn.H.L. 103, 104: 1 Str.H. L. 71; *Kristo Kissore* v. *Kader Moye*, 2 C.L.R. 583; *Bhiko* v. *Chamela*, 2 C. W.N. 191; *Thayammal* v. *Kuppanna*, 38 M. 1125.

(7) *Premkuar* v. *Banarsi Das*, 15 L. 630.

(8) *Ram Singh* v. *Bhugwan*, (1866) P. R. 101.

(9) *Tataram* v. *Ramcharan*, 33 A. 222.

(10) Act XXI of 1850; *Q.* v. *Bezonji Perry's* O.C. 91; *Muchoo* v. *Arzoon*, 5 W. R. 235; *Kanabi Ram* v. *Biddya Ram*, I A. 549; *Kanlesra* v. *Jorai*, 28 A. 233; *Sham Singh* v. *Santabai*, 25 B. 551 (555); *Putlabai* v. *Mahadu*, 33 B. 107.

(11) ***Ishwar Chunder Surma*, (In re),** (1850) B.S.D.A. 471.

(12) *Kali Das* v. *Subbamma*, 7 M. 29.

(13) S. 19 (*b*), Guardians and Wards Act (VIII of 1890); *Lachmi Narayan* v. *Balaram*, 2 Pat.L.J. 190; 39 I.C. 662; *Bindaji* v. *Mathura*, 30 B. 152; *Mahabaleswar* v. *Ramchandra*, 38 B. 94; *Deba Nand* v. *Anandmani*, 43 A. 213; *Albrecht* v. *Jellamma*, 22 M.L.J. 247 (248): 13 I.C. 453: *Alagappa* v. *Mangathai*, 40 M. 672; *Moosala* v. *Kotamarti*, 44 M. 189; *contra* in *Chidambaram* v. *Subbayya*, 41 M. 561 F.B.; *Rungabhai* v. *Paurusami*, 21 I.C. (M.) 848; *Subramania* v. *Ammayee*, (1915) M.W.N. 414: 29 I.C. 740; *Albrecht* v. *Jellamma*, 22 M. L.J. 247: 13 I.C. 453 (same under Buddhist Law) *Mathlin* v. *Maung Po*, 8 Bur.L.T. 73: 29 I.C. 980.

sequently the court has on jurisdiction to appoint or declare him as such; nor can he seek such appointment or declaration; though some one else may, in supersession to him and on proof of his unfitness. But this is only so as regards the person of his minor children which term includes both his natural and adopted son.[1] But the court did not regard a Kulin Brahmin with his numerous wives whom he visited after lengthened absence whom the court as such natural guardian as the mother of their daughter.[2] It seems that under the Mithila Law the mother is the acknowledged guardian of all her children, whether male or female.[3]

Adoptive Father v. Natural Father.

774. As already stated, a boy on adoption completely passes into the family of his adoptive father, who is then his natural preferential guardian even against his natural father, who with the adoption resigns all his parental connection, control and authority, but where, in the absence of the adoptive father, the natural father acted for his son and effected a compromise on his behalf and for his benefit, the court held the compromise good as the natural father was a proper guardian to assert the right of his son as adopted heir against a rival claimant.[4] In another case, the claim of the natural father, was, on the death of the adoptive father, sustained in preference to the latter's relations and even daughters, on the ground of his natural affection for his child.[5]

Illegitimate Children.

775. An illegitimate child is, in the eye of the law, nobody's child, and the natural guardian of such children is their mother,[6] unless the child was born in continuous concubinage, when, probably, the ordinary rule would apply.[7] But as observed by Lord Herschell: "It is no longer important to enquire what are the rights of the mother in relation to an illegitimate child at common law. All the courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction."[8] In other words, **the question in such cases is not whether** the mother should possess the child, but what would be for the benefit of the child. Consequently, though the mother is the guardian of her illegitimate children, the court would not consign them to her care if she is leading an immoral life, and is likely to corrupt their morals.[9] On the other hand, where the child is too young to be removed from her care, the court would tolerate her guardianship till it can safely place it in better hands.

English and Hindu Laws how far identical.

776. The English and Hindu Laws of guardianship to a large extent coincide. Both under the Hindu Law and the English Law, the father is the guardian by nature of his minor children, and at common law, he is entitled to the custody of them against all

(1) *Lakshmibai* v. *Shridhar*, 3 B. 1; *Sree Narain* v. *Kishen Soondery*, 11 B.L.R. 171 (191) P.C.; *Nogendro* v. *Kishensoondery*, 19 W.R. 133 (139) P.C.; *Moosalakant* v. *Kotamarti*, 40 M.L.J. 46: 62 I.C. 437.

(2) *Modhoosoodun* v. *Jadub Chunder*, 3 W.R. 194.

(3) *Jussoda* v. *Lallah Nettya Lall*, 5 C. 43.

(4) *Nirvanaya* v. *Nirvanaya*, 9 B. 365 (367).

(5) *Ganga Prasad* v. *Nara Kanta*, 15 C.W.N. 558: 7 I.C. 234.

(6) *Venkamma* v. *Savitramma*, 12 M. 67 (68, 69); *Saithri*, In re, 16 B. 307 (317); *Moneya* v. *Felix Slym*, 5 Bur.L.T. 164: 17 I.C. 986.

(7) *Prem Kuar* v. *Banarsi Das*, 15 L. 630.

(8) *Barnardo* v. *McHugh*, (1891) A. C. 388 (398).

(9) *Venkamma* v. *Savitramma*, 12 M. 671; In re, *G (Infants)*, (1889) 1 Ch. 719.

the world, including even the mother.[1] And so under both laws, on the death of the father, the mother is the natural guardian of her children, but at law, she has no right to interfere with them against a testamentary guardian appointed by the father.[2] Equally under both laws the mother is *prima facie* the natural guardian of her illegitimate children, and, therefore, under ordinary circumstances, entitled to their custody,[3] and thus her right must be recognized unless there are strong grounds for displacing her.[4] But it is not an absolute right; nor can she transfer her right to another person.[5] It is not the practice of the court in either country to appoint or declare a guardian of a minor who has no separate property of his own.[6] In England, the Guardianship and Infants Act, 1886[7] now regulates the appointment of guardians as the Guardians and Wards Act[8] regulates their appointment here. In both countries, the common law has been brought under the control of the statute, and the leading principles of English Law will be found to have crept into the rules which the courts now enforce as the acknowledged rules of Hindu Law. And this was to be expected, since Hindu Law has no developed system of guardianship, and English Law naturally fills in the void as embodying the rules of justice, equity and good conscience.

777. Mother's Right.—Next to the father, the mother[9] is entitled to the guardianship of her minor children and of their property,[10] but unlike the father, she does not possess the power of appointment. Her customary or statutory remarriage does not necessarily deprive her of the guardianship of her son,[11]

Clause (b).

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(1) *Wellesley* v. *Duke of Beaufort*, (1827) 2 Russ. 21: 38 E.R. 236.

(2) *Eyre* v. *Countess of Shaftesbury*, (1722) 2 P. Wms. 103 (115): 24 E.R. 659.

(3) *Darcys* (In re), (1860) 11 Ir. R. 298.

(4) *R.* v. *Nash*, 10 Q.B.D. 454; *Barnardo* v. *McHugh*, (1891) A.C. 388 (399).

(5) *Ullee*, In re, 53 L.T. 711.

(6) *Humphreys* v. *Polak*, (1891) 2 K. B. 385.

(7) 49 & 50 Vict., C. 27, S. 3 (1).

(8) Act VIII of 1890.

(9) 1 Mac.H.L., Ch. VII, p. 103; *Ib.*, Ch. VII, p. 205; *Doe* v. *Doorgapersaud*, 2 Mor. Dig. 49: 3 I.D. (O.S.) 801 (802): *Kooldeep Narain* v. *Rajbunsee*, 7 B.S.R. 467: 8 I.D. (O.S.) 354 (356); *Bunseedhur* v. *Bindeseree*, 10 M.I.A. 454 (471, 472), in which step-mother's right to guardianship of her step-son's estate was assumed; *Pirthee Lal* v. *Doorgalal*, 7 W. R. 73 (75); *Ramdheen* v. *Ram Ruttun*, 10 W.R. 425; *Soonder Narain* v. *Bennud Ram*, 4 C. 76; *Manishankar* v. *Muli*, 12 B. 686; *Honapa* v. *Mhalpai*, 15 B. 259; *Murari* v. *Tayana*, 20 B. 286 (288); *Namasevayam* v. *Annamalai*, 4 M.H.C.R. 339 (343); *Doraisami* v. *Nondisami*, 38 M. 118; *Kanlesra* v. *Jora Kasundan*, 28 A. 233 (235); *Bachchan Singh* v. *Kamta Prasad*, 32 A. 392; *Collector* v. *Umrao Singh*, 13 A.L.J. 437: 29 I.C. 220; *Swarath Ram* v. *Ram Ballabh*, 47 A. 784; *Madho Singh* v. *Mhd. Ibrahim*, 1 C.P.L.R. 72; *Birdhi Chand* v. *Marian Bi*, 3 C.P.L.R. 86; *Sitaram* v. *Tukia*, 6 C.P.L.R. 15; *Tanto* v. *Gajadhar*, 1 N. 129 (130); *Jago* v. *Oodal*, 4 N. 20; *contra* in *Husen* v. *Rajaram*, 10 N. 133; *Vithu* v. *Devidas*, 15 N. 55.

(10) *Bunseedhar* v. *Bindeshree*, 10 M. I.A. 454 (471, 472); *Murari* v. *Tayana*, 20 B. 286 (288); *Doraisami* v. *Nondisami*, 38 M. 118; *Honapa* v. *Mhalpai*, 15 B. 259; *Manishankar* v. *Bai Muli*, 12 B. 686; *Bachchan Singh* v. *Kanta Prasad*, 32 A. 392; *Madho Singh* v. *Mhd. Ibrahim*, 1 C.P.L.R. 72; *Birdhi Chand* v. *Marian Bi*, 3 C.P.L.R. 86.

(11) *Ganga Prasad* v. *Ramasrey*, 38 C. 862; *Bindo* v. *Sham Lal*, 29 A. 210; *Acho* v. *Acha*, 35 M. 728; *Bhalton Prasad* v. *Ram Chandra*, 4 Pat.L.W. 373: 45 I.C. 253; *Nur Bibi* v. *Mohran*, (1887) P.R. 44; *Fatima* v. *Rani*, (1915) P.L.R. 101: 28 I.C. 507; *Ambo* v. *Ganga Sahai*, (1913) P.L.R. 193; *Indi* v. *Ghania*, 53 I.C. (L.) 783; *Ram Labhai* v. *Durga Das*, 15 L. 28; *Jago* v. *Godel*, 4 N.L.R. 20, *contra* in *Chironji* v. *Punam*, 48 I.C. (N.) 75; *Ranganaiki* v. *Ramanuja*, 35 M. 728; *Jiwani* v. *Mala Ram* 3 L. 29.

though the court may apply a different rule if she has young daughters and a strange step-father,[1] or if she was leading an immoral life.[2]

778. The fact that the mother is illiterate[3] or a *paradanashin* is no objection to her eligibility,[4] unless it will interfere with her duties, *e.g.*, if she is a young widow, or only a step-mother, and the estate is large which will have to be managed by her father,—who is himself in embarrassed circumstances, and there is a reasonable fear of the estate being squandered.[5] It would seem that, apart from the guardianship of her minor daughters, she has the right to be consulted in the selection of a bridegroom, and that she may even effect a valid marriage even in the presence of a paternal grandfather, even though the latter is not shewn to have neglected his duties,[6] and such marriage may be valid even though it was contracted without the father's consent.[7]

779. The guardianship of the mother is in the nature of a trust which she cannot part in favour of another, though if by parting with her child to be brought up by another as his own child, she would not be restored to its custody, if she is found to be without means, and the change of custody would not be in the child's interest.[8]

Step-mother.

780. As to the step-mother's right of guardianship, Manu declares: "If among all the wives of the same husband, one bring forth a male child, Manu has declared them all, by means of that son, to be mothers of male issue."[9] Following this verse it was held in some old cases that a step-mother is the legal guardian of her step-son in preference to the paternal uncle,[10] though in a Bengal case, her right was generally doubted and denied in preference to the paternal grand-mother.[11] But it has since been held that a step-mother is a competent guardian,[12] though the contrary has also been held elsewhere.[13]

Clause (c).

781. Paternal Relations.—Next to the parents, the right of guardianship is said to vest in the paternal relations of the minor in preference to his maternal relations,[14] but neither has any paramount right, and the court is free to appoint any one it considers competent to take the place of the child's parent.[15] So it was observed: "In fact, the main question for the court

(1) *Bindo* v. *Shamlal*, 29 A. 210.

(2) *Venkamma* v. *Savitramma*, 12 M. 67 (68, 69); following *R.* v. *Clarke*, 7 E. & B. 186; *Skinner* v. *Orde*, 14 M.I.A. 309; *Harman* v. *Partalu*, (1911) P.L.R. 67.

(3) *Nikharennesia* (In re), 20 C.W. N. 663: 33 I.C. 918.

(4) *Jaiwanti*, v. *Gajadhar*, 38 C. 783.

(5) *Sundarmani* v. *Gokulanand*, 18 C. W.N. 160: 16 I.C. 900.

(6) *Ranganaikammal* v. *Ramanuja*, 35 M. 728; *Ram Kore* v. *Jamnadas*, 37 B. 18; *Mayadevi* v. *Ramchand*, (1916) P.R. 20; 31 I.C. 184; *Indi* v. *Ghania*, 53 I.C. 783.

(7) *Mulchand* v. *Bhudhia*, 22 B. 812.

(8) *Peterson* v. *Shave*, 24 C.W.N. 711: 56 I.C. 242; *Pollard* v. *Rouse*, 33 M. 288.

(9) Manu, IX-188.

(10) *Lukmee* v. *Umar Chand*, 2 B.S. D.R. 14; *Nunko Lal* v. *Sohodra*, 1827 S.D.A.N.W.P. 115; Vyavastha Darpan, p. 563; W. Mac.H.L., 103, following the first case.

(11) *Ram Bunsee* v. *Soobh Koonwaree*, 7 W.R. 321 (325).

(12) *Bunseedhur* v. *Bindeseree*, 10 M. I.A. 454 (471, 472), in which the step-mother's right to act as guardian was not questioned; *Sundarmani* v. *Gokulanand*, 18 C.W.N. 160 (163); *Mukthu Veerappa* v. *Ponnuswami*, 22 M.L.J. 68: 13 I.C. 16; *Venkatasami* v. *Muthusami*, 34 M.L.J. 177: 45 I.C. 942; *Jago* v. *Oodal*, 4 N. 20; *contra* in *Vithu* v. *Devi Das*, 15 N.L.R. 55.

(13) *Vithu* v. *Devi Das*, 15 N.L.R. 55.

(14) *Gulbai* (Re), 32 B. 50.

(15) *Kristo Kissore Neoghy* v. *Kadermoye*, 2 C.L.R. 583.

to consider in the case of the unfortunate minors who have lost their natural guardians is, who amongst the relations, or for the matter of that, friends of the minors, can you select who will supply as nearly as possible the place of their lost parent or parents."[1] But the nearness of relationship of the guardian to the minor is always germane to the discussion, because near relations feel natural love and affection for the minor which insures his welfare.[2] As such, the minor's elder brother ranks next in affection after the parents and he is placed in a class apart from the rest of his paternal relations.[3]

Brother.

782. **Maternal Relations.**—After the brother, the paternal lineal relations, and after them the maternal lineal relations are held qualified to act as guardians. But their claim is so slender that the court does not weigh it in golden scales, placing before it the broad question, which amongst the several claimants would treat the minor kindly, and study his welfare, in short, who will be his best appointed parent.

Clause (d).

783. Consequently, the courts have preferred a maternal grandmother to a paternal grandfather,[4] and a father's mother to a paternal granduncle,[5] a maternal uncle to a paternal uncle,[6] a maternal grandmother to a paternal grandfather's brother[7] a mother's sister to a father's brother,[8] in all of which the court regarded welfare of the minor as more important than the propinquity of the claimants. It was also pointed out that, except the parents of the minor, no other relation had the same legal right to be a guardian of the minor whose welfare must be the paramount consideration for the court, though due regard will always be paid to the rights of blood relations, and failing them, to other relations who, by reason of their kinship, are likely to take more care of the minor than mere strangers who, however, are not wholly disqualified on that account.

True test: Welfare of Minor.

Marriage and loss of caste no disqualification.

76. (1) Neither re-marriage,[9] conversion[10] nor loss of caste[11] is any disqualification to act as a guardian.

(2) Where a Hindu child becomes converted to an alien faith, it is for the court to consider whether it would be for the welfare of the child that it should be restored to its parents.[12]

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(1) *Kulbai* (Re), 32 B. 50 (54), following *Bindo* v. *Sham Lal*, 29 A. 210.

(2) *Kristo Kissore Neoghy* v. *Kadermoye*, 2 C.L.R. 583 (586); *Bhikno* v. *Chamela*, 2 C.W.N. 191.

(3) 1 Mac.H.L. 103, (104); 1 Str.H. L., 71; *Kristo Kissore Neoghy* v. *Kadermoye*, 2 C.L.R. 583; *Bhikno* v. *Chamela*, 2 C.W.N. 191; *Thayammal* v. *Kuppanna*, 38 M. 1125.

(4) *Ambo* v. *Ganga Sahai*, (1913) P. L.R. 193: 18 I.C. 141.

(5) *Venkatasan* v. *Ethirajammah*, 5 M.L.T. 208: 4 I.C. 1117.

(6) *Baijnath* v. *Emp.*, 1 O.L.J. 416: 25 I.C. 840.

(7) *Buta* v. *Bhagan*, (1913) P.W.R. 45: 19 I.C. 609.

(8) *Fulkumari* v. *Buah Singh*, 18 C. W.N. 1198: 25 I.C. 112.

(9) *Ganga Prasad* v. *Ramasrey*, 38 C. 862; *Bindo* v. *Sham Lal*, 29 A. 210; *Acho* v. *Acha*, 35 M. 728; *Ram Labhai* v. *Durga Das*, 15 L. 28; *Subramania* v. *Ammayee*, (1915) M.W.N. 414: 29 I.C. (M.) 740, following *Audiappa* v. *Nallendran*, 22 M. L.J. 442: 29 I.C. (M.) 5: 5 W.R. 235.

(10) *Muchoo* v. *Arzoon*, 5 W.R. 235.

(11) Act XXI of 1850.

(12) *Saithri* (in the matter of), 16 B. 307; *Joshi Assam* (in the matter of); 23 C. 290; *Mokoond* v. *Nabodip*, 25 C. 881; *Sarat Chandra* v. *Forman*, 12 A. 213.

784. Analogous Law.—All the facts mentioned in the section would have been insuperable obstacles to guardianship under Hindu Law, but they have all been removed by the Caste Disabilities Removal Act, 1850, which has abrogated any law or usage in force in British India, which inflicts on any person forfeiture of rights or property by reason of his or her renouncing or having been excluded from the communion of any religion or being deprived of caste.[1]

Re-marriage of Father.

785. It has been there seen that the father has the inherent right to the guardianship of his children, both male and female, and that that right cannot be ignored merely because he has re-married[2] or has forsaken his religion.[3] This is undoubtedly the law.[4] But the fact that the fathtr has been re-married or become a convert to an alien faith cannot be altogether ignored, if his right to guardianship is challenged in court. The question would be solved not with reference to its legality but with reference to its propriety in a given case.[5]

If, for instance, the child is a daughter and the father had practically abandoned it, having lived apart from its mother whose relations had brought her up, the court, though conceding the father's legal right, may yet deem it expedient that his daughter should not be torn away from her familiar surroundings to be placed in the strange company of a step-mother. (§ 780).

His Conversion.

786. So again where the father becomes a convert to Mahomedanism or Christianity, he does not forfeit his paternal right of guardianship, of which he can be deprived only if the court is satisfied "not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself, to be a person of such a description, or is placed in such a position as to render it, not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended."[6] So where **the daughter of a Chinaman was delivered by** the father to a Mrs. Allen whose husband was a Chinese Christian and who herself was a Christian, the court on the application of the father for the custody of his child, refused to accede to his prayer, holding that, though as father he was the natural guardian of the child, her moral and intellectual well-being required that she should not leave the family in which she was treated as a daughter of the house.[7] In another case, the plaintiff, originally a Hindu, abandoned his family residence and left his minor son in the custody of his grandfather, a Hindu, on whose death, the son began to live with his maternal uncle. He applied for custody and his application was refused by his paternal and maternal uncles. It appeared that the father was not well off, being dependent upon a Mission for his support, that he had practically abandoned the son, who being aged 12 or 13 expressed a desire

(1) XXI of 1850; *Muchoo* v. *Arzoon*, 5 W.R. 235; *Kanhai Ram* v. *Biddya*, 1 A. 549; *Kubera* v. *Jirai*, 28 A. 233; *Gul Mohamed* v. *Wajirlugam*, (1901) P.L.R. 167.

(2) *Subramania* v. *Ammayee*, (1915) A.W.N. 414: 29 I.C. (M.) 740, following, *Audiappa* v. *Nallendran*, 22 M.L.J. 442: 29 I.C. (M.) 5: 5 W.R. 235.

(3) *Muchoo* v. *Arzoon*, 5 W.R. 235.

(4) *Narayen* v. *Luxmeebaee*, (1850-1) Morris S.R. 61; *Sham Singh* v. *Santa Bai*, 25 B. 551 (555) *Muchoo* v. *Arzoon*, 5 W.R. 235.

(5) *Muthuverappa* v. *Ponnuswami*, 22 M.L.J. 68: 13 I.C. (M.) 16; *Ganga* v. *Kausilla*, 11 A.L.J. 209: 19 I.C. 65.

(6) *Per* Knight-Bruce, V.C., in *Fynn*, In re, cited with approval in In re, *Joshy Assam*, 23 C. 290 (297, 298).

(7) In re, *Joshy Assam*, 23 C. 290 (297, 298).

against his conversion to Christianity, which appeared to be the father's ulterior motive for getting himself appointed as his guardian which the court refused, holding "that the father must be regarded as having abdicated his strict legal parental rights, and that it would be a capricious, if not cruel resumption of his paternal authority, if he could now compel his child to be brought up henceforth as a Christian which admittedly would be the result of handing over the child to the custody of his father."[1]

787. In following this rule, the court does not contravene any rule of Hindu Law, for there is no rule on the subject in that law which remains unrepealed by the Caste Disabilities Removal Act,[2] but follows the rule of equity taking its guidance from the English Law, which is on this subject based upon the natural principles of justice and right.[3]

Mother's Re-marriage and Conversion.

788. The analogies furnished by the father apply with even greater force to the case of the mother, whose right to the guardianship of her children is not equal to that of the father. But her re-marriage is equally no insuperable obstacle to the assumption of her duties as the natural guardian of her children. (§ 777.) But it cannot be forgotten that by her re-marriage she herself passes into another control, and the question is how far her own subjection to martial control will affect the performance of her obligations towards the children of her former husband. If, for instance, her children are of the female sex and are already in the safe keeping of other relations, the court will not order the removal as a matter of course merely on assertion of the legal right of the mother to their lawful guardianship, unless it is convinced that the removal would be for their good. (§ 777.)

The same rule applies to where she is converted to another religion. That fact does not in the slightest degree impair her right, but if the Court apprehends that she is demanding their custody with a view to convert them, the Court may demand a satisfactory assurance that she would not get her minor children converted, and otherwise place her on terms.[4]

Converted Child.

789. The religion which a child is presumed to follow is the religion of its father. If he was a Christian then the child must be brought up as a Christian. So the Privy Council said: "A child in India under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social status and it is, therefore ordinarily and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion."[5]

The religion of the father here does not mean the religion which he might have newly adopted,[6] but the religion which was his established religion.

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(1) *Mookond* v. *Nobodip*, 25 C. 881 (886).

(2) Act, XXI of 1850.

(3) *Saithri*, (In re), 16 B. 307 (323); *Besant* v. *Narayaniah*, 38 M. 807 (819) P.C.

(4) *Dwijapada* v. *Bailean*, 20 C.W.N. 608.

(5) *Skinner* v. *Orde*, 14 M.I.A. 309 (323); but this is only the ordinary rule; In re *Clarke*, 21 Ch.D. 817; In re *Naven*, (1891) 2 Ch. 299; and the Court may depart from it for sufficient reason: In re *McGrath*, (1893) 1 Ch. 143 (149).

(6) *Radhi Bai* v. *Vessanamal*, 11 S.L.R. 17: 41 I.C. 571.

790. So where the Hindu father had entrusted his minor daughter to a missionary by whom she was baptized at his instance and brought up for three years, after which the father died and the mother applied for her guardianship, the court, in rejecting the mother's application, held that it was for the father to say in what religion his children should be brought up, and that it would not be for the minor's welfare to accede to the mother's prayer for the guardianship of her daughter, who had for three years been in charge of a Christian missionary and had been educated and brought up as a Christian.[1] A converse case was presented to a Calcutta Bench in which the father, having become a convert to Christianity, applied for the guardianship of his minor son aged 12 or 13 years, who expressed a preference to remain a Hindu, and with his maternal uncle, whereupon the court refused the father's application for guardianship.[2] Two questions determine the course the court would take in such cases.

Clause 2.

If the child is old enough to make an election as to the custody in which it should like to be, then it is delivered into that custody; otherwise, the court has to decide as to what would be its best advantage.[3]

77. (1) The natural guardian of a minor's property possesses the power to transfer any portion of the minor's property in case of necessity or for the benefit of the estate;[4]

Natural guardian's right.

(2) Provided that where the property comprises a family trade, the guardian has the power to transfer or pledge the property and credit of the firm for the ordinary purposes of that trade.[5]

791. **Analogous Law.**—The powers of the natural guardian of a minor's estate are closely comparable to those of the manager (other than the father) of a joint Mitakshara family. In the one case, the guardian, as in the other, the manager, is entitled to mortgage or sell the estate if justified by necessity or benefit.[6] Whether manager or not, the father is, however, further entitled by reason of a text to alienate the joint property for the payment of his antecedent debts.[7]

792. Clause (2) is an exception, and is justified by the nature of the business which brings the minor in trade relations with the world at large, who, in their ordinary commercial dealings, cannot be expected to investigate the status of the family and its requirements on each occasion. This was clearly pointed out by Sausse, C.J., of Bombay in a case,[8] which

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(1) *Albrecht* v. *Bathe*, 22 M.L.J. 247: 13 I.C. (M.) 453.

(2) *Mokoond* v. *Nobodip*, 26 C. 881 (886).

(3) *Saithri* (In re), 16 B. 307; *Sarat Chandra* v. *Forman*, 12 A. 213; *Reade* v. *Krishna*, 9 M. 391; *Besant* v. *Narayaniah*, 38 M. 807 P.C.

(4) *Hunooman Pershad* v. *Babooee*, 6 M.I.A. 393.

(5) *Ram Lal* v. *Lakhmichand*, 1 B.H.C.R. (App.) 51.

(6) *Hunooman Pershad* v. *Babooee*, 6 M.I.A. 393; *Gharibullah* v. *Khalaksingh*, 25 A. 407 P.C.; *Hurry Mohun* v. *Gonesh Chunder*, 10 C. 823 F.B.; *Nandan* v. *Harikishen*, 3 A. 535; *Bhemsingh* v. *Luchho*, (1882) A.W.N. 70; *Moharund* v. *Nafur Mondul*, 25 C. 823; *Nanti Chundar* v. *Bisheshwar*, 25 C. 505; *Rash Moni* v. *Soorjakanta*, 32 C. 832. There is no distinction in principle between a mortgage or a sale; *Mohammd* v. *Nafur Mondul*, 25 C. 820 (825).

(7) S. 159.

(8) *Ram Lal* v. *Lakhmichand*, 1 B.H.C.R. (App.) 51.

is now considered a leading case on the subject, and as such, has been since continuously followed.[1]

793. But the powers of a certificated guardian are not the same, but very much less, as enacted in S. 29 of the Guardians and Wards Act.[2] He cannot without the previous permission of the court transfer any part of the property of the ward or lease it for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor.[3] In a case in which the manager of a joint Mitakshara family was also the certificated guardian, the court held that his appointment by the court could not detract from his legal powers as manager, and that if he alienated the minor's property without leave of the court, the alienation would not be invalid, because it was made without leave, since by agreeing to become a certificated guardian, he did not cease to be the manager of the joint property.[4] But such a case is not likely to occur now, since it is no longer competent to the court to appoint a guardian in respect of a mere coparcenary interest.

What is legal necessity and benefit.

794. The question what constitutes a legal necessity is one which must depend upon the facts of each case. The performance of the father's funeral rites,[5] the payments of the father's debts,[6] the marriage expenses of the minor, and the purchase of jewels for bridal presents[7] the repairs to his property,[8] and maintenance of the minor,[9] are all instances of such necessity, to which many more could be added. So the guardian may alienate property for the benefit of the estate.[10] Where the mother entered into a contract for the sale of her minor son's immoveable property and the son having subsequently died, the mother succeeded to him as his heir, whereupon the other party sued her for specific performance of her contract of sale, the court threw out the suit holding that as the mother had no right to sell except for a legal necessity—and it was found against the plaintiff—and as she did not purport to sell the property as her own, the principle underlying S. 43 of the Transfer of Property Act was inapplicable, and the plaintiff had no equity which he could enforce against her in respect of a contract made by her for her minor son.[11]

795. The minor is bound when the transfer made on his behalf was either necessary or beneficial to him. A transfer may be necessary though it may not be beneficial to the minor as where his estate is sold to pay off an antecedent debt of the father or other debts incurred for purposes

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(1) *Joykisto* v. *Nityanund*, 3 C. 738; *Morrison* v. *Verchoyele*, 6 C.W.N. 429; *Sanka* v. *Bank of Burma*, 21 M.L.J. 620: 11 I.C. 79 (and cases cited therein); *Bishamber* v. *Fatehlal*, 29 A. 176; *Raghunathji* v. *Bank of Bombay*, 34 B. 72; *Ram Pertab* v. *Fooli Bai*, 20 B. 767.

(2) VIII of 1890.

(3) *Ib.*: in *Adhar Chand* v. *Kirtibash*, 6 I.C. 638, the *obiter* to the contrary overlooks this distinction.

(4) *Ram Autar Singh* v. *Chowdhuri Nursingh*, 3 C.L.J. 12; *Sham Das* v. *Umerdin*, 11 L. 312, F.B.

(5) *Nath Ram* v. *Chhagan*, 14 B. 562.

(6) *Murari* v. *Tayana*, 20 B. 286.

(7) *Kankipati* v. *Racherla*, (1911) 2 M.W.N. 477.

(8) *Adhar Chandra* v. *Kirtibash*, 12 C.L.J. 586: 6 I.C. 638; *Hurry Mohun* v. *Ganesh Chunder*, 10 C. 823 (829) F.B.

(9) *Soonder Narain* v. *Benud Ram*, 4 C. 76.

(10) *Mohamund* v. *Nafur Mondul*, 26 C. 820 (822); *Rajani Kanta* v. *Abinash Chandra*, 2 I.C. (C.) 366.

(11) *Rash Moni* v. *Surjakanta*, 32 C. 832 (836).

which the law regards as creating a just charge on the estate.[1] So a transfer may be beneficial to the minor though it may not be necessary.[2]

S. 38, T. P. Act, Compromise.

796. Moreover, the rule here stated is subject to the provisions of other laws; *e.g.*, S. 38 of the Transfer of Property Act.[3]

The guardian is equally entitled to make a compromise on behalf of his ward.[4]

Clause (2).

797. **Liability of a Trading Firm.**—The general rules and restrictions applicable to persons dealing with a minor or with his property do not apply to a case where the minor inherits an interest in a trading partnership. In such cases, the rule first laid down by Sausse, C.J.,[5] and consistently since followed,[6] defines the exact powers of the guardian or manager of such minor's property in the following terms:—

"Ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family; and we think that such a family can, by its manager, or its adult members, acting as managers, enter into copartnership with a stranger.

"In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to, and flowing out of, the carrying on of that trade, whether it be singly or with a copartner.

"The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of *bona fide* trade dealings, should not be held bound to investigate the status of the family represented by the manager, whilst dealing with him on the credit of the family property.

"Were such a power not implied, property in a family trade, which is recognized by Hindu Law to be a valuable inheritance, would become practically valueless to the other members of an undivided family wherever an infant was concerned, for no one would deal with a manager, if the minor were to be at liberty on coming of age to challenge, as against third parties, the trade transactions which took place during his minority.

"The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest, and the recognition of a trade, as inheritable property, renders it necessary for the general benefit of the family that the protection, which the Hindu Law generally extends to the interests of a minor, should be so far trenched upon as to bind him by acts of the family manager, necessary for the carrying on, and consequent

(1) *Kaihur Singh* v. *Roop Singh*, 3 N.W.P.H.C.R. 4; *Hanuman Persaud* v. *Babooee*, 6 M.I.A. 393; *Babaji* v. *Krishnajee*, 2 B. 666; *Sucaram* v. *Kalidas*, 18 B. 631; *Arunachala* v. *Chidambara*, 13 M.L.J. 223.

(2) *Vembu Iyer* v. *Srinivasa*, 17 I.C. 609.

(3) *Rajani Kanta v. Abinash Chandra*, 2 I.C. 366.

(4) *Sarabjit* v. *Indarjit*, 27 A. 203 (250); *Nirvanaya* v. *Nirvanaya*, 9 B. 365; *Natesa* v. *Rama*, (1911) 2 M.W.N. 145: 10 I.C. (M.) 221.

(5) *Ram Lal* v. *Lakhmichand*, 1 B.H. C.R. (App.) 51 (71, 72).

(6) *Joykisto* v. *Nityanund*, 3 C. 738; *Morrison* v. *Verchoyele*, 6 C.W.N. 429; *Sanka* v. *Bank of Burma*, 21 M.L.J. 620; 11 I.C. 79 (and cases cited therein); *Raghunathji* v. *Bank of Bombay*, 34 B. 72; *Bishambhar* v. *Fatch Lal*, 29 A. 176; *Jhiti Bai* v. *Jejmah*, 13 N.L.R. 109.

preservation of, that family property; but that infringement is not to be carried beyond the actual necessity of the case."

798. It has been, however, pointed in later cases that in such cases the liability of the minor must be confined to the extent of his interest in the firm and that his liability should not be extended to himself personally or to his other property unconnected with the firm.[1]

The subject will be found more fully set out in the sequel (**S. 144**).

799. The natural guardian of a minor must not enter into speculative or hazardous enterprises on behalf of his ward. And though he is entitled to continue the business of his ward, he must carry it on as a man of ordinary prudence avoiding obvious risks and probable losses. The minor's father in a case was a money-lender. His guardian continued the business, lending money to insolvent persons without security and subscribing to the capital of a new company. It appeared that, in the course of the money-lending business, he had to lend money to persons who failed but there was no proof of any misconduct or want of care or prudence. It was held that inasmuch as the guardian had acted to the best of his ability, the minor could not hold him liable for losses suffered by him by reason of his guardian's failure to recover the debts advanced, but as regards his subscription to the capital of a new Mill Company, the success of which was a mere matter of speculation, he had acted beyond the scope of his authority and the minor was entitled to recover Rs. 10,000 which he had subscribed to the capital in exchange for the shares which were made over to the guardian.[2]

78. Transfer by guardian when voidable.

(1) A transfer made by the guardian may be avoided by the minor, if it is wholly[3] or partially unsupported by necessity, or was not for the benefit of the estate:

(2) Provided that in the case of partial necessity or benefit, the alienee is entitled to restitution of the money paid for such necessity or benefit.[4]

(3) Provided further that where the bulk of the consideration is supported by legal necessity, the court may, instead of setting aside the transfer, order payment to the transferor of such consideration as is not supported by necessity or benefit.[5]

800. **Analogous Law.**—This section deals with two classes of transfers: (*a*) that made without any legal necessity, and (*b*) that which is to some extent supported by legal necessity. In the former case, the minor is entitled to avoid the sale and he is subject to no equity to refund the consideration paid to his guardian on his account.[6] In the latter case however, he is equitably bound to restore the benefit received by him[7] which may be charged on the estate he sues to recover from the transferee.[8]

(1) *Sanka* v. *Bank of Burma*, 21 M.L.J. 620: 11 I.C. 79.

(2) *Bansidhar* v. *Ganpatlal*, 3 C.P.L. R. 95.

(3) *Hunooman Persaud Panday* v. *Babooee*, 6 M.I.A. 393 (421); *Bunseedhur* v. *Bindeseree*, 10 M.I.A. 454 (474).

(4) S. 41, Specific Relief Act (I of 1877); *Bunseedhur* v. *Bindesseree*, 10 M.I.A. 454 (474).

(5) S. 41, Specific Relief Act (I of 1877).

(6) *Humooman Persaud Panday* v. *Babooee*, 6 M.I.A. 393 (421); *Bunseedhur* v. *Bindeseree*, 10 M.I.A. 454 (474).

(7) S. 41, Specific Relief Act (I of 1877); *Bunseedhur* v. *Bindesseree*, 10 M.I.A. 454 (474).

(8) *Bukshun* v. *Doothin*, 12 W.R. 337: *Pranchandra* v. *Karunamay*, 15 W.R. 268; *Kesar (Bai)* v. *Ganga*, 8 B.H.C.

A transfer by a certificated guardian is subject to the provisions of S. 31 of the Guardians and Wards Act.[1]

801. Restitution.—In either case where the transfer is set aside, the question arises and is covered by S. 41 of the Specific Relief Act,[2] which enacts that "on adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

802. The question then is what is the requirement of justice in such a case of cancellation. Now, a consideration for a sale may (*a*) be wholly paid, or (*b*) partially paid, the balance being payable and not paid; (*c*) it may be paid for necessity which is not proved, or, (*d*) is only partially proved; and lastly (*e*) it may be paid by a transferee *bona fide* after due enquiry, being satisfied that it was necessary, though in fact, it was not necessary.

803. In cases (*a*) and (*b*) where the whole or part of the consideration has been paid and the transfer is set aside, there can be no question of restitution if no part of the consideration was supported by necessity and there was no inquiry as mentioned in case (*e*). There is then no equity, since the transfer is wholly void and the transferee has to thank himself if he loses both the property and his money too; for he knew that he was merely dealing with a guardian and it was his duty to inquire into the necessity of the transfer. If, however, he did inquire and paid the money *bona fide*, being satisfied that the transfer was necessary, then the equitable rule enacted in S. 38 of the Transfer of Property Act[3] would come into play, and even if there was no necessity the court might still uphold his transfer.[4] But assuming that there was no inquiry and no necessity justifying the transfer to its full extent, then the court may or may not cancel the transfer. If for instance, the bulk of the consideration was utilized for purposes binding on the minor, the court would not cancel the transfer, though it will decree the sum paid otherwise than for legal necessity. Such was held to be the case where out of the consideration of Rs. 1,300 necessity was proved to the extent of Rs. 1,022.[5] But where out of the total consideration of Rs. 1,425 only a little more than a moiety was paid for necessity and the purchaser had given the vendor a promissory note for Rs. 525, and Rs. 138 were not proved to have been spent on a purpose binding on the minor's estate, the court set aside the whole sale conditional on the plaintiff paying to the vendee Rs. 762.[6] In another case, the court charged the debt against the land purchased for the minor.[7] In decreeing restitution the Court may award interest at a reasonable rate.[8]

R. (A.C.) 81; *Mirga Pana* v. *Saiad Sadik*, 7 N.W.P.H.C.R. 201; *Kuvarji* v. *Moti*, 3 B. 234; *Dattaram* v. *Vinayak*, 28 B. 181 (192); *Sivaya* v. *Munisami*, 22 M. 289; *Jagar Nath* v. *Lalta Prasad*, 31 A. 221 (227).

(1) VIII of 1890: *Tejpal* v. *Ganga*, 25 A. 59; *Giriraj* v. *Kazi Hamid Ali*, 9 A. 340; *Nizamuddin* v. *Anandi Prasad*, 18 A. 373 (375).

(2) I of 1877.

(3) IV of 1882.

(4) *See* Gour's Law of Transfer (6th Ed.).

(5) *Thalagara* v. *Thalagara*, 27 M.L.J. 132: 26 I.C. 178.

(6) *Rukmani* v. *Muthammal*, (1915) M.W.N. 8: 26 I.C. 489; *Kattapa* v. *Deivasigamani*, (1913) M.W.N. 795: 18 I.C. 27.

(7) *Jeladi* v. *Ponduri*, 47 M. 449.

(8) *Nur Baksh* v. *Rukum Singh*, 8 A. L.J. 764: 11 I.C. 764: *Muhamad Ismail* v. *Gaur Prashad*, (1916) P.R. 24; *Manashram* v. *Ahmed Hoosein*, 20 C.W.N. 63: 37 I.C. 380.

304. This is, of course, an equitable relief which the transferee may forfeit unless he had acted *bona fide*.[1] If he had colluded with the guardian or purchased the minor's estate at an undervalue, the court will refuse him the benefit of restitution. On the other hand, he need make no inquiry at all where the money is paid by him for a transfer duly sanctioned by the District Judge under S. 29 of the Guardians and Wards Act,[2] or which is otherwise proved to have been justified by necessity. Where a transfer does not affect the minor's interest, the latter cannot be heard to complain on the ground that it was made with reference to his property. So where the guardian mortgaged his property to the defendant and then sold the equity of redemption to the plaintiff who sued to redeem the prior mortgage, the court held that the minor could not complain of the sale to the plaintiff as not being for his benefit as his interest was not concerned.[3] But this case does not appear to have been correctly decided, for the sale of the equity of redemption was the sale of the minor's property in which the minor was certainly concerned and the propriety of which he was entitled to challenge.

805. Limitation.—The question of limitation applicable to a minor suing to set aside a transfer made by his guardian is governed by Art. 44 or Art. 91 of the Limitation Act[4] which allows him 3 years from the date the ward attains majority. The applicability of the shorter period of limitation, prescribed in Art. 44 depends upon what is meant by the word "guardian" and upon the nature of the transfer made by him, that is, whether it is voidable or void, for if it is the latter, then the transfer being a nullity there is no necessity to avoid it,[5] but since the possession of the transferee would, in such a case, be adverse, the minor must sue to set it aside within the ordinary period prescribed in Art. 144 enlarged to the extent allowed in S. 6. Now, since a guardian is entitled to alienate his ward's property only in the case of necessity, or when it is for the minor's benefit, it follows that this must again depend upon the personal law of the party to whom that provision is applied. In the case of a Mahomedan, where the elder brother of a minor devisee mortgaged his property and it was found that the brother was not authorized either by the will or by the Mahomedan Law to act as a guardian of the minor, the Privy Council held the mortgage a nullity and one which the minor was not bound to set aside within the period provided in Art. 44. This article would be obviously inapplicable, and if so, the only other article applicable would be Art. 144. There would be a varying period of limitation even in the case of a Hindu according as the transfer is wholly or partially unsupported by legal necessity, since in the former case, the guardian, being wholly incompetent to convey his ward's estate, the transfer would be void and not voidable merely, as in the other case, where it is only partially unsupported by legal necessity.

806. Again, where such guardian is also a coparcenary manager, the same question may assume a greater importance. But these distinctions would be immaterial if regard is had to the fact that a transfer, whoever might have made it for a minor, is only voidable at his instance on proof of certain facts without which it is as much good against the minor as

(1) *Sultan Singh* v. *Hashmat*, (1915) P.R. 109: 29 I.C. 804.
(2) *Akhil Chandra* v. *Girish Chandra*, 21 C.W.N. 864: 41 I.C. 302.
(3) *Vithoba* v. *Sakharam*, 4 C.P.L.R. 128.
(4) IX of 1908.
(5) *Hanooman Pershad* v. *Babooee*, 6 M.I.A. 393; *Mata Din* v. *Sheikh Ahmad*, 34 A. 213 P.C.

against a third party.[1] But this is not conclusive, since the question still remains whether an alienation by the manager can be regarded as an alienation *qua* guardian within the meaning of Art. 44 of the Limitation Act. That it cannot be so regarded, appears to be the view of the Privy Council,[2] though in some earlier cases that Article was held to be applicable.[3]

807. But though it is clear that the authority of a guardian is more limited than of a *karta* or manager of a joint Mitakshara family, still since they have both the same right of alienation, the question of limitation does not depend upon the distinction that exists between a manager and any other guardian, but on the language of Art. 44. But of course, a transfer purported to be made by one who professes to be a guardian but is neither a *de facto* nor a *de jure* guardian would necessarily be a nullity and the minor is not bound to set it aside before recovering possession of his property.[4] Such would be the case where the alienation is made by a coparcener who is not the manager.[5] The question of limitation may be considered from the following standpoints: (*a*) Where the transfer is made by a relation such as a coparcener but who is not a *karta* of the family or guardian of the minor; (*b*) Where the transfer is made by a *de facto* guardian authorized to transfer for necessity, but who had transferred in fact without any necessity; (*c*) Where such transfer is made not by the guardian but by the manager of a coparcenary of which the minor was at the time a member; and (*d*) Where it is made by either the *karta* or the guardian for partial necessity.

808. In case (*a*) it is now settled by the Privy Council that the transfer is a nullity and the minor, is therefore, not bound to cancel it either under Art. 44 or 91, and that his suit is subject to the ordinary limitation prescribed in Art. 144 enlarged to the extent provided in S. 6.[6] But the courts are not agreed as to the limitation applicable in the other cases. In case (*b*) it has been held in some cases that the transfer is equally void, and that, therefore, it need not be set aside,[7] whereas it has been held in others that the transfer is, in every case, good till it is avoided by the minor, and that therefore, it is voidable and not void and as such, the minor is, as regards limitation, subject to Art. 44 or Art. 91.[8] It must be con-

(1) *Mata Din* v. *Sheikh Ahmed Ali*, 34 A. 213 (222, 223) P.C.; *Imambandi* v. *Mutasuddi*, 45 C. 878 (903) P.C.; *Sardar Shah* v. *Haji*, (1908) P.L.R. 182; *Rajab Ali* v. *Wajir Ali*, 1 Pat.L.J. 188, 34 I.C. (P.) 85.

(2) *Jawahir Singh* v. *Udai Parkash*, 48 A. 152 (158) P.C.; *Anandappa* v. *Totappa*, 17 Bom.L.R. 1137; *Dwyanu* v. *Vishnu*, 27 Bom.L.R. 495: 87 I.C. 721; *Thayammal* v. *Kupanna*, 38 M. 1125; *Unni* v. *Kunchiamma*, 14 M. 426; *Kamakshi* v. *Ramasami*, 7 M.L.J. 131; *Hussan* v. *Raja Ram*, 10 N.L.R. 133: 26 I.C. 813; *Asaram* v. *Ratan Singh*, 12 N.L.R. 12: 32 I.C. 242.

(3) *Doraiswami* v. *Nondiswami*, 38 M. 118; *Arumugam* v. *Pandigam*, 40 M.L.J. 475: 62 I.C. 630; *Brojendra* v. *Prosunna Kumar*, 24 C.W.N. 1016: 59 I.C. 589; *Fakirappa* v. *Radiappa*, 42 B. 626; *Kolhu* v. *Bel Singh*, 17 N.L.R. 183: 66 I.C. 303: (1922) N. 201.

(4) *Mata Din* v. *Sheikh Ahmad*, 34 A. 213 P.C.

(5) *Banwarilal* v. *Daya Sunker*, 13 C.W.N. 815.

(6) *Mata Din* v. *Sheikh Ahmad*, 34 A. 213 P.C.; *Banwarilal* v. *Daya Sunker*, 13 C.W.N. 815; *Sardar Shah* v. *Haji*, (1908) P.L.R. 182; *Rajab Ali* v. *Wazir Ali*, 34 I.C. (P.) 85: 1 Pat.L.J. 188.

(7) *Kamakshi* v. *Ramasami*, 7 M.L.J. 131; *Unni* v. *Kunchi*, 14 M. 26; *Ramansar* v. *Raghubar*, 5 A. 490; *Lal Hurro Prasad* v. *Dasaruth*, 25 A. 909; *Abdul Rahman* v. *Sukh Dayal*, 28 A. 30 (32); *Bachchan Singh* v. *Kamta Prasad*, 32 A. 392; *Kalyansingh* v. *Pitambur*, 13 A.L.J. 94; *Shree Shankar* v. *Ram Shewak*, 24 C. 77 (Art. 91 inapplicable); *Balappa* v. *Chanbasappa*, 17 Bom.L.R. 1134; *Husen* v. *Rajaram*, 10 N.L.R. 133; *Asaram* v. *Ratansingh*, 12 N.L.R. 12; *Thayammal* v. *Kuppanna*, 38 M. 1125.

(8) *Satish Chunder* v. *Chunder Kant*,

fessed that in some of these cases[1] the distinction between the unauthorizad transfer of a guardian and the transfer of an unauthorized guardian was not kept in view, but it is a distinction which cannot be ignored. Nor is the distinction between a mere guardian and a *karta* on this point immaterial.[2] As regards case (*d*) the courts are agreed on the shorter limitation on the ground that since the authority to transfer depends on the necessity or benefit, its insufficiency may make the transfer voidable, being improper; but it cannot render it null and void *ab initio*.

Natural guardian may contract or compromise.

79. The guardian of a minor may enter into a contract or compromise[3] on behalf of his ward, acknowledge his debt before it is barred by time[4] and do all other acts which are reasonable and proper for the protection of his property and for his benefit.[5]

809. **Analogous Law.**—The powers of a *Karta* of a joint *Mitakshara* family must be distinguished from those of a guardian and of the latter, when he is a *de facto* guardian and when he is appointed by a will or by the court. Both the natural and *de facto* guardians possess far larger powers than the certificated guardian whose powers are defined by S. 27 and limited by S. 29 of the Guardians and Wards Act. But for the special limitation, all the three would possess the same powers. He is entitled to make any contract or compromise on behalf of his ward provided it was necessary and done in the *bona fide* interest of the ward.[6]

Promissory Note Acknowledgment.

810. As such, the guardian is entitled to execute or renew a promissory note on behalf of his ward, and acknowledge any liability not barred by limitation.[7] He is also now, declared to be "the agent duly authorized" for the purpose of Ss. 20 and 21 of the Limitation Act.[8]

811. To a certain extent the powers of a *de facto* and a *de jure* guardian are identical.[9] Both must, generally speaking, deal with the ward's property, as a man of ordinary prudence would deal with it, if it were his own, and they may do all acts which are reasonable and proper for the realization, protection or benefit of the property[10] or of the minor[11]

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3 C.W.N. 278; *Shama Chundra* v. *Godadhar*, 13 C.L.J. 277; *Krishna Dhoni* v. *Bhagowan*, 34 I.C. (C) 188; *Ranga Reddi* v. *Narayana*, 28 M. 1811; *Vemul Pallai* v. *Maganti*, 49 M. 768.

(1) *Thayammal* v. *Kuppanna*, 38 M. 1125 (1126).

(2) *Mahableshwar* v. *Ramchandra*, 38 B. 98.

(3) *Hurry Mohan* v. *Ganesh Chunder*, 10 C. 823 (829, 830) F.B.; *Nirvanaya* v. *Nirvanaya*, 9 B. 365.

(4) S. 21 Lim. Act (IX of 1908).

(5) *Hurry Mohan* v. *Ganesh Chunder*, 10 C. 823 F.B.; *Subramania* v. *Arumuga*, 26 M. 330; *Sundararaja* v. *Pattana*, 17 M. 306; *Sonu* v. *Dhondu*, 28 B. 330; *Krishna* v. *Nagamani*, 39 M. 915; *Nirvanaya* v. *Nirvanaya*, 9 B. 365 (a case of compromise).

(6) *Hurry Mohan* v. *Ganesh Chunder*, 10 C. 823 (829, 830) F.B. *Jagat Narain* v. *Mathura Das*, 50 B. 969 F.B., test of a prudent owner dealing with his own property—dissented from in *Hemraj* v. *Nathu*, 59 B. 525 F.B.—benefit of the minor is the true test for which the application of the money is not to be disregarded.

(7) *Sobhanadri* v. *Sriramulu*, 17 M. 221; *Kailasa* v. *Ponnukannu*, 18 M. 456; *Chinnaya* v. *Gurunatham*, 5 M. 169 F.B.; *Subramania* v. *Arumuga*, 26 M. 330; *Muthuswami* v. *Annamalai*, (1937) M. 1; *Nathuram* v. *Shoma*, 14 B. 562; *Amrit* v. *Manik*, 10 B. 512; *Annapagauda* v. *Sangadigyappa*, 26 B. 221; *Bati Maharani* v. *Collector*, 17 A. 198.

(8) Act IX of 1908, *Annapagauda* v. *Sangadigyappa*,, 26 B. 221 (234).

(9) *Tulsidas* v. *Vaghela*, 57 B. 40 F. B.; *Seetharamanna* v. *Appiah*, 49 M. 768 *obiter* Mahomedan Law—*Imambandi* v. *Mutsuddi*, 45 C. 878 P.C., explained in *Seetharamanna* v. *Appiah*, 49 M. 768 (772).

(10) S. 27, Guardians and Wards Act, (VIII of 1890).

(11) *Hemraj* v. *Nathu*, 59 B. 525 F. B. (application of the money material).

or for the maintenance of their ward.[1] The guardian is entitled to borrow money on the credit of his ward's estate for any purpose binding on the minor, such as for instance, the performance of the funeral rites of his father[2] or to pay off his father's debts,[3] to marry and maintain the minor, to purchase jewels to be presented to the minor's wife during marriage,[4] and in fact, on any of the heads of what is known as legal necessity.[5] But he cannot make his ward personally liable by a simple contract debt, nor can such debt be recovered out of his estate unless it is charged[6] except where it is incurred for the minor's necessaries, or is a trade debt which is subject to a different rule.[7] A guardian of a minor cannot bind his ward's estate except by a document purporting to bind it.[8] But where the guardian acquires new property by borrowing a loan, the minor cannot keep the property and repudiate the loan.[9] *A* purchased certain properties out of monies belonging to a common fund in which *B* had a share, the latter permitted *A* to use the money on condition that it should be repaid with interest, failing which *A* should transfer to him a proportionate share of the property purchased out of common fund. On *A's* failure to repay the money, which had become timebarred, *B* sued *A* and a minor member of his family for specific performance of *A's* agreement. The minor pleaded *A's* incompetency to make the contract so as to bind his interest in the joint property, but the court decreed the claim holding that he could not be heard to repudiate *A's* contract when he has had the benefit of the new property acquired by *A* for a period of 12 years. If the contract had affected joint family property, his interest therein could not have been so affected, but, being a new acquisition, he could not retain the benefit and repudiate the contract, the specific performance of which was decreed.[10]

812. Minor's Necessaries.—The guardian is empowered to bind the minor personally by contracts entered into for necessaries of the minor or of his estate.[11] Such liability is not affected by the fact that the loans were advanced at the instance of the guardian. "His contract on his behalf might be ineffectual like one entered into by himself, but the liability to discharge debts incurred for necessaries would remain. The necessity for them would determine whether or not he was bound to repay them, and not we think the reasonable belief of the borrower that they were for necessary purposes."[12] Where the promise is to pay money which has been expended for necessaries, the estate of the minor may be liable not on the promise but because the money had been supplied.[13]

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(1) *Nandan Singh* v. *Harkishen Singh*, 3 A. 535.

(2) *Nathu Ram* v. *Chhagan*, 14 B. 562.

(3) *Murari* v. *Tayana*, 20 B. 286.

(4) *Kankipati* v. *Racherla*, (1911) 2 M.W.N. 477.

(5) *Padma Krishna* v. *Nagamani*, 39 M. 915; *Suchit* v. *Harnandan Singh*, 12 Pat. 112.

(6) *Ranmalsinghji* v. *Vadilal*, 20 B. 61; *Bhawal Sahu* v. *Baijnath*, 35 C. 320.

(7) *Bhawal Sahu* v. *Baijnath*, 35 C. 320 (329); *Ram Partap* v. *Foolibai*, 20 B. 767; *Sakrabhai* v. *Maganlal*, 26 B. 206 F.B.; *Raghunathji* v. *Bank of Bombay*, 34 B. 72; *Jhijibai* v. *Tejmal*, 13 N.L.R. 100 (110, 111).

(8) *Batchu* v. *Vajula*, 36 M.L.J. 29 F.B.; *Padma Krishna* v. *Nagamani*, 39 M. 915; *Subramania* v. *Arumuga*, 26 M. 330; *Tukaram* v. *Ramchandra*, 20 B. 767; *Surendra Nath* v. *Atal Chandra*, 34 C. 892.

(9) *Sohan Lal* v. *Atal Nath*, 56 A. 142 (157).

(10) *Sohanlal* v. *Atal Nath*, 56 A. 142 (157).

(11) Contract Act, (X of 1872), S. 68; *Bhawal Sahu* v. *Baijnath*, 35 C. 320 (323, 324).

(12) *Ranmalsinghji* v. *Vadilal*, 20 B. 61; *Juggessur* v. *Nilambur*, 3 W.R. 217; *Bhawal Singh* v. *Baijnath*, 35 C. 320 (323).

(13) *Sundararaja* v. *Pattanathusami*, 17 M. 336; *Bhawal Sahu* v. *Baijnath*, 35 C. 320 (328).

813. The term "necessaries" must be understood with reference to Hindu Law. For instance, the marriage of a sister is "necessary" within the meaning of Hindu Law for which a minor's estate would be liable for the payment of money borrowed from another.[1] To a Hindu marriage is a prime necessity, and a *samskar* (a religious sacrament)[2] the expense of which is a charge on the inheritance.

Meaning of Necessaries.

814. Guardian may Acknowledge Debt.—Though the guardian cannot revive a barred debt,[3] he is competent to acknowledge it on behalf of his ward before it becomes time-barred.[4] His authority to revive a barred debt depends upon the language of S. 25 of the Contract Act which enforces "a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf to pay wholly or in part a debt, of which the creditor might have enforced payment, but for the law of limitation of suits."[5] The position then depends upon whether the guardian is the minor's agent "generally or specially authorized" to promise to pay barred debts. Even where he is the manager of a joint family, he would appear to possess no power to revive such debt,[6] and *a fortiori*, a guardian cannot possess such power. [*Cf.* Section 132, *post.*]

The guardian cannot acknowledge a debt on behalf of his ward after he is dead.[7]

80. A guardian cannot contract in the name of a ward, so as to impose on him a personal liability.[8]

Personal contract by guardian.

***Explanation.*—Nothing herein applies to the acknowledgment of liability made by the guardian on behalf of his ward**[9] **or a liability arising by way of indemnity or otherwise than under the contract.**[10]

Illustrations.

(*a*) *A* the guardian of his minor ward *B* executes a bond for him. *B* is not liable.

(*b*) But if, in the last illustration, the bond was executed for necessaries supplied to the minor, the latter's estate would be liable, not under the bond, but by way of reimbursement, as provided in section 68 of the Indian Contract Act.

(*c*) *A* executes a *hundi* on behalf his ward *B* in the ordinary course of *B's* ancestral business as banker. *B's* estate is liable, being a trade debt which carries with it mutual right and obligation incident to such business.[11]

(*d*) *A* executes a bond in favour of *C* for a sum of money necessary to pay a paramount charge on his ward *B's* estate. *B's* estate is liable to *C*, as *A* was entitled to indemnity for saving *B's* estate from forfeiture or sale, and *C* was entitled to be subrogated to *A's* right.

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(1) *Nandan Prasad* v. *Ajudhia Prasad*, 32 A. 325 (328) F.B.; *Vaikuntam* v. *Kallabhiran*, 23 M. 512.

(2) *Kameswara* v. *Veeracharlu*, 34 M. 422.

(3) *Virrappa* v. *Muthusami*, 7 M.L.T. 383; *Subhanarayana* v. *Narendra*, 19 M. 255; *Bramhadin* v. *Ram Lakhan*, 3 O.W.N. 980.

(4) S. 21, Lim. Act; *Sobhanadri* v. *Sriramulu*, 17 M. 221; *Subramania* v. *Arumuga*, 26 M. 330; *Annapagauda* v. *Sangadigyappa*, 26 B. 221; *Bhawal* v. *Baijnath*, 35 C. 320 (324); *Narendra* v. *Raicharan*, 29 C. 647; dissenting from *contra* in *Wajbun* v. *Kadir Buksh*, 13 C. 292.

(5) S. 25 (3), Contract Act.

(6) *Chinnaya* v. *Gurunatham*, 5 M. 169 F.B.; *Daikat* v. *Appaji*, 20 B. 155; *Gopalnarain* v. *Muddomutty*, 14 B.L.R. 21. But an executor or an administrator possesses such authority—*Tilakchand* v. *Jitamal*, 10 B.H.C.R. 206; *Jethibai* v. *Putlibai*, 14 Bom.L.R. 1020 (1027).

(7) *Yellappa* v. *Desayappa*, 13 B. 218, (in which the Nazir had acknowledged a debt after his ward was dead).

(8) *Waghela* v. *Sheikh Masludin*, 11 B. 551, P.C.

(9) *Annappa Gauda* v. *Sangadigyappa*, 26 B. 221 F.B.

(10) *Ramajogayya* v. *Jagannathan*, 42 M. 185 F.B.; see *illus.* (*e*).

(11) *Satyanarayana* v. *Mallayya*, 58 M. 735 F.B.

(*e*) *A* executes a bond in favour of *C* for a sum of money necessary to pay for his ward *B's* sister's marriage. *B's* estate is liable to *C* on an obligation arising under his personal law to pay for the marriage of his sister.[1]

815. Analogous Law.—This rule is based upon a decision of the Privy Council[2] decided upon the following facts: The guardian mother, on behalf of her minor son, sold certain villages rent free, personally covenanting both for herself and for her minor son, to indemnify the purchaser should any one disturb the purchaser, or should the Government assess any rent on the property sold. The Government having assessed the villages to revenue and cesses, the purchaser sued the minor after he came of age upon the covenant, and his defence was that his guardian could not legally enter into any covenant so as to make him at any time personally liable—a contention which the Privy Council upheld, holding that it was so under the English Law, and as there was no rule of Hindu Law, "the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English Law, if found applicable to Indian society and circumstances." They then added: "They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her power so far as she purported to bind her ward."[3] The same principle underlay the decision in another case in which one Ganga, father of a boy, delivered him to one Durga who promised to educate him and appoint him his heir. He brought him up and dying intestate, his widow contested his right to inherit, and the Privy Council upheld her contention holding that there was no completed contract between Ganga and Durga, as Ganga could not make an agreement which should legally bind his son on attaining majority to remain with Durga, which was the sole consideration for Durga's promise to constitute him his heir.[4] But in such a case, where a minor comes to court to have an account taken as between himself and an agent, the latter is entitled to deduct the advances made to the guardian for the benefit of the minor.[5]

816. Limits of the Rule.—In another case, the Privy Council held that it was not "within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property," and that as the minor was not bound by the contract, there was no mutuality, and that the minor, on reaching majority, could not obtain specific performance of the contract.[6] This case does not extend the doctrine of incapacity to contract any further than illustrating the rule that a minor is not only not liable on his guardian's contract made on his behalf, but he is not entitled to ratify it on attaining majority. Such contract is, in short, void and not merely voidable at the option of the minor.

817. Then, again, even a contract in which a minor is only jointly liable would be enforceable, though not personally against the minor. Such was the case of the defendants, some of whom were minors who had agreed to let their interest to the plaintiffs, who sued them all for specific perform-

(1) *Ramajogayya* v. *Jagannadhan*, 42 M. 185 (196) F.B.

(2) *Waghela* v. *Shekh Masludin*, 11 B. 551 P.C.; *Tukeeram* v. *Ramachandra*, 2 N.L.R. 25; *Jhitbai* v. *Tajmai*, 13 N. L.R. 109; *Kashi Prasad* v. *Akleshwar*, 58 I.C. (P.) 22; *Rajkumar* v. *Mirza*, 5 Pat.L.J. 239: 55 I.C. 214.

(3) *Waghela* v. *Shekh Masludin*, 11 B. 551 (556) P.C.

(4) *Lala Narain* v. *Lala Ramanuj*, 20 A. 209 P.C.

(5) *Surendra Nath* v. *Atul Chandra*, 34 C. 892 (895).

(6) *Sarwarjan* v. *Fakhruddin*, 39 C. 232 (237) P.C.

ance, which the court decreed holding the contract good and for the benefit of the minor.[1] It would seem that the rule does not invalidate contracts made in the ordinary course of management of the ward's property, relating thereto.[2] The rule means no more than this that the guardian cannot make any *contract* so as to impose on his ward a personal liability and not that he cannot do any *act* entailing such liability on his ward. And even as regards his contract, while the disqualification remains, the ward may yet be liable, not under the contract, but independently of it, as where the promise is to pay money which has been expended for necessaries, in which case the estate of the minor may be liable, not on the promise, but because the money has been supplied[3] (§ 813).

818. Apart from such obligation it is now settled that a minor inheriting an ancestral trading business will be bound by contracts made by his guardian or manager of the business on behalf of his firm to the extent of the assets of the business.[4] This liability is no exception to the rule that a guardian has no power to bind his ward by a personal contract. It is in the nature of indemnity to the guardian who becomes personally liable on his contract which is transferred to his creditors. This is based on the principle of subrogation which permits the creditor to step into the shoes of the guardian to enforce the right which the latter had against the minor's estate. But a guardian must not invest the manager with powers larger than are reasonably proper for carrying on the business; and where, as a consequence of giving such powers, the guardian has become involved in liablity for the fraud of the agent, the guardian has no right of indemnity against the assets of the minor, nor are the creditors entitled to claim such right through the guardian.[5] On the same principle, money borrowed by the guardian for the payment of land revenue for which the minor was liable as lambardar, was held to be legally recoverable from the minor's estate, although he was not personally liable therefor.[6] So in a simple mortgage executed by the guardian of a minor, it was held competent to the court to pass a supplementary personal decree in accordance with the provisions of Or. XXXIV, Rule 6 of the Code of Civil Procedure limiting its execution to his assets.[7]

Then again, while the guardian may not *contract* there is nothing to prevent him from acknowledging a debt due from the minor and it is agreed that he can do so.[8] (§ 830).

819. Though the guardian cannot enter into a personal covenant on behalf of his ward, there is no law to prevent him from charging his estate.[9]

Charge distinguished.

Karta or guardian of coparcenary.

81. (1) Where the minor is a member of a joint family governed by the Mitakshara law, the father, and in his absence, the elder brother or other senior male member of the family, is entitled to the manage-

(1) *Lal Gopal* v. *Khoroorian Zemindari*, 16 C.W.N. 297: 13 I.C. 673.

(2) *Mg. Po Thwe* v. *Ma Baw*, 4 Bur. L.J. 272: 13 I.C. 373.

(3) *Walter* v. *Everard*, (1891) 2 Q.B. 369; *Ranmal Singh* v. *Vadilal*, 20 B. 61; *Juggessur* v. *Nilambur*, 3 W.R. 217; followed in *Bhawal* v. *Baijnath*, 35 C. 320 (328); *Sundararaja* v. *Pattanathusami*, 17 M. 306.

(4) *Krishnamurthi* v. *Bank of Burma*, 35 M. 692; *Sanyasi* v. *Krishnadhan*, 49 C. 560 P.C.

(5) *Krishnamurthi* v. *Bank of Burma*, 35 M. 692; *Ramajagayya* v. *Jagannadhan*, 42 M. 185 (191, 192) F.B.

(6) *Umar Hayet* v. *Devi Das*, (1910) P.W.R. 5: 5 I.C. 590.

(7) *Jiwan Das* v. *Janki*, 65 I.C. (N.) 53.

(8) *Annapagauda* v. *Sangadigyappa*, 26 B. 221 (232) F.B.

(9) *Ranmalshingji* v. *Vadi Lal*, 20 B. 61 (74); *Jagannath* v. *Mirza*, 5 Pat.L.J. 239: 55 I.C. 214.

ment of the whole coparcenary property including the minor's interest.[1]

(2). But there is nothing in the Mitakshara law to preclude the appointment of a guardian of the person of such minor,[2] though not of his property by the court.

820. Analogous Law.—It will be seen from S. 88 that a guardian can be appointed only of the separate property of a minor. As a member of a Mitakshara joint family, a minor coparcener has no separate property of his own for which a guardian could be appointed. Being a member of the joint family his property is subject to the law of the management of coparcenary property. So long as he remains joint he is bound to submit to its joint management. Even if the property be mismanaged, the remedy is a suit for partition,[3] and not the appointment of a guardian of his interest. As the Privy Council observed: "It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all and that, therefore, a guardian, if appointed, would have nothing to do with the family property"[4] (§ 857).

821. But of course, there is nothing in law to prevent the court from appointing a guardian of the person of a minor,[5] although he may continue to be a member of the joint family. And in two cases, the court even appointed the Mitakshara father as the guardian of the minor son's property, though the latter had no property of his own, in order to enable the father to realize better value for the property he was about to sell. But such appointment was justified in the exercise of the Court's inherent jurisdiction, and independently of the provisions of the Guardians and Wards Act.[6]

Clause (2).

As to the rights and liabilities of a manager, see *post* under "Joint Family."

82. (1) The husband is the lawful guardian of his minor wife and is entitled to require her to live with him irrespective of her infancy.[7]

Husband his wife's guardian.

(2) After the husband's death, the guardianship of her person devolves on the husband's relations in preference to her paternal relations.[8]

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(1) *Gharibullah* v. *Khalak Singh*, 25 A. 407 (416) P.C.

(2) *Virupakshappa* v. *Nilgangava*, 19 B. 309 F.B.; *Brijbhukandas* v. *Ghashiram*, 59 B. 316 F.B.

(3) *Mahadev* v. *Loshman*, 19 B. 99.

(4) *Gharibullah* v. *Khalak Singh*, 25 A. 407 (416) P.C.; *Jhabbu Singh* v. *Ganga Bishan*, 17 A. 529; *Bandhu Prasad* v. *Dhirai*, 20 A. 400; *Gurja* v. *Moher Singh*, (1896) A.W.N. 30; *Jagannath* v. *Chunnilal*, (1933) A. 180; *Sham Kuar* v. *Mohanwnda*, 19 C. 301; *Virupakshappa* v. *Nilgangava*, 19 B. 309 (where all the previous cases on the point are referred to); *Bindajee* v. *Mathurabai*, 30 B. 152; *Ramachandra* v. *Krishnarao*, 32 B. 259; *Kajigar* v. *Maru*, 32 M. 139; *Murlidhar* v. *Harilal*, (1906) P.L.R. 165; *contra* in *Manilall*, (*In re*), 25 B. 353, which must now be deemed to be overruled by the Privy Council.

(5) *Virupakshappa* v. *Nilgangava*, 19 B. 390; *Jambagathachi* v. *Mannarsami*, 11 M.L.W. 596: 57 I.C. 678.

(6) *Mani Dall Hurgovan*, (*In re*), 25 B. 353; *Hari Narain Das*, (*In re*), 5 O.C. 141 (144).

(7) Manu, IX-2, 3; *Navanit Lal* v. *Purushottam*, 50 B. 268.

(8) Narad, XIII-28, 29; *Kesar* v. *Ganga*, 8 B.H.C.R. (A.C.) 31.

822. **Analogous Law.**—Both Manu and Narad declare the dependence of the wife upon her husband and his own paternal relations.[1] The husband's right to guardianship of his wife was recognized by the early text writers,[2] and cases.[3] Even in one later case the High Court reversed the District Judge's appointment of the widow's brother and appointed her husband's sister's son as her guardian in consonance with Hindu Law.[4] But the court now is not likely to yield to *a priori* legal right without reference to the welfare of the minor.[5]

823. The husband, even if he be a minor,[6] is the lawful guardian of his minor wife in preference to her parents[7] and other relations, unless he is precluded by the usage of his caste from such a custody until his wife attains puberty.[8] This is the established rule of Hindu Law,[9] and is recognized in the Guardians and Wards Act.[10]

824. Clause (2) is consequential on her renouncing her father's *gotra* and becoming affiliated as a member of her husband's family.[11] The subject has already been considered on the preceding pages to which the discussion here must be regarded as merely supplementary.

825. Though the husband has naturally the right of guardianship over his wife, it is a right which might, at any moment, be challenged by an application made under the Guardians and Wards Act, when the question of his unfitness must be considered by the court. Where the husband has failed to obtain the custody of his wife by civil suit he should not be appointed a guardian as it would then give the husband relief in a summary proceeding which he had failed to obtain in a regular suit.[12]

826. In this case, the wife aged 16 who had become a convert to Mahomedanism refused to return to her Hindu husband who failed in a suit to obtain restitution of conjugal rights. He thereupon resorted to an application under the Guardians and Wards Act, but the Court refused to assist him in evading the consequence of a decree by appointing him the guardian of his wife's person, which, it held, would be otherwise not in the interests of either party and would, on the other hand, lead to mutual unhappiness, since the wife would be treated as an outcast in her husband's home, and the husband was not likely to extend to her the affection, which, as a wife, she had the right to expect.[13]

(2) Of De facto Guardians.

83. A person, not a *de jure* guardian, who, being interested in the minor, assumes charge of his property for purpose of management, possesses the same

Powers of a de facto guardian.

(1) *See* § 770 *ante* Manu, IX-2, 3; Narad XIII, 28, 29; 33 S.B.E. 196 cited in Dayabhag XI-64, (Quoted in Hindu Code, 3rd Ed., § 974, p. 510).

(2) Mac. H.L., II-203.

(3) *Kishen Mohan* v. *Khetter Moni*, 2 Hay 196; *Kisar* v. *Gunga*, 20 W.R. 207; *Navanti Lal* v. *Purushottam*, 50 B. 268.

(4) *Khudi Ram* v. *Bonwarilal*, 16 C. 584.

(5) *Navanti Lal* v. *Purushottam*, 50 B. 268.

(6) S. 21, Guardians and Wards Act, (VIII of 1890).

(7) *Amba* v. *Shrinivasa*, 26 C.W.N. 369 P.C.: 68 I.C. 754.

(8) Such is the practice in the Madras Presidency; *Armuga* v. *Viraraghava*, 24 M. 753.

(9) *Sumtosh* v. *Gera Pattuck*, 23 W. R. 22; *Katteeram* v. *Gendhenee*, ib., p. 178: *Boolchand* v. *Janokee*, 24 W.R. 228: 25 W.R. 386; *Surjyamoni* v. *Kal Kanta*, 28 C. 37 (45).

(10) Ss. 19 (*a*), 21, Guardians and Wards Act, (VIII of 1890).

(11) Mac.H.L., Vol. I, Ch. VII; Vol. II, Ch. VII; *Kesar* v. *Ganga*, 8 B.H. C.R. (A.C.) 31; *Khater Monee* v. *Kishen Mohun*, 2 Hay 195; *Khudi Ram* v. *Bonwarilal*, 16 C. 584.

(12) *Bhagwana* v. *Ramchand*, (1911) P.L.R. 231: 11 I.C. 145.

(13) *Bhagwana* v. *Ramchand*, (1911) P.L.R. 231: 11 I.C. 145.

rights of alienation thereof as a *de jure* guardian.[1]

Illustrations.

(*a*) *A*, the natural guardian of a minor *B*, alienates his property for legal necessity or for the benefit of *B* or of his estate. The alienation binds *B*.

(*b*) *A*, a distant relation of the minor, *B* acts as his guardian, and as such; alienates his property for legal necessity or for the benefit of *B* or of his estate. The alienation binds *B*.[2]

827. Analogous Law.—All guardians may be classed as—

GUARDIAN.

De Jure. *De facto.*

(1) Natural.
(2) Testamentary.
(3) Certificated.

The rights and duties of a certificated guardian are those specified in sections 20-37 of the Guardians and Wards Act. But those of the other three, namely, natural, testamentary and a *de facto* guardian are limited by Hindu Law, which (except as regards the father) permits of an alienation made by them on his behalf for legal necessity or benefit of the minor or of his estate. As the Privy Council observed in a leading case: "Under the Hindu Law, the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge, had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title."[3]

Mahomedan Law Different.

828. It will be observed that in this respect Mahomedan Law offers no analogy, but rather presents a contrast; since under that law a *de facto* guardian has no recognized position, being regarded as no better than an intermeddler who may, as such, incur liability; but can confer no right by his alienation of his ward's property. The one inquires who made the alienation; the other why it was made. As the Privy Council observed: "It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was, therefore, necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a *de facto* guardian. He may by his *de facto* guardianship assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."[4] But their Lordships were careful to observe that they were not deciding whether a sale by a *de facto* guardian, if made for

(1) *Hunooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393.

(2) *Kundan Lal* v. *Beni Prasad*, 13 L. 399; *Sheo Govind* v. *Ram Adhin*, 8 Luck. 182.

(3) *Hanooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393 (412, 413); *Amrit* v. *Manik*, 10 B.H.C.R. 79; *Keshav* v. *Daulat Ram*, (1891) B.P.J. 147; *Arunachala* v. *Chidambara*, 13 M.L. J. 223; *Adhar Chandra* v. *Kirtibash*, 12 C.L.J. 586: 6 I.C. 638; *Gunga Pershad* v. *Phool Singh*, 10 W.R. 106; *Dorab Ally* v. *Abdool Azeez*, 4 C. 229; *Ram Chunder* v. *Brojonath*, 4 C. 929 F.B.; *Mohanund* v. *Mafur Mondul*, 26 C. 820; *Thayammal* v. *Kuppanna*, 38 M. 1125; *Kalliappa* v. *Deivasigamani*, (1913) M. W.N. 795: 18 I.C. 27; *Omar Hayat* v. *Devi Das*, (1910) P.W.R. 5: 5 I.C. 590; *Jago* v. *Oodal*, 4 N.L.R. 20 (24).

(4) *Mata Din* v. *Ahmad Ali*, 34 A. 213 (222) P.C.; followed in *Imambandi* v. *Mutsaddi*, 45 C. 878 (892) P.C.

necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, was altogether void or merely voidable.[1] But it was assumed that it would be either one or the other, merely because the transfer, though supported by necessity, was made by an unauthorized person. This distinction between the two systems appears to have been ignored in some cases in which an alienation by a Hindu *de facto* guardian was treated as *ipso facto* void.[2] But the different structure of Hindu society with its joint family, unknown to Mahomedan Law, gives to a *de facto* guardian of a minor a position identical with that acknowledged in a *de jure* guardian.[3] Where the latter is the father, he, moreover, possesses greater right of alienation, in that he is permitted even greater latitude, and may transfer his son's estate for his own antecedent debts, not illegal or immoral. The subject is a part of the joint family law and will have to be discussed more in detail in the sequel (Ss. 149-169).

829. **Personal Rights.**—But this is so only as regards the minor's property. As regards his personal rights, *e.g.*, his marriage, the *de facto* guardian has not the same power as his *de jure* guardian. And so it has been held that the father of a married minor girl, being neither her natural nor legal guardian, cannot act as her "representative" within the meaning of S. 32 (*b*) of the Registration Act, so that any deed of the minor presented by him for registration and registered is not validly registered.[4]

830. **Acknowledgment by De Facto Guardian.**—As the status of a *de facto* guardian is recognized by law, he must be deemed to be a "legal guardian" within the meaning of S. 21 (1) of the Limitation Act; and as such, he can enlarge limitation by his payment or acknowledgment.[5] In one case it was held that a payment made by the eldest brother of certain minors could not save limitation, when their mother, their natural guardian, was alive.[6] But a minor may have both a natural and a *de facto* guardian, in which case they would be both classed as legal guardians within the meaning of law.

831. **Officious Intermeddler Excepted.**—The position assigned by Hindu Law to a *de facto* guardian does not extend beyond a relation or friend interested in the minor, who from love and affection to him assumes superintendence of his estate. It excludes an officious intermeddler with his estate. In the Privy Council case, the *de facto* guardian was the mother of the minor Zemindar who denied her competency to mortgage his estate, and even averred that, being a *pardanashin* lady with no business experience, her affairs were practically in the hands of her agents who treated the Zemindari as if it were her own, and who, describing herself as "proprietor" and "heir," charged the estate, from which her son, on

(1) *Mata Din* v. *Ahmad Ali*, 34 A. 213 (222) P.C.

(2) *Husen* v. *Rajaram*, 10 N.L.R. 133: 26 I.C. 813; *Sunder* v. *Shiaman*, 68 I.C. (L.) 731, following *Mata Din* v. *Ahmad Ali*, 34 A. 213 P.C.; *Mayna Bibi* v. *Banku Behari*, 29 C. 473, (both cases of Mahomedan *de facto* guardians).

(3) *Hanooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393; *Vemulapallai* v. *Maganti*, 49 M. 768; *Bai Kunthi* v. *Adhar Chandra*, 92 I.C. 727; (1926) C. 653; *Kesheo* v. *Jagannath*, 22 N.L.R. 5, F.B., 92 I.C. 121: (1926) N. 81, (powers of alienation *qua de facto* manager). But may not the management be only an incident of guardianship? *Sheikh Muhamed* v. *Ramchandra*, 90 I.C. (N.) 74; *Lalchand* v. *Narhar*, 89 I.C. (N.) 896; *Narayan* v. *Dharma*, (1925) N. 134; *Lakhmichand* v. *Khushaldas*, 18 S.L.R. 230: (1925) S. 330.

(4) *Amba* v. *Shrinivas*, 26 C.W.N. 369 P.C.

(5) *Tirupayya* v. *Mullidi*, 25 M.L.J. 428: 19 I.C. 362.

(6) *Bireshar* v. *Ambica Charan*, 45 C. 630 (633, 634) a *de facto* guardian is "guardian" within the meaning of Ss. 4

attaining majority sought exoneration, whereupon the Privy Council said: "Had the Rani intruded into the estate wrongfully, and even practised deception upon the Court of Wards, by putting forth a case of joint proprietorship in order to defeat the claim of a Court of Wards to the worship, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection, then, to the Rani's assumption of proprietorship, in order to get the management into her hands does not really go to the root of the matter, nor necessarily invalidates the charge."[1] In other cases, the *de facto* manager was a relation, *e.g.*, the mother,[2] the stepmother,[3] or the grandmother[4] but relationship is not necessary. For instance, the father is not necessarily the legal guardian of his illegitimate child but his *de facto* guardianship could not be repudiated on that ground. On the same ground, the guardianship of the natural father of an adopted son,[5] or of a married female would be easily recognized.

But a person who is not attached to the minor by ties of affection or other recognized affinity, but assumes charge of his estate, is no better than an intermeddler with his estate, for which he would be accountable to him as a trustee *de son tort* for the period of his intermeddling.[6]

832. **De Facto Guardian's Power.**—The powers of a natural and a *de facto* guardian are said to be the same as those of a legal guardian[7] (§§ 793, 809). But in order to vest a person with the right of a *de facto* guardian, there must be some course of conduct in that capacity, otherwise a person who has for several years never intermeddled with the property of his ward, but suddenly takes upon himself to sell his property, cannot be described his *de facto* guardian, since he is merely his guardian *ad hoc*.[8] Any act done by a *de facto* guardian would be equally binding on the minor if it is supported by necessity or benefit of the minor.[9] Such for instance, would be an alienation made by the guardian for repairs of the minor's property or other case of proved necessity.[10]

Guardian must act as such.

84. A guardian cannot bind his ward by an act not purported to be done on his behalf.[11]

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(2) and 7 (2) of the Guardians and Wards Act, *Wallace Sitha Boi* v. *Wallace Radha Boi*, 36 M.L.J. 189: 51 I.C. 236.

(1) *Hanooman Pershad Pandey* v. *Mt. Babooee*, 6 M.I.A. 393 (413).

(2) *Soonder* v. *Bennud*, 4 C. 76; *Arumugum Chetty* v. *Vellaichami*, 37 M. 38.

(3) *Jago* v. *Oodal*, 4 N.L.R. 20 (24, 25).

(4) *Mohamud* v. *Nafur Mondul*, 26 C. 820. In *Odhar Chandra* v. *Kirtibash*, 12 C.L.J. 586: 6 I.C. 638, the alienation was by the grandmother of a married female whose husband was her *de jure* guardian.

(5) *Ganga Prasad* v. *Hara Kanta*, 15 C.W.N. 558: 7 I.C. 234.

(6) Cf. *Baroda Prosad* v. *Gajendra Nath*, 13 C.W.N. 537: 1 I.C. 289; *Dhanpat* v. *Mahesh Nath*, 24 C.W.N. 752: 57 I.C. 805; *Damodar* v. *Dayal*, 11 Bom.L.R. 1187: 4 I.C. 283.

(7) *Adhar Chandra* v. *Kirtibash*, 12 C. L.J. 586. (588); 6 I.C. 638; *Sham Chandra* v. *Gadadhar*, 13 C.L.J. 277; Mahomedan Law different—*Mata Din* v. *Ahmad Ali*, 34 A. 213 (222) P.C.; *Ganpat* v. *Bissessor Lal*, 8 N.L.J. 110: (1923) N. 230; *Tulsidas* v. *Vaghela Raisingji*, 57 B. 40 F.B.

(8) *Harilal* v. *Gordhan*, 51 B. 1040.

(9) *Amrit* v. *Manik*, 12 B.H.C.R. 79; *Keshav* v. *Doulat Khan*, (1891) B.P.J. 147; *Arunachala* v. *Chidambara*, 13 M.L.J. 223; *Siddick* v. *Mhd. Hushum*, (1916) M.W.N. 341: 37 I.C. 728; *Arumugum* v. *Vellaichami*, 37 M. 38; *Adhar Chandra* v. *Kirtibash*, 12 C.L.J. 586; 6 I.C. 638; *Kundan Lal* v. *Beni Pershad*, 13 L. 399.

(10) *Adhar Chandra* v. *Kirtibash*, 12 C. L.J. 586; *Muthusami* v. *Annamalai*, (1937) M. 1.

(11) *Indu Chunder* v. *Radha Kishore*, 19 C. 507 (513) P.C.

833. **Analogous Law.**—This rule is founded on the principle that a guardian cannot be permitted to act on his own account with the chance of transferring his obligations to the minor if he finds it to his advantage to do so.[1] Such was the case of the mother who had taken a lease, which she surrendered during the minority of her adopted son, against whom the lessor sued for its rent. It did not appear that the mother had taken the lease *qua* guardian of her minor son. The suit against the son was launched on the ground that he had ratified it on coming of age which could not be proved. The Privy Council held that the plaintiff could not bind the minor on the ground that he had taken the lease through his mother, because the mother's *Kabuliyat* did not purport to be on his behalf, or to bind his estate.[2]

834. The fact that his estate had been benefited by the transaction is immaterial, for, as observed by the Privy Council: "It is not in every case in which a man has been benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay."[3] But the principle of this case only applies to cases where it is doubtful in which capacity the guardian had purported to act. Where, therefore, the guardian had no estate of his own, the court held that the conveyance could not be impeached on the ground that the guardian had omitted to mention that he was acting for his ward.[4] But the contrary has been laid down in other cases in which it has been held as established law that a guardian cannot bind his ward's estate except by a document purporting to bind it.[5] If, therefore, the bond was executed by the guardian in his own name, and it was sought to prove that it had been executed for the minor, the court held that it was not open to it to go behind the terms of the bond for the purpose of construing it: "In our opinion, when a third person enters into dealing with the guardian of a minor, and advances money for necessaries of the minor or for the benefit of the estate, and takes a bond for the debt from the guardian, the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt."[6]

835. The rule must then be merely confined to cases of uncertainty, and not to those of defective conveyancing; that is to say, cases in which though the transaction was nominally with the guardian in his own name, but it was in reality with him as representative of the minor.[7]

836. **Guardian's Tort.**—The minor is not, of course, liable for a tort committed by his guardian, unless it is committed in connection with the management and for the benefit of his estate.[8]

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(1) *Indu Chunder* v. *Radha Kishore*, 19 C. 507 (513) P.C.

(2) *Indu Chunder* v. *Radha Kishore*, 19 C. 507 (512, 513) P.C. To the same effect. *Gadgappa* v. *Apaji*, 3 B. 237 (240).

(3) *Ram Tutvel Singh* v. *Biseswar*, 23 W.R. 305, cited and applied in *Gadgappa* v. *Apaji*, 3 B. 237 (240); *Babur Ali* v. *Sookeea*, 13 W.R. 63.

(4) *Murari* v. *Tayana*, 20 B. 286; *Ghasi Ram* v. *Binia*, 1 N.L.R. 66.

(5) *Ranmalsingji* v. *Vadilal*, 20 B. 61; *Bhawal Sahu* v. *Baijnath*, 35 C. 320 (329).

(6) *Bhawal Sahu* v. *Baijnath*, 35 C. 320 (329).

(7) *Hanooman Persad Panday* v. *Mt. Babooee*, 6 M.I.A. 393 (412); *Girja Nath* v. *Upendra Nath*, 20 I.C. (C.) 241; contra *Arumugam* v. *Vellaichami*, 37 M. 38.

(8) *Maharaj* v. *Paresh Nath*, 31 C. 839; *Sunu* v. *Dhondu*, 28 B. 330.

(3) *Of Testamentary Guardians.*

Father's power to appoint guardian by will.

85. (1) **A Hindu father may, by his will, appoint one or more persons to act as a guardian or guardians of his children after his death in respect of his separate property; and in so doing, he may exclude even the mother from her natural guardianship.**[1] **The mother, however, has not a similar power to appoint a guardian by will, though the court may pay regard to her wishes so expressed.**[2]

(2) Where more than one person are appointed guardians, unless the contrary is expressed or necessarily implied, it is competent to any of them to accept the office though the others may disclaim, or die.[3]

(3) Any guardian accepting office cannot resign at will.[4]

Explanation.—**A father has no power to appoint a testamentary guardian of his coparcenary property even where he was then the sole surviving adult coparcener.**[5]

837. **Analogous Law.**—The law of wills is novel to Hindu Law and has arisen out of the law of gifts. The father's power to appoint a guardian by will is, consequently, based on no textual authority, but is one corollary of his acknowledged parental power over his own children established by a long series of cases.[6] But in Madras, it was held that the father had no testamentary right to appoint a guardian to his son's joint estate over which he had then no power of disposal;[7] and that right cannot be exercised in respect of coparcenary property even where he is the sole surviving coparcener.[8] It is recognized that this may lead to inconvenience, and in the absence of any prohibition in Hindu law, it had swayed the court in acknowledging the validity of such appointment;[9] but the Bombay Full Bench have treated inconvenience as fit for removal by the Legislature and not by court.[10]

838. It has been stated before that Hindu Law regards the father, the son and the grandson as really a single person and the father's tes-

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(1) *Debanand* v. *Anandmani*, 43 A. 213; *Budhilal* v. *Morarji*, 31 B. 413.

(2) *Venkayya* v. *Venkata*, 21 M. 401.

(3) This clause is drawn from English law, being applicable to Hindus; *Eyre* v. *Shaftsbury* (*Countess*), 2 P.Wms. 102 (107).

(4) Drawn from English law, being equally applicable to Hindus; *Spencer* v. *Chesterfield* (*Earl*) Amb, 146; *Grays, Minors*, (*Re*), (1891) 27 L.R.Ir. 609; A guardian may however disclaim before acceptance, *Ex parte Champney*, 1 Dick 350; *O'Keefe* v. *Casey*, 1 Sch. & Lef. 106.

(5) *Chidambaram* v. *Rangaswami*, 41 M. 561 F.B.; followed in *Brij Bhukan Das* v. *Damodar*, 59 B. 316 F.B.

(6) *Railukhee* v. *Gokool*, 13 M.I.A. 209; *Pirthee Lal* v. *Doorgalal*, 7 W.R. 73 (75); *Bindaji* v. *Mathura*, 30 B. 152; *Durga* v. *Neelanumd*, 7 W.R. 74; *Budhi Lal* v. *Murarji*, 31 B. 413; *Ramchandra* v. *Krishna*, 32 B. 259; *Mahabaleshwar* v. *Ramchandra*, 38 B. 94 (103); *Chidambaram* v. *Veerappa*, 22 M.L.J. 380: 43 I.C. 865; *Moosala* v. *Kotamarti*, 44 M. 189; *Deba Nand* v. *Anand Mani*, 43 A. 213; contra *Chidambaram* v. *Rangasamy*, 41 M. 561 F.B.; *Deba Nand* v. *Anand Mani*, 43 M. 213.

(7) *Moosala* v. *Katamanti*, 40 M.L.J. 46; *Subbarayudu* v. *Subbanna*, 47 M.L.J. 765; *Kanagasabbai* v. *Ponnusami*, 21 I.C. (M.) 848; *Alagappa* v. *Mangathai*, 40 M. 672; *Chidambaram* v. *Rangaswami*, 41 M. 561 F.B.

(8) *Chidambaram* v. *Rangaswami*, 41 M. 561 F.B. followed in *Brij Bhukan Das* v. *Ghasi Ram*, 59 B. 316 F.B.

(9) *Mahableshwar* v. *Ram Chandra*, 38 B. 94.

(10) *Brij Bhukan Das* v. *Ghasi Ram*, 59 B. 316 (336) F.B., overruling; *Mahableshwar* v. *Ramchandra*, *Ibid.*

tamentary power of appointment may be treated as arising out of his right of management which he may provide for against his son's minority after his demise. The same power may be defended on the basis of justice, equity, and good conscience, in a matter upon which Hindu Law is silent. In any case, it is conceded, even in Madras, that the father's wishes are *prima facie* entitled to consideration, and may only be ignored if the paramount benefit of the minor warrants it. It is equally established that this power is inherent only in the father. It is not possessed by the mother,[1] and even as to the father, it is a power of nomination which he can only exercise in his will to take effect after his death. He cannot substitute another person to be a guardian in his place during his lifetime.[2] A person cannot appoint a guardian for any other relation, *e.g.*, a nephew.[3] And since as regards his capacity to make a will he is subject to the Indian Majority Act, it follows that he must be an adult within the meaning of that Act, before he is competent to give such testamentary directions.[4] Where, moreover, the father was himself subject to the Guardians and Wards Act,[5] then his incapacity to make a will or appoint a guardian for his children would be further prolonged till he has completed his 21st year.[6]

839. A father may, it is apprehended, appoint a guardian not only in respect of every child born, but one *en ventre sa mere* at his death, whether born or conceived before or after the date of appointment,[7] and the guardianship may be limited for any period before the minor attains his majority. But if the minor be a female, her guardianship will, ordinarily, cease on her marriage when her guardianship is naturally transferred to her husband.

840. Delegation of Authority.—The natural guardian may delegate his authority within limits. Where he allows another to assume complete control over the minor and his estate, the latter becomes a *de facto* guardian, but there is no delegation, which implies the transfer of his power to another to act for him to the extent of his transferred authority. So far as the alienation of the minor's estate is concerned, the question of the status of the transferor is not so material as the question of necessity. But in the exercise of personal rights, such as adoption or marriage, the question of delegation is material, for it has already been seen to what extent this is permissible by law.

841. The parents and natural guardians have at times to place their ward under the care and control of others for the purpose of education and training, in which case, the delegate assumes jurisdiction over the ward to the extent incidental to that purpose. Such delegation is revocable at any time, and must be revoked if it is used to the detriment of the children. The court within whose jurisdiction the children are found may equally revoke it, if sufficient cause is shown for its interference, especially when the parents have put it out of their power to interfere themselves for the protection of their children by sending them touring round the world in

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(1) *Venkayya* v. *Venkata*, 21 M. 401.
(2) *Besant* v. *Narayaniah*, 38 M. 807 P.C.
(3) *Dhanpat Ram* v. *Prem Singh*, (1911) P.L.R. 220: 12 I.C. 452.
(4) *Harduari Lal* v. *Gomi*, 8 A.L.J. 385, followed in *Golab* v. *Thakore Lal*, 36 B. 622.
(5) Act VIII of 1890.
(6) *Harduari Lal* v. *Gomi*, 8 A.L.J. 385.
(7) 17 Halsbury's L.E., 124.

charge of a stranger. In exercising its power, the court will consider not only the physical, but also the moral, and religious welfare of the child, construing the term "welfare" in its largest possible sense and doing what a wise parent, acting in the true interest of the child, would or ought to do.[1]

An agent appointed by the guardian is responsible to the latter. He is not, however, liable to account to the minor for his acts as agent on the principle of trustee *de son tort* which does not apply to him.[2]

(4) *Of Certificated Guardians.*

Appointment or declaration of a guardian by Court.

86. (1) Any relation or friend of a minor, or the Collector of the District in which the minor resides or has any property, may apply to the court for the appointment or declaration of a guardian, and the court may, on being satisfied that it would be for the welfare of the minor, subject to the rules herein stated, appoint or declare a guardian:[3]

(2) Where a guardian has been validly appointed by the father in his will, the court may not appoint or declare any other person as a guardian, until he has been removed for any of the reasons stated in S. 39 of the Guardians and Wards Act:[4]

(3) Where any parent, and in the case of a married female, her husband, is available, the court may not appoint any other guardian unless it finds that the parent or the husband, as the case may be, is unfit to discharge the obligations of that office:[5]

(4) Provided that in the case of other relations, the court will pay due regard to their natural claims to guardianship and may appoint any of them, or any other person found best fitted to promote the minor's welfare:[6]

(5) Provided further that where the minor has attained sufficient maturity of intelligence and discretion, it will consult him and pay due regard to his choice of a guardian but will not be bound to appoint his nominee if it finds any other person better fitted to promote his welfare:[7]

(6) An order passed by the court acting under the Guardians and Wards Act is final, and cannot be contested by suit or otherwise.[8]

842. Analogous Law.—Both the English and Hindu Laws declare the sovereign as the guardian of all infants.[9] The authority of the sovereign is now exercised by the courts whose authority, being *quasi* parental,[10] must be used in the best interest of the minor, whose welfare should be its paramount concern, subject only to the legal rights of persons whom the law acknowledges as the natural or preferential guardians.[11] But, in this respect, the Guardians and Wards Act is stated to have modified the pre-existing rule of Hindu Law which recognized an absolute

(1) *Pollard* v. *Rouse*, 33 M. 288. As to jurisdiction of the court, see *Besant* v. *Narayaniah*, 38 M. 807 P.C.
(2) *Ramanathan* v. *Muthia*, 43 M. 429.
(3) S. 8, Guardians and Wards Act.
(4) *Ib.*, Ss. 6 and 7.
(5) *Ib.*, S. 19, *Bhikno* v. *Chamela*, 2 C.W.N. 191.
(6) *Ib.*, S. 17.
(7) *Ib.*, S. 17.
(8) *Ib.* S. 48.
(9) Manu, VIII-27.
(10) *Skinner* v. *Orde*, 14 M.I.A. 309 (329).
(11) *Basanta* v. *Chedilal*, 40 C. 241; *Joshy Asam, In re*, 23 C. 290.

right in the father and the mother. The law now qualifies this absolute right by subordinating it to the minor's welfare.[1] But, nevertheless, it cannot ignore their claim. Their predominant right still remains, though, if they be unfit, the court is free to supersede them for a sufficient reason. But this is, in view of the statutory enactment, merely reduced to a rule of practice.

843. The Act merely saves the personal law so far as it relates to an appointment by the father,[2] and recognizes the predominant claims of the father and the husband whom it cannot appoint or declare, because they are the natural guardians, and in their place, it cannot appoint another guardian, unless they are declared to be unfit.[3] Clause (1) is based on S. 8; clause (2) on Ss. 6 and 7 (3); clause (3) partially on S. 19, and the rest on case-law; clauses (4) and (5) on S. 17, and clause (6) on S. 48 of the Guardians and Wards Act.[4]

844. The Guardians and Wards Act saves from its operation the Hindu personal law so far as it relates to any power to appoint a guardian of a minor's person or property, or both. It does not save any rule which, apart from appointment, vests the right of guardianship of one person over another. Consequently, it is competent to the court to remove a natural guardian, even though the father, and appoint another in his place,[5] the result being that a guardian may be appointed under the personal law independently of the Act or under the Act; but unless there has been such appointment, any party may have recourse to the provisions of the Act for such appointment. Now, since the right to appoint a guardian, apart from the Act, is held only to reside in the father when making a will, it follows that his right to appoint a guardian is only then absolute: otherwise the guardian, whoever he be, is always liable to be superseded by an appointment by the court under the Act.

Parents' claims.

845. But both under the Hindu as well as under the English Law, the claims of the parents to guardianship of their children are regarded as absolute. Consequently, where they are alive, their legal claims must be considered, and though they may be rejected for sufficient reason, they cannot be ignored. As between the parents, the father has undoubtedly an absolute right and the Act recognizes this fact in enacting that he must be appointed the guardian, unless he is found to be unfit. The Act does not define this term, but it is apparent that this unfitness must be relative to his duties as the guardian of his minor son.

Such has been held to be the case where the father had practically deserted his religion, and his object was to get his child converted to Christianity,[6] or where the father had got the child converted to Christianity and the mother after three years, applied with the object of getting her to renounce Christianity.[7]

846. Declaration or Appointment of Guardian.—The law of guardians is now consolidated in the Guardians and Wards Act, which

(1) *Bhikno* v. *Chamela*, 2 C.W.N. 191; *Murari Lal* v. *Saraswati*, 86 I.C. 226: 88 I.C. 576: (1925) L. 358.
(2) S. 6, Act VIII of 1890.
(3) *Ib.*, S. 19.
(4) Act VIII of 1890.
(5) *Bindo* v. *Shamal*, 29 A. 210.
(6) *Mokoondlal* v. *Nobodip*, 25 C. 881.
(7) *Albrecht* v. *Bathee*. 22 M.L.J. 247: 13 I.C. 453.

supersedes Hindu Law so far as it is not expressly or by necessary implication saved by it. The limits of this saving clause are set out in the last paragraph. Apart from those express exemptions, S. 17 enacts that "in appointing or declaring a guardian of a minor, the court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor." In other words, while the court has to pay due regard to the welfare of the minor it must do so "consistently with the law to which the minor is subject," which means that its order must not ignore the claims of the minor's legal guardians, though it is not bound to treat them as sacrosanct.

Clause (1).

847. Clause (1) is drawn from S. 8 of the Guardians and Wards Act,[1] which empowers any person desirous of being or claiming to be the guardian of the minor, or by any relative or friend of the minor, or the Collector of the District or other local area, within which the minor ordinarily resides or in which he has property, or the Collector, having authority, with respect to the class to which the minor belongs, to apply for the declaration or appointment of a guardian of his person or property, or both. This section disqualifies the court to appoint a guardian *suo motu* by requiring that its jurisdiction in the matter does not come into play unless it is moved by an application made under S. 7. Again, no application can be made under this section for the appointment of a guardian of the minor's property, unless he has some property of his own.[2] Consequently, no guardian is possible of a minor's coparcenary interest in the joint property of a Mitakshara family[3] (§ 847). Otherwise, the court may either *declare* a guardian, that is to say, declare a natural guardian to be a guardian under the Act, or it may appoint one. In either case, the certificated guardian must thenceforward act in accordance with the provisions of the Act.[4] The fact that he is also a natural guardian does not enlarge his statutory powers which supersede and qualify his natural rights.

848. It will be observed that the court is not bound to declare or appoint a guardian in every case, even though it is moved to do so. It is only empowered to act if it considers that its interference would be for the welfare of the minor. If this is once made clear, the fact that the minor had already a guardian, even so qualified as the father or the mother, would not prevent it from exercising its powers. The absolute right of the father and the mother has so far been subordinated by the Act to the minor's welfare.[5]

Clause (2).

849. Removal of Guardian.—But at the same time, the Act safeguards the parental right of the minor and provides that where a guardian has been validly appointed by the father by his will, the court shall not declare or appoint any other guardian until the former has been removed for any of the reasons stated in S. 39 of the Act,[6] or the will is found to be invalid.[7]

(1) Act VIII of 1890.
(2) *Ib.*, S. 84.
(3) S. 81, *ante*.
(4) As to which *see* Ss. 24-37 of the Act VIII of 1890.
(5) *Bhikno* v. *Chamela*, 2 C.W.N. 191.
(6) Ss. 6, 7 (3) and 39, Guardians and Wards Act (VIII of 1890); *Besant* v. *Narayaniah*, 38 M. 807 P.C.; *Subramanya* v. *Ammayee*, (1914) M.W.N. 414; 29 I.C. 740.
(7) *Shahu* v. *Hapoja*, 17 B. 560.

In so framing the Act, the intention of the Legislature was to recognize the testamentary guardian as *prima facie* qualified,[1] and unless he is removed for incapacity or abuse of his trust the court should not supersede him by appointing another guardian.

Clause (3).

850. Parent or Husband.—Following the same policy, the court must give effect to the personal law which recognizes the parents and husband of a married minor female as the minor's natural guardians who must be formally removed for unfitness before the court can declare or appoint any other guardian.

Father's Unfitness.

851. The unfitness of the father to be the guardian of his minor children must not be judged by the fact that some other person was better able to maintain and educate them. The question in this case is not whether the child would be better taken care of by another, but only in what way and to what extent the father had neglected his children. If he has habitually ill-treated, neglected or deserted them, waived his right or abdicated his office, by consigning them to another person for their maintenance or education, then the court will not assist the father in enforcing his parental right of custody and control, if it will be to the detriment of the child, or interfere with its education or be averse to its expressed wishes.[2] But the fact that the father, a goldsmith by caste, was keeping a concubine in his house is no ground for refusing him the guardianship of his children as that circumstance, though an objection, was not so serious and grave as to justify the supersession of the father's legal right.[3] In one case, after anxious consideration, an Allahabad Bench upheld the father's right to the guardianship of his daughter 11 years old whom he was about to marry to an old impotent man of seventy years.[4] But this case should not be regarded as a precedent.

Then again, on the rule that a right once vested cannot be divested, the Madras High Court negatived the right of the father who had renounced the world by becoming a *Sanyasi*, returning to his household to claim the custody of his daughters aged 14 and 16 with a view to prevent their early marriages.[5]

Grounds for Unfitness.

A person, otherwise eligible, cannot be condemned as unfit on the ground of his extreme youth,[6] or old age. The unfitness must be found by proving specific acts of mismanagement.[7]

Meaning of "Welfare."

852. The term "welfare" is used in this connection in its larger sense as implying a child's intellectual, physical, moral and religious well being.[8] But the ties of affection should not be disregarded as they are generally conducive to its well-being.[9]

(1) *Sami Row* v. *Elivatha*, 16 M.L.J. 357.
(2) *Joshy Assam, In re*, 23 C. 290 (296); *Mokoond Lal* v. *Nobodip*, 25 C. 881; *Besant* v. *Narayaniah*, 38 M. 807 P.C.
(3) *Kalidas* v. *Subbamma*, 7 M. 2.
(4) *Kanhai Ram* v. *Biddya Ram*, 1 A. 552.
(5) *Muthuswami* v. *Narayana*, 21 M. L.J. 202: 3 I.C. 393 (397).
(6) *Rangubai* v. *Gopal*, 5 Bom.L.R. 542.
(7) *Rindabai* v. *Girdharlal*, 4 Bom.L. R. 799.
(8) *McGrath, In re*, (1893) 1 Ch. 143 (148).
(9) Act VIII of 1890.

853. **Choice of a Guardian.**—After the parents the court cannot ignore the natural claims of other relations, though it is not bound to view them with the same solicitude.[1] And in a choice between fitness and propinquity, in the appointment of a guardian for the minor the former must prevail; the welfare of the child is the paramount consideration and should not be subordinated to the requirements of the law to which the minor is subject.[2]

Clause (4).

854. **Minor When Consulted.**—This clause is drawn from S. 17 (3) of the Guardians and Wards Act.[3] The court must in each case judge whether the minor is old enough to form an intelligent preference. A boy aged 14 and of course a girl aged 16, are old enough to form an intelligent preference which is strongly entitled to consideration.[4] And the court has given effect to the wishes of a boy aged 12 or 13 who preferred to live with his Hindu uncles to his father who had become converted to Christianity.[5]

Clause (5).

855. **Finality of Court's Order.**—The order of the court declaring or appointing or refusing to declare or appoint a guardian is appealable to the High Court,[6] which may otherwise exercise its general power of revision.[7] But such order cannot be otherwise contested by suit or by review.[8]

Clause (6).

87. One person may be appointed guardian of the person and another of the property: and two or more persons may be so appointed joint guardians of the person or of the property, or of both.[9]

Joint guardians of persons and property.

88. It is not competent to the court to appoint a guardian in respect of the property of a minor, or of an otherwise disqualified member of a joint family, of which he has no present separate possession.[10]

Court's jurisdiction when limited.

Illustrations.

(*a*) *A* is a minor member of a Mitakshara joint family. The manager of the family being his guardian, the court has no power to appoint another as *A's* guardian.[11]

(*b*) *A* is a minor. He has a title to his estate but no possession. The court cannot appoint a guardian in respect of such estate.[12]

856. **Analogous Law.**—This section lays down a general principle, that there cannot be a guardian of a minor's estate when it is not in his

(1) *Palku* v. *Budh Singh*, 18 C.W.N. 1198: 25 I.C. 112.

(2) S. 17, Guardians and Wards Act (VIII of 1890); *Neroda* v. *Bholanath*, 26 I.C. (C.) 300.

(3) Act VIII of 1890.

(4) *Saithri, (In re)*, 16 B. 307; followed in *Batoolal* v. *Ekstrand*, 12 N.L.R. 35.

(5) *Mokoond Lal* v. *Nobodip Chunder*, 25 C. 881; *Joshy Assam, (In re)*, 23 C. 290; *Albrecht* v. *Jellamma*, 22 M.L.J. 247.

(6) S. 47, Act VIII of 1890.

(7) *Ib.*, S. 48.

(8) *Farid* v. *Mitho*, (1906) P.R. 143; *Ralla* v. *Manglan*, (1912) P.R. 116: 15 I.C. 559; *Nagina Singh* v. *Sunder*, (1916) P.W.R. 24: 33 I.C. 987.

(9) Abstracted from S. 15, Guardians and Wards Act.

(10) *Gharibullah* v. *Khallak Singh*, 25 A. 407 (416) P.C.

(11) *Ib.*

(12) *Marquis of Salisbury, In re* L.R. 20 Eq. 527 (528).

possession. Consequently, as observed later, the court has no power to appoint a guardian in respect of the property of an undivided Hindu coparcener[1] (§ 857). As Sir G. Jessel, M.R., observed: "I doubt whether the court has any power of its own to appoint a guardian of the estate of an infant whose estate is not in possession, the jurisdiction existing for the sole purpose of taking care of an infant's present property."[2] Following this case, it has been held by the Allahabad High Court that the court had no jurisdiction to appoint a guardian of the estate of a minor where it was in the actual possession of trustees on his behalf, and the minor had no interest in the property beyond that of a beneficiary until he came of age, and that if the trustees misbehaved, it was open to the minor to obtain redress in a regular suit.[3] The same view has been followed in Calcutta in a case in which the minor's estate had become vested in the executor of his father's will, whereupon the court held that no guardian of the property of the minor could be appointed so long as the executorship continued.[4]

857. Minor Coparcener.—In a joint Mitakshara family, the father and in his absence, the senior member is the manager and, as such, the guardian of the interests of its several coparceners. On the death of the father, the mother becomes entitled to the guardianship of her children, but she is not entitled to the guardianship in respect of their proprietary interest in the joint family (§ **847**).

A guardian can only be appointed in respect of the minor's separate property. Where, therefore, he possesses only a coparcenary interest in the property of a joint Mitakshara family, no guardian is possible "on the plain ground that the interest of a member of such family is not individual property at all, and that, therefore, a guardian, if appointed, would have nothing to do with the family property."[5] In this view it is possible to appoint a guardian of all the joint property when all the coparceners are minors,[6] or the minor's property is *prima facie* separate, though his separation be disputed.[7] In the former case, as soon as any coparcener comes of age, the guardian must be removed, and all the joint property handed over to him, notwithstanding the fact that the other coparceners are

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(1) *Gharibullah* v. *Khallak Singh*, 25 A. 407 (416) P.C.

(2) *Marquis of Salisbury, In re*, L.R. 20 Eq. 527 (528).

(3) *Ashrafi Kuar* v. *Jai Narain*, 6 I. C. (A.) 861.

(4) *Ganga Prasad* v. *Hara Kanta*, 15 C.W.N. 558.

(5) *Gharibullah* v. *Khalaksingh*, (1903) 25 A. 407 (416) P.C.; *Alkajikar* v. *Naru*, 35 M.L.J. 504: 34 I.C. 766; *Kajikar Lakshmi* v. *Maru Devi*, 32 M. 139; *Ramkishen* v. *Beli Ram*, (1910) P. R. 23: 5 I.C. 887; *Murlidhar* v. *Harilal*, (1906) P.L.R. 165; *Kuri* v. *Bhanna Mal*, (1909) P.R. 43: 1 I.C. 745; *Virupakshappa* v. *Nilgangava*, 19 B. 309 F. B.; *Govind* v. *Moro*, (1875) B.P.J. 261; *Sakaram* v. *Motiram*, (1881) B.P.J. 24; *Vyankatrav* v. *Mahadev*, (1882) B.P.J. 226; *Samatsang* v. *Bavaji*, (1882) B.P. J. 404; *Chhagan* v. *Ramchandra*, (1886) B.P.J. 275; *Sheo Nundun* v. *Ghunsam*, 21 W.R. 143; *Ajhola* v. *Digambur*, 23 W.R. 206; *Gourah* v. *Gujadhur*, 5 C. 219 (220); *Sham Kuar* v. *Mahanda*, 19 C. 301; *Salikram* v. *Janka*, 40 C. 269; *Gurja* v. *Mohersingh*, 16 A.W.N. 31; *Mahanand* v. *Dasreth*, 46 I.C. 815; *Gourah* v. *Goujodhur*, 5 C. 219; *contra* in *Babaji* v. *Sheshgiri*, 6 B. 593; *Manilal, (In re)*, 25 B. 353. This case was followed *per* Greaves, J., in *Hari Narain Das, (In re)*, 50 C. 141 (144), in wheih the Court was held to possess the jurisdiction to appoint a guardian in special cases. But in neither of these cases was the Privy Council case cited or considered.

(6) *Sandoui* v. *Kamalakant*, 15 I.C. (C.) 434.

(7) *Gurappa* v. *Tayawa*, 40 B. 513.

minors.[1] In the latter case the procedure of the Guardians and Wards Act being only summary, it is competent to the party aggrieved by the order to sue and show that the property in respect of which the court has appointed a guardian, is still joint, and he may recover it as such.[2]

858. No Separate Possession.—A minor coparcener may hold possession of an item of the joint family property, *e.g.*, a house for convenience of enjoyment or residence. But since his possession is the possession of the family, and not exclusive, it would not justify the appointment of a guardian. This is in consonance with the rule of law that in a joint family the manager—and he alone—is entitled to possession of the joint estate, and no coparcener, major or minor, can arrogate to himself the right of separate possession and enjoyment of any item of the joint property. His possession, if any, by arrangement or acquiescence is peaceful, but is neither exclusive nor adverse to the other coparceners. If he is dissatisfied with this arrangement he has his remedy in partition.

859. "Otherwise Disqualified Member."—The reason applicable to a minor applies equally to a joint member otherwise disqualified, *e.g.*, one suffering from lunacy.[3]

Lunatic.

89. A guardian of the minor's person has the right to the custody of his ward during the period of his guardianship.[4]

Right to custody.

860. Analogous Law.—This is in accordance with S. 24 of the Guardians and Wards Act which enacts as follows:—

"A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires."

The next section empowers the court to restore the guardian's custody enforcing it, if necessary, by arrest of the ward and delivery to his guardian.

861. Apart from the Act, the natural guardian is entitled to the custody of his ward.[5] The Act has merely transferred to the court general powers to be exercised for the protection of the welfare and well-being of children.[6] Even apart from the Act, the High Court has, in its equitable jurisdiction, authority to interfere with the legal right of the guardian, even if he is the father, if he be an improper person.[7]

862. The question whether the guardian of a minor's person can enforce his right of custody of the minor by suit or an application under the Guardians and Wards Act has led to some conflict, it being held in some cases that such custody can be only obtained by an application made under the Act and

Suit for custody.

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(1) *Virupakshappa* v. *Nilgangava*, 16 B. 309 F.B.; *Bindaji* v. *Mathurabai*, 30 B. 150 (156); *Ramachandra* v. *Krishnarao*, 32 B. 252; *Samdani* v. *Kamala Kanta*, 15 I.C. (C.) 424.

(2) *Gurappa* v. *Tayawa*, 40 B. 513.

(3) *Parmadube* v. *Mahadeo*, 49 I.C. (Pat.) 907.

(4) S. 24, Guardians and Wards Act.

(5) *Holmes*, (*In re*), 1 Hyde. 99; *Carran*, (*In re*), 1 Hyde. 143.

(6) *Joshy Assam*, (*In re*), 23 C. 290.

(7) *Carran*, (*In re*), 1 Hyde 143; *Bhikus Koer* v. *Chamela*, 2 C.W.N. 191.

not by a suit,[1] which the other cases hold to be equally maintainable.[2] Of course, after the ward is once delivered into the guardian's custody, the court possesses the power to restore him into it.[3] But the question arises regarding his first delivery. It seems that no suit will lie for the custody of a minor, the only remedy being by an application under the Guardians and Wards Act, which was intended by the Legislature to be a complete code defining the rights and remedies of guardians and wards. The father is, therefore, not entitled to sue as guardian of the infant child, detained by the defendant who is the maternal grandmother of the child.[4] In an application under the Act, the court has to decide the question of custody with reference to the welfare of the minor irrespective of its age. "The practice in such cases is that if the children be of a proper age, the court gives them their election as to the custody in which they will be; if not, the court takes care that they be delivered into proper custody."[5]

90. The appointment of a guardian by court has the effect of cancelling a guardian otherwise appointed or constituted.[6]

Appointed guardian supersedes others.

Illustrations.

(*a*) *A* is a minor. The court appoints his eldest brother *C* as the guardian of his person and property. *B* the father who was his natural guardian until *C's* appointment, ceases to possess over *A's* person and property any right as such guardian.

(*b*) *A* the father of his minor son is appointed by the court as the guardian of his person and property. On his appointment *A* ceases to be his natural guardian and possesses only such rights and is liable to the extent provided in the Guardians and Wards Act (VIII of 1890).

863. Analogous Law.—The appointment of a guardian by court under the provisions of the Guardians and Wards Act[7] implies the removal of one not so appointed. If the ward had then a natural[8] or any other *de facto* guardian,[9] they would both vacate their office with the appointment of a certificated guardian; and it follows that as soon as a guardian is appointed by court, no other person can legally bind the minor's estate.[10] And if the person so appointed was his natural guardian his powers as such are reduced to those which he can exercise under the Act. He cannot be heard to defend a transaction on the ground that he was the natural guardian of his ward.

91. A transaction entered into with a minor is only voidable at the option of the minor.[11]

Minor's privilege is personal.

864. Analogous Law.—It has been held that minority is a personal privilege, and no one dealing with a minor can object to a transaction on

(1) *Shamlal* v. *Bindo*, 26 A. 594; *Utma Kuar* v. *Bhagawanta*, 37 A. 515; *Ghasita* v. *Wazira*, (1897) P.R. 10 F.B.

(2) *Sharifu* v. *Munakan*, 25 B. 574; *Achratlal* v. *Chimanlal*, 40 B. 600.

(3) S. 25, Act VIII of 1890; *Dayabhai* v. *Parvati*, 39 B. 438.

(4) *Sham Lal* v. *Bindo*, 26 A. 594; *Ghasita* v. *Mazvia*, (1896) P.R. 41 F.B.

(5) *K.* v. *Grenwhill*, 4 A. and E. 624 (639-642); *Saithri*, (*In re*), 16 B. 307 (cases reviewed).

(6) *Ramchander* v. *Chhedalal*, 2 A.L.J. 460 (64); *Arumugam* v. *Vellaichami*, 37 M. 38.

(7) *Ibid.*

(8) *Ram Chander* v. *Chhedalal*, 2 A. L.J. 460 (464); *Arumugam* v. *Vellaichami*, 37 M. 38; *Krishnamurthi* v. *Parvathi*, 6 M.L.W. 760: 42 I.C. 505; *Hanuman* v. *Ganesh Prasad*, 50 I.C. (N.) 580.

(9) *Sitha Bai* v. *Radho Bai*, 36 M.L. J. 189: 51 I.C. 238.

(10) *Arumugam* v. *Vellaichami*, 37 M. 38.

(11) *Hari Ram* v. *Jitam Ram*, 3 B.L. R. (A.C.) 426; *Sashi Bhushan* v. *Jadu Nath*, 11 C. 552; *Mahamed Arif* v. *Saraswati Debya*, 18 C. 256.

the ground of his incompetency, except the minor himself.[1] So where the minor conveyed his property to the plaintiff, after which the minor died and was succeeded by his father as his heir, the plaintiff sued for a declaration of his title against the father who pleaded the invalidity of his sale on the ground of the minority of his son, but the court held that the plea was one open only to the minor and could not be availed of by his heir.[2] Where the guardian enters into a contract prejudicial to a minor, the latter is entitled to sue him through his next friend.[3]

Minor's Fraud.

865. The question whether a minor is precluded from obtaining relief on a contract induced by him by a fraudulent statement that he was of age, is one which has often been agitated in the courts of this country with varying results. In some cases it was held that the minor was estopped under S. 115 of the Evidence Act,[4] while in others there was held to be no estoppel, the word "person" in S. 115 of the Evidence Act being construed to refer to one *sui juris* and not to a mere minor. This view has now been affirmed by the Privy Council in a colonial appeal from Penang, when their Lordships adopted the rule laid down by the King's Bench in a case to which they referred for their guiding principle.[5] In the English case, the plaintiff a moneylender had sued a minor for recovery of £400 and £75 for interest, on the ground that the defendant had contracted the loan by fraudulently representing himself to be of full age at the time. In dismissing the claim Lord Sumner passed in review the entire case-law on the subject, the result of which may be thus stated: (*i*) that where a minor has, by a fraudulent misstatement of his age, induced another to lend him money, the court cannot order its recovery on the ground of fraud, since the rule as to infant's immunity was made to safeguard the weakness of infant at large, even though here and there a juvenile knave skipped through; (*ii*) that, nevertheless, wherever it is possible to order restitution, the court will strive to effect it; where, for instance, the money can be traced to the possession of the minor, the court will order its return; (*iii*) and that apart from restitution, it cannot decree the claim *ex contractu* either on the ground of estoppel or fraud or other overwhelming equity destroying the privilege of infancy.[6]

Minor's liability under decree.

92. **(1) A minor is bound by the result of a suit to which he was a party, if he was properly represented therein:[7]**

(2) Provided that, if any decree be passed on a compromise, such compromise must be sanctioned by the court:[8]

(3) Provided further that no decree obtained by consent has any effect against the minor, unless it was consented to by his natural or certificated guardian:[9]

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(1) *Ibid.*

(2) *Mahamed Arif* v. *Saraswatie*, 18 C. 259; *Vithoba* v. *Sakaram*, 4 C.P.L.R. 128; *contra* in *Deedchand* v. *Chandkhan*, 11 N.L.R. 1 (3).

(3) *Abdulla* v. *Ramdas*, 2 N.L.R. 146.

(4) I of 1872.

(5) *Leslie, Ltd.* v. *Sheill*, (1914) 3 K. B. 607; followed in *Mahamed* v. *Yech*, 21 C.W.N. 257 (265) P.C.: 39 I.C. 401: 43 I.A. 256.

(6) *Lestle, Ltd.* v. *Sheill*, (1914) 3 K.B. 607.

(7) *Karamali* v. *Rahimbhoy*, 13 B. 137.

(8) Or. XXXII, R. 6.

(9) Or. XXXII, R. 7 (1).

(4) But no decree so obtained has any effect against him if it was secured by the fraud or misconduct of such guardian.[1]

Clause (1).

866. Analogous Law.—A suit may be instituted by a minor through his next friend. It is not necessary that he should sue only through his guardian, though it is the ordinary rule.[2] Where he is a defendant it is cast on the plaintiff to sue him through a guardian who must be appointed for that purpose by the court.[3] Ordinarily, it will appoint a certificated guardian[4] and in his absence the natural guardian[5] and failing him, any other person fit and willing to act as his guardian. Such person is designated the guardian *ad litem* and is then, for the conduct of the suit, subject to the provisions of Or. XXXII of the Code of Civil Procedure; and the direction of the Judge as therein stated. A suit relating to the estate or person of a minor, and for his benefit, has the effect of making him a ward of court, and no act can be done affecting the property of the minor unless under the express or implied direction of the court itself.[6]

867. Effect of Such Decree.—A decree obtained by fraud, and one brought about by the misconduct or negligence of the guardian, do not stand on the same footing; since fraud vitiates all transactions and so it does a decree which is void being a nullity. As Willes, J., said that "a judgment or decree obtained by fraud upon a court binds not such court, nor any other, and its nullity upon this ground, though it has not been set aside or reversed may be alleged in a collateral proceeding."[7] But all fraud does not render a decree nugatory. It is only so when the fraud is practised on the court and there is a total want of jurisdiction. Fraud in the proceedings giving rise to a mere irregularity in the exercise of jurisdiction is insufficient.[8] So is the proof of misconduct or negligence on the part of the guardian.[9] The decree so obtained is only voidable but not void.

The effect of a suit on the rights of a minor, not properly represented, belongs to the domain of general law to which reference should be made for further information.

The decree passed against the minor is subject to the provisions of that order final and as binding upon him as if he were an adult.

Clauses (2) and (3).

868. No guardian *ad litem* can compromise a suit without the leave of the court,[10] expressly recorded in the proceedings.[11] "Any such agreement or compromise entered into without the leave of the court so recorded shall be voidable against all parties other than the minor."[12] These provisions are

(1) *Ram Autar* v. *Mumtaz Ali*, 24 C. 853 P.C.
(2) Or. XXXII, R. 4 (2), C.P.C.
(3) *Ib.*, Or. XXXII, R. 3.
(4) *Ib.*, Or. XXXII, R. 3.
(5) *Ib.*, Or. XXXII, Rr. 3 (4) and 4 (2).
(6) *Karamali* v. *Rahimbhoy*, 13 B. 137; followed in *Doraswami* v. *Thungasamy*, 27 M. 377 (378).
(7) *R.* v. *Saddlers' Co.*, 10 H.L.C. 404 (431); 11 E.R. 1983; *see* S. 44, Evidence Act; *Hari Krishna* v. *Umesh Chandra*, (1921) Pat. 209: 62 I.C. 962 F. B.; *Krishna* v. *Ramamurti*, 16 M. 198: *Srirangammal* v. *Sandammal*, 23 M. 216 (218, 219); *Barkatunnissa* v. *Fazal Haq*, 26 A. 272.
(8) *Rajwant Prasad* v. *Ram Ratan*, 37 A. 485 P.C.
(9) *Krishna* v. *Bhagaban*, 34 I.C. (C.) 188; *Gottepati* v. *Gottepati*, 27 M.L.J. 486: 26 I.C. 16.
(10) Or. XXXII, R. 6 (1).
(11) Or. XXXII, R. 7, as to which see *Prag Das* v. *Girdhar Das*, 28 A. 35; *Lakhmana* v. *Chinnathambi*, 24 M. 326; *Atmaram* v. *Bhila*, 15 Bom.L.R. 223; 19 I.C. 424.
(12) Or. XXXII, R. 7 (2).

embodied in clauses (2) and (3). The guardian cannot consent to a decree or relinquish the minor's rights thereby secured without considering his benefit. The minor is not bound by such decree or compromise.[1]

Clause (4).

869. Clause (4) is based on the general principle of law which protects minors and other disqualified persons against the fraud, misconduct or negligence of their guardians.[2] But this rule should not be extended to guardians who are also managers of a joint Mitakshara family in which the minor has no separate interest. In such a case, the fact that he is joined as a necessary party does not entitle him to open a decree obtained against the joint family, unless there was anything to show that the other members had colluded to defraud him.[3]

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(1) *Ganesha* v. *Tuljaram*, 36 M. 295 P.C.; *Venkata* v. *Tuljaram*, 45 M. 298 (304) P.C.

(2) *Ram Autar* v. *Mumtaz Ali*, 24 C. 853 P.C.; *Rameshwar* v. *Ram Bahadur*, 34 C. 70 P.C.

(3) *Rameshwar* v. *Ram Bahadur*, 34 C. 70 P.C.; *Daya Shankar* v. *Hublal*, 37 A. 105; *Madari* v. *Har Dayal*, 13 O.C. 158; 7 I.C. 538; *Amarpal Singh* v. *Chhabraj*, 11 I.C. (O.) 105; *Ajudhia* v. *Mahabir*, 22 I.C. (O.) 923.

CHAPTER VII.

LAW OF MAINTENANCE.

870. Topical Introduction.—The law of maintenance is not based on any contract, but is evolved out of the right in property to which a person was *prima facie* entitled, but which he became disqualified from sharing, by reason of the nature of the estate, or his own disqualification, whether personal or sexual. Being thus excluded from participation in the estate, law afforded him the solatium of maintenance. The right of maintenance is, thus, not dependent on near relationship but on the existence, in the hands of the heir, of property upon which all dependent members of a joint family lay a claim.[1] Even where there is no joint family, the law of necessity enjoins on a certain person by reason of his jural relationship to another, the duty of maintaining him. Such is the duty of the husband and the father. It is the duty of the State to protect its infant population and that duty it casts upon those who are primarily responsible for bringing them into existence. This is the underlying principle of S. 488 of the Code of Criminal Procedure. Apart from that enactment, Hindu Law recognizes the necessity of maintenance founded upon the dictates of natural justice, sometimes supported by the theory of co-ownership,[2] personal identity,[3] moral duty,[4] or relationship, but in all cases it is ultimately traceable to the original fount of *jus naturale*, which the wisdom and experience of mankind has taught to be the best for the community, and the underlying principles of which are visible in the framework of the jurisprudence of every nation.

871. The close connection of maintenance with the law of person and property is everywhere visible in Hindu Law. In the second stage of social evolution, when the patriarchal family became transformed into a joint family, the growth of individual rights developed and altered the early notions of property. As it became divisible, it was seen that an equal division was not possible, both because the rights of all members were not equal, as also because some members were not equal, and also because some members by reason of their sex or deformity had not the same claim as others who contributed to the wealth and strength of the joint family. Subordinate rights became thus recognized, which, in some cases, naturally took the shape of maintenance grants, either as a substitute or as a solatium for the greater right to property. But being still a right which was intimately allied to the right of property, it became spoken of as a charge thereupon. But as legal concepts became more defined, it was perceived that a right might be closely connected with land and yet be separate from it. Such is the history of all debts, which at one time were regarded as charged both on the debtor and his land, till their relation to

(1) *Ramabai* v. *Trimbok*, 9 B. H. C.R. 283; *Savitri Bai* v. *Luxmi Bai*, 2 B. 573; *Apaji* v. *Gangabai*, *ib.*, p. 632; *Gopikabai* v. *Dattatray*, 24 B. 386 (392, 393).

(2) *Jamna* v. *Machul Sahu*, 2 A. 315 (317).

(3) *Srenath* v. *Probodh Chunder*, 11 C.L.J. 580: 6 I.C. 244.

(4) *Sidessury* v. *Janardhan*, 29 C. 557.

him and his land became more defined. Maintenance was also so regarded at one time. But it was then perceived that it did not possess even the certainty of a debt; for till its amount was ascertained and fixed, it was not even a debt. But even in the abstract, a claim for maintenance is no more a charge on property than the expenses of marriage, or other religious ceremonies. Debts due by a deceased person stand higher than other claims upon his estate, and yet debts are no charge upon specific property, unless expressly so made by a bond or a decree.[1] Nevertheless, being a right obtained in lieu of a right in property, it was an appropriate subject of a charge, and one which bears same relation to property. In the case of the wife, Yadnavalkya fixed one-third of the husband's estate as an appropriate solatium to a deserted wife by way of maintenance,[2] but as will be seen presently, such rigid necessity was fixed without regard being had to the demands of other claimants upon it. The law of maintenance is, consequently, almost wholly the law of leading principles, deducible from the decided cases, and these will now be set out.

93. **A person is personally bound to maintain the following persons,[3] namely:—**

Personal obligation to maintain certain relations.

(a) his wife so long as she remains under his roof and protection, or lives apart for a just cause;

(b) his minor sons, whether legitimate or illegitimate;

(c) his unmarried daughters;

(d) his aged father and mother.

872. **Analogous Law.**—The law of maintenance has been developed from the scanty texts, which enjoin on the father to support his sons, and on the first born to support his younger brothers,[4] while the husband is enjoined to maintain his wife, and the sons their aged parents.[5]

873. The wife's right to maintenance belongs to the law relating to husband and wife and has been already set out in that connexion (**S. 27**). Ordinarily, she is entitled to maintenance as she is liable to live with, and under the protection of, her husband and her right is not dependent upon any property or share possessed by him.[6] If she abandons him for a just cause, such as the leprosy of her husband,[7] his habitual cruelty or neglect[8] endangering her health or personal safety, then she

(a) **The Wife.**

(1) *Beer Chunder* v. *Raj Coomar*, 9 C. 535 (555).

(2) Ch. 1-76 (Mandlik), p. 171; Mayukh, XX (Mandlik), p. 153.

(3) Manu, IX-10, 8, Digest, Book V, Ch. VI, p. 400, cited and followed in *Savitri Bai* v. *Luxmi Bai*, 2 B. 592 (597).

(4) Manu IX-10, 8, quoted in the Hindu Code (3rd Ed.), 1057, pp. 544, 545.

(5) *Ib. see also* Digest VIII-38; *Narad* XIII-25, 26; 33 S.B.E., pp. 195, 196 (quoted in Hindu Code, 3rd Ed., 1057, p. 545).

(6) *Premkuvar* v. *Bhika*, 5 B.H.C.R. (A.C.) 209; *Bangaramma* v. *Bramhaze*, 31 M. 338; *Unnamalai* v. *Official Assignee*, 103 I.C. (M.) 869; *Shinappaya* v. *Rajamma*, 45 M. 812; *Sher Singh* v. *Sham Kuar*, 108 I.C. 175: 1928 L. 502.

(7) *Sri Raja Bommade Vara* v. *Naganna*, 87 I.C. 571: (1925) M. 757; reversed on facts *Naganna* v. *Rajya*, (1928) P.C. 187.

(8) *Ude Singh* v. *Daulat Kuar*, 16 L. 892.

would be entitled even to a separate maintenance.[1] But an occasional outburst of temper or assault does not justify her in deserting her husband. The fact that the husband had married another wife is no ground for leaving him;[2] still less will she be justified in leaving him in order to live in adultery.[3] On the other hand, if she lives with her husband, she is entitled to maintenance even though she be unchaste.[4] If a wife after leaving her husband without just cause is willing to return to live with him, but he declines to receive her, he must allow her a separate maintenance so long as she is willing, and he is not.[5]

874. The question whether her right is conditional and contingent upon her chastity admits of no doubt,[6] since the husband is entitled to condone her act and maintain her so long as she lives under his protection, or to turn her out, in which case she is not entitled to sue for maintenance from her husband, if at the time of the suit she is living in adultery and persists in that vicious course.[7] This was a case in which the wife, though she had not given birth to an illegitimate child was still actually living in adultery at the time of her suit. If, however, she had withdrawn from her vicious course when she sued, then she could not be deprived of maintenance on the ground of her unchastity[8] (§ **908**).

875. The wife may live apart from her husband for a just cause already set out (§ **873**). Is she is justified in living apart she is equally justified in receiving a separate maintenance from her husband. It was so held in a case where the wife refused to reside with her husband because he was suffering from virulent leprosy.[9]

876. Concubine.—*See* S. 95.

877. The right of a legitimate son to maintenance during his minority against his father is both provided in S. 488 of the Criminal Procedure Code, and is also supported by Hindu Law.[10] But upon attaining his majority, the son cannot enforce this right against his father's self-acquired property[11] though he can do so against his father's ancestral estate.[12] Where the son has the right of maintenance, it is not forfeited by reason of his disobedience or refusal to live with his father. It may be a good ground for reducing the amount to the minimum, but it is no ground for discontinuing it altogether.[13]

(b) Legitimate Sons.

(1) *Kullyanessuree* v. *Dwarka Nath*, 6 W.R. 116; *Sita Nath* v. *Haimbutty*, 24 W.R. 377; *Matangini* v. *Jogendra*, 10 C. 34; *Sidlingapa* v. *Sidava*, 2 B. 634; *Shinappaya* v. *Rajamma*, 45 M. 812.

(2) *Virasami* v. *Appasami*, 1 M.H.C.R. 375.

(3) *Illata* v. *Illata*, 1 M.H.C.R. 372.

(4) *Parami* v. *Mahadevi*, 34 B. 278.

(5) *Subhadramma* v. *Narasimhaswami*, 57 M. 1003; *Yeshodabai* v. *Lal Talobashet*, (1886) B.P.J. 231; *Sita Devi* v. *Gopi Saran*, (1928) Pat. 375.

(6) The texts speak of the "virtuous wife" as entitled to maintenance—Yad. II-140, 142; Mitak. II-10; Dayabhag V-10, 11; Mayukh, II-1-9; Vishnu, XV-32, 34; Dayakram Sangrah, III-7-17; *Rama Rao* v. *Raja of Pittapur*, 41 M. 778 (785) P.C.; *Chirukala* v. *Chirukala*, 23 M.L.J. 289; but see *Sathyabhama* v. *Kesaracharya*, 39 M. 658 (660) (she is entitled to have maintenance).

(7) *Devi* v. *Daulata*, 39 A. 234, following *Subhayya* v. *Bhavani*, 24 I.C. (M.) 390.

(8) *Kandasami* v. *Murugammal*, 19 M. 6; *Subhayya* v. *Bhavani*, 24 I.C. (M.) 390; *Parami* v. *Mahadevi*, 34 B. 278; *Sita Devi* v. *Gopal Saran*, (1928) Pat. 376.

(9) *Shinappaya* v. *Rajamma*, 45 M. 812.

(10) Manu, IX-108; *Chanvirgouda* v. *The District Magistrate*, 51 B. 120 (case of a lunatic son).

(11) *Amma Kannu* v. *Appu*, 11 M. 91.

(12) *Sardul Singh* v. *Partab Singh*, (1877) P.R. 46; *Futteh Singh* v. *Shera Singh*, (1868) P.R. 84; contra *Budawa* v. *Gurdit Singh*, (1870) P.R. 65.

(13) *Sardul Singh* v. *Partab Singh*, (1877) P.R. 46.

Illegitimate Sons.

878. Similarly, the right of an illegitimate son to maintenance against his natural father is now equally recognized by S. 488 of the Code of Criminal Procedure, as it is supported by Hindu Law,[1] and is settled by the Privy Council.[2] This right exists whether the father belongs to a regenerate caste, or is a Shudra, though in the latter case, the son is even entitled to inheritance.[3] The right to maintenance is not altered because the illegitimate son is by an adulterous intercourse,[4] or was begotten on a female slave or on a concubine.[5] Under the Mitakshara law, his right is lifelong in recognition of his status as a member of his father's family, and by reason of his exclusion from inheritance among the regenerate classes.[6] But it is conditional upon his obedience to the head of the family—"If he be docile," says Vidnyaneshwar;[7] "provided he be not disobedient," says Mitra Misra. Quoting these texts, the Allahabad High Court said: "Obedience to the head of the family, not the age of the illegitimate descendant, or his capacity to earn his own livelihood, is the test by which under Hindu Law, the continuance of the right to receive maintenance must be decided. Till the illegitimate sons reach full age, this test cannot be applied; but thereafter it cannot be ignored; what constitutes docility or disobedience in the sense of the texts, is a question the answer to which is not easy. We think that on attaining full age, the respondents must, as a condition of receiving maintenance from the estate of Manji Lal (the father), render to the head of the family such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong."[8] This is a personal right and cannot be devised or inherited.[9]

Illegitimate Son by a Non-Hindu Woman.

879. The Criminal Procedure Code makes no distinction between the illegitimate son of a Hindu mother, and one born of a non-Hindu mother, but a claim made under that Code must conform to its provisions, and is limited as to the amount therein specified. But apart from the Code, the illegitimate son of a Hindu father and a non-Hindu mother has no right to maintenance. Such has been the view of the court in a case where the son was born of a Mahomedan[10] or a Christian concubine.[11]

Adopted Son.

880. Though an adopted son has the same right of maintenance as a legitimate son, no such right can be claimed if the adoption is found to be invalid. As pointed out by Sir Michael Westropp, C. J.: "An invalid adoption

(1) *Sukharam* v. *Ram*, 1 B.H.C.R. 191; *Muthusamy* v. *Venkatasubha*, 2 M.H.C.R. 293.

(2) *Choturya* v. *Saheb Purhulad Syn*, 7 M.I.A. 18; *Parichat* v. *Zalim Singh*, 3 C. 214; *Roshan Singh* v. *Balwant Singh*, 21 A. 191 P.C.; *Raoji* v. *Kunji Lal*, 54 B. 455 P.C.; *Vellaiyappa* v. *Natarajan*, 50 M. 340; *Natarajan* v. *Muthia Chetty*, 22 M.L.W. 650.

(3) *Pandaya* v. *Pali*, 1 M.H.C.R. 478 affirmed O.A. *Inderan* v. *Ramaswamy*, 13 M.I.A. 141; *Vellaiyappa* v. *Natarajan*, 50 M. 1 P.C.

(4) *Subramanya* v. *Velu*, 20 M.L.J. 350: 5 I.C. 919; *Kuppa* v. *Singaravelu*, 8 M. 325; *Viraramamurthi* v. *Singaravelu*, 1 M. 306.

(5) *Rahi* v. *Govind*, 1 B. 97; *Sarusuti* v. *Manu*, 2 A. 134 (136); *Hargobind* v. *Dharumsingh*, 6 A. 329 (332, 333) where the texts are cited.

(6) *Ananthaya* v. *Vishnu*, 17 M. 160; *Motichand* v. *Chandra Bai*, 26 Bom. L. R. 488: (1924) B. 421.

(7) Mitakshara, Ch. I-11, 12.

(8) *Hargobind* v. *Dharamsingh*, 6 A. 329 (335) P.C.

(9) *Balwant Singh* v. *Roshan Singh*, 18 A. 253, O.A. *Roshansingh* v. *Balwant Singh*, 22 A. 191 (197) P.C.

(10) *Addoyto* v. *Woojan*, 4 C.L.R. 154; *Haidri* v. *Narindra*, 1 Luck. 184: (1926) L. 294.

(11) *Lingappa* v. *Esudason*, 27 M. 10 (15).

works nothing. It leaves the alleged adoptee precisely in the same position which he occupied before the ceremony, no matter how formally it may have been celebrated."[1]

Chela.

881. The chela who possesses the status of a son has, on the analogy of a son, the right of maintenance against his *guru*, provided that the latter is not an ascetic, and follows the life of a householder, though it is said, he must show that he has been deprived of procuring his ordinary means of livelihood.[2] But this is by no means necessary in every case, since the question must depend upon the nature of the *guru's* estate and his status and the nature of his relationship to his *chela* and the custom or usage, if any, determining their rights.

(c) Unmarried Daughter.

882. The unmarried daughter has a legal claim to be maintained by her father and out of his estate,[3] but except in the case of a Shudra,[4] an illegitimate daughter, though possessing a legal claim against the father, has no such claim to maintenance out of his estate.[5]

(d) Aged Parents.

883. The liability to maintain one's parents is clear both from the text[6] as also the decided cases,[7] and is independent of inherited assets.

Married Daughter.

884. The obligation to maintain the daughter rests upon the parental duty to maintain his own offspring. And in the case of an unmarried daughter, this obligation descends to the heir who is equally bound to maintain her.[8] But as soon as the daughter is married, the obligation to maintain her is transferred to the husband. And on his death, she is entitled to be maintained out of his estate. Even if she be in indigent circumstances, she has no right to be maintained out of her deceased father's estate unless she can show that she continued after her marriage to be dependent member of her father's family with those whom he was legally or morally bound to maintain. She is, however, in no case entitled to separate maintenance out of the estate of her father in the hands of his heirs.[9] But of course, illegitimate daughters have no such right of maintenance.[10]

Sister.

885. An unmarried and widowed destitute sister must be maintained by the heir, out of the assets of the joint family. Even where the sister is a discarded

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(1) *Laksamappa* v. *Ramava*, 12 B.H. C.R. 364 (397); *Dalpat Singhji* v. *Raisinghi*, 17 Bom. L.R. 566.

(2) *Narain Dass* v. *Mahtab*, 7 W.R. 137.

(3) *Inderun* v. *Ramaswamy*, 13 M.I.A. 141 (159); *Ramabai* v. *Trimbak*, 9 B.H. C.R. 283; *Mangal* v. *Rukhmini*, 23 B. 291; *Jamna* v. *Machul*, 2 A. 315; *Tulsha* v. *Gopal Rai*, 6 A. 263; *Mansha* v. *Jiwan Mal*, *ib.*, p. 617 (621).

(4) *Natarajan* v. *Muthia*, 22 M.L.W. 650.

(5) *Inderun* v. *Ramaswamy*, 13 M.I.A. 141 (159); *Vellaiyappa* v. *Natarajan*, 50 M. 340; *Rahi* v. *Govind*, 1 B. 97 (102); *Parvathi* v. *Ganpat Rao*, 18 B. 177 (183); *Saraswati* v. *Kashi Ram*, 4 C.P.L.R. 43; *Bhayalal* v. *Churaman*, 9 C.P.L.R. 38 but *contra* in *Salu* v. *Hari*, (1877) B.P.J. 34 (case of *Shudra*).

(6) Manu, VIII-389; *see* other texts cited in *Savitri Bai* v. *Laxmi Bai*, 2 B. 592 (597).

(7) *Prankoonwar* v. *Deokoonwar*, 1 Borr. (2nd Ed.) 404; *Dai* v. *Purshotum*; *Ib.*, p. 453; *Savitri Bai* v. *Laxmi Bai*, 2 B. 573; *Koobai* v. *Ramabai*, ib., p. 592; *Subharaya* v. *Subhakka*, 8 M. 236; *Veeranna* v. *Subamma*, (1926) M.W.N. 921.

(8) *Mangal* v. *Rukhmini*, 23 B. 291.

(9) *Mokhoda* v. *Nand Lall*, 27 C. 555 O.A. 28 C. 278 (288); *Siddessury* v. *Janardan*, 29 C. 557.

(10) *Parvati* v. *Ganpat Rao*, 18 B. 177 (183); *Bhayalal* v. *Sunderia*, 9 C.P.L.R. 38.

wife, old and infirm, she has the same claim for maintenance as a widowed sister.[1]

Son's Widow and Grandchildren.

886. Though the father is personally bound to maintain his children, he is not bound to maintain his son's widow or his grandchildren,[2] though if maintained, their maintenance is held to be a legitimate ground of necessity,[3] and it has been held that on the death of the father-in-law, his estate might be justly charged to defray the marriage expenses of his grand-daughter.[4]

Step-son and the Step-mother.

887. Similarly, a Hindu is under no personal obligation to maintain his step-son or the step-mother.[5] The obligation to maintain the step-mother depends upon the condition that the son has inherited available assets from his father.[6]

Son-in-law.

888. The son-in-law has, of course, no claim to maintenance by his father-in-law, though in a case his claim based on an implied contract was upheld on the ground that he had lived in his father-in-law's as his *Gharjamai* (resident son-in-law).[7]

Brother.

889. There is again no such obligation to maintain a brother, even though a minor, though, of course, in a joint family the elder brother as manager is charged with the maintenance of all coparceners and other relations as stated in the sequel.

Husband's conversion immaterial.

94. A wife, who is entitled to maintenance, does not forfeit her right by her husband's conversion to another faith.[8]

890. Analogous Law.—The right to maintenance arises out of the jural relationship between the husband and the wife created by marriage, which is not dissolved by reason of conversion to another faith, though the converted husband may dissolve his marriage under the provisions of the Native Converts' Marriage Dissolution Act,[9] but till such dissolution, he remains bound by the tie of marriage, and its attendant obligations, one of which is the maintenance of his spouse.[10]

Mistress's right to maintenance.

95. No mistress of a Hindu has any right of maintenance unless she was his continuous and faithful mistress until his death, in which case she becomes entitled to maintenance out of the estate in the hands of his heirs, so long as she remains chaste.

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(1) *Ruttun Singh* v. *Chundan*, (1866) P.R. 80.

(2) *Savitri Bai* v. *Laxmi Bai*, 2 B. 574 F.B.; overruling *contra* in *Udaram* v. *Sonkabai*, 10 B.H.C.R. 483; *Kalu* v. *Kashi Bai*, 7 B. 127; *Khettar Moni* v. *Kashinath*, 2 B.L.R. (A.C.) 15 F.B.; *Manmohini Dasi* v. *Balak Chandra*, 8 B. L.R. 22; *Nilmoney* v. *Hingu Lall*, 5 C. 256.

(3) *Chumun Lal* v. *Gunput Lall*, 16 W.R. 52.

(4) *Ramcoomar* v. *Inchmonyi*, 6 C. 36 (39).

(5) *Daya* v. *Natha*, 9 B. 279 (284); *Hamangini* v. *Kedar Nath*, 16 C. 758 (765) P.C.

(6) *Daya* v. *Nath*, 9 B. 279; *Sukh Dial* v. *Ram Ditti*, (1874) P.R. No. 31; *Thakur Prasad* v. *Bhagabati*, 1 C.L.J. 142.

(7) *Govind* v. *Radha Ballabh*, 15 C.W. N. 205; 7 I.C. 118.

(8) 4 M.H.C.R. (App.) 8.

(9) XXI of 1866.

(10) 4 M.H.C.R. (App.) 8.

891. **Analogous Law.**—The following texts support this right:—

Mitakshara.—"Heirless property or wealth which is without an heir to succeed to, goes to the king or becomes the property of the sovereign, deducting however a subsistence for the females as well as the funeral charges, that is, excluding or setting apart a sufficiency for the food and raiment of the women."[1]

Mayukh.—"Except in the case of Brahmins, a king (when succeeding to the estate of an heirless person) who is attentive to his duty should give something as maintenance to the women (*Stri*) of the deceased. This is the law of inheritance declared; both these have reference to concubines, because the term used is not *Patni* (married wife).[2]

This relates to women kept in concubinage, for the term employed is "females" (*Yoshid*). The text of Narad likewise relates to concubines, since the word there used is "women" (*Stri*).

892. The wife has a legal status and has consequently legal rights and obligations. The concubine is reprobated by law, and she has, therefore, no right of any kind against her paramour, as she can stay with him or leave him at her pleasure.[3] But concubines were common in Vedic India, and their right to maintenance is recognized out of the paramour's estate, whether ancestral or self-acquired on his death, if she was faithful to him till then.[4] All concubines, even though permanent are not, however, entitled to claim maintenance as of right, since such right only belongs to those of the Hindu faith. A Mahomedan or a Christian concubine has no such right.[5]

893. **Concubine's Right of Maintenance.**—The rules governing the maintenance of concubines may be thus stated: (*i*) No concubine has any right to maintenance against her paramour during his lifetime;[6] (*ii*) an occasional concubine[7] or even a continuous one has no right if she was discarded by her paramour before his death;[8] and (*iii*) her maintenance is contingent upon her continuous chastity,[9] though she need not live in the house of her paramour;[10] nor (*iv*) need her relationship be known to his family.[11] So a widow who has remarried in the lifetime of her first husband without his consent, is not the legal wife of the second husband, and upon his death she would be entitled only to maintenance as a concubine,[12] and not even that if she was only his mistress.[13] Such was also held to be the case where a Brahmin woman had married a Shudra, which being a marriage not recognized by law or usage, her status was held to be no better than that of a concubine entitling her to maintenance only as such, dependent upon her

(1) Mit., Ch. II., Sect. I, §§ 27, 28. In the original अवरुध् (*Avrudh*), which etymologically means women "obstructed, detained or confined,"—hence a permanent concubine—*Nagubai* v. *Monghibai*, 50 B. 604 (614, 615) P.C.; *Haidri* v. *Nariandra*, 1 Luck. 184: (1926) L. 294.

(2) Mayukh (Mandlik), p. 78.

(3) *Nigareddi* v. *Lakshmana*, 26 B. 163.

(4) *Nigareddi* v. *Lakshmana*, 26 B. 163; *Yeshwantrao* v. *Kashi Bai*, 12 B. 26; *Panchapekasa* v. *Kanaka*, 23 M.L.J. 455: 42 I.C. 344.

(5) *Haidri* v. *Nariandra*, 1 Luck. 184: (1926) L. 294.

(6) *Sikhi* v. *Venkatasamy*, 8 M.H.C. R. 144; *Ramanarasu* v. *Buchamma*, 23 M. 282; *Ningareddi* v. *Lakshmana*, 26 B. 163 (167, 168); *Chandra Kunwar* v. *Rukmin*, 9 O.L.J. 60; *Rab Prasad* v. *Chhote Munwar*, (1937) O. 29.

(7) *Ramanarasu* v. *Buchamma*, 23 M. 282.

(8) *Ibid.*

(9) *Yashvantrao* v. *Kashi Bai*, 12 B. 26.

(10) *Nagubai* v. *Monghibai*, 50 B. 604 P.C.

(11) *Dayawati* v. *Kesaribai*, (1934) B. 218.

(12) *Khemkor* v. *Umishankar*, 10 B.H. C.R. 381; *Salu* v. *Hari*, (1877) B.P.J. 34.

(13) *Anandilal* v. *Chandree Bai*, 48 B. 203.

continuous connection with her husband.[1] The fact that the concubine has a son by her paramour does not improve her claim to maintenance for herself.[2] On the other hand, her claim cannot be resisted on the ground that she did not live in the house of the deceased, but had kept a house of her own, or that she had previously been in the keeping of another man, or that her connection with the deceased was adulterous.[3]

Manager's duty to maintain.

96. (1) The manager of a joint Mitakshara family is bound to maintain all male members of the family, their wives and their children,[4] and on the death of any of the male members, he is bound to maintain his widow and his children.[5]

(2) The obligation is commensurate only with the possession of family property.

(3) The same principles apply to cases governed by the Dayabhag Law.[6]

(4) The holder of an impartible estate is bound to maintain all those who are customarily entitled to maintenance.[7]

894. **Analogous Law.**—The unit of Hindu society is the joint family comprising a patriarch, his wives, his unmarried daughters, and his sons with their wives and descendants. This social group had in ancient times a common dwelling, and they lived, ate, worshipped their gods, and enjoyed their estate in common.[8] The rights of the subordinate members have now become recognized, but there still remain those whose rights have either not been reduced to possession or have no present rights at all (§§ 892, 887). The obligation to maintain all such relations lies on the manager of a Mitakshara family or on the father of a Dayabhag household. But this obligation is not personal, but confined to him as the manager of the joint estate, or in the case of a Dayabhag family, to the head of a family in which all the other members have a contingent interest. These and their wives are entitled to maintenance, since it is a principle of Hindu Law that an heir succeeding to any property takes it for the spiritual benefit of the late proprietor, and is under a legal obligation to maintain persons whom the late proprietor was morally bound to support. It is immaterial whether the property so inherited is movable or immovable. In each case, it must be determined whether, having regard to the relationship, the means and other circumstances of the party claiming maintenance, the late proprietor was morally bound, according to Hindu Law and customs and practice of the people, to maintain that party.[9] As such, the rule applies equally to cases whether subject to the Mitakshara or the Dayabhag school of law. The question in

(1) *Kashi* v. *Jamna Das*, 14 Bom. L. R. 547, *contra Ramachandra* v. *Hanamnaik*, 60 B. 75; Shudra cannot keep a Brahmin mistress, but dasi may be of any caste though a son by her may not be eligible for inheritance.

(2) *Sikhi* v. *Venkatasamy*, 8 M.H.C.R. 144.

(3) *Nagubai* v. *Monghibai*, 50 B. 604 P.C.; overruling O.A. *Monghibai* v. *Nagubai*, 47 B. 401.

(4) Manu, Ch. 9, Sect. 108; Narada, Ch. 13, Ss. 26, 27, 28, 33; *Vaikuntam* v. *Kallabiran*, 23 M. 512 (516).

(5) *Bhagwan Singh* v. (*Mt.*) *Kewal Kuwar*, 8 L. 360.

(6) *Kamini Dasi* v. *Chandra*, 17 C. 373.

(7) *Raja Rama Rao* v. *Raja of Pittapur*, 41 M. 778 P.C., affirming O.A. *Raja Rama Rao* v. *Raja of Pittapur*, 38 M. 396.

(8) Antiquities of India, p. 109.

(9) *Kashee Nath* v. *Khettur Monee*, 9 W.R. 413 O.A. *Khettur Mani* v. *Kashi Nath*, 10 W.R. 89 F.B.; *Kamini Dasi* v. *Chandra*, 17 C. 373 (376, 377); *Janki* v. *Nand Ram*, 11 A. 194.

each case being: Has the relation any moral claim to maintenance, the moral claim being as regards maintenance, treated as a legal claim which the courts would enforce?[1] As such, the relations mentioned in S. 87 have undoubtedly such claim. But there are others whose claim to maintenance is recognized, though it is dependent upon the existence of ancestral property.

Widow.

895. The widow of a coparcener is entitled to be maintained out of her husband's estate in the hands of his surviving coparceners or heirs, even though she may have been deserted by the husband.[2] But she has no such right if her husband left no assets,[3] or if she is leading an unchaste life;[4] otherwise, she is not bound to reside with her husband's relatives.[5] A Hindu widow must, in the first instance, look for her maintenance to her husband's family[6] failing which she may claim it from his father or out of his inherited estate. But the widow has no legal claim to maintenance out of the self-acquired property of her father-in-law.[7] But as soon as that property descends to his heirs, *e.g.*, his sons, the latter become legally bound to maintain the widow to the same extent as if they had inherited ancestral property. This result is supported on the ground that since the father-in-law was morally bound to support his daughter-in-law, and the discharge of this moral obligation by the son is conducive to his father's spiritual benefit, the moral obligation of the father ripens into a legal obligation as against the son who inherits his father's estate.[8] And the same obligation would continue even if the estate descends on the father-in-law's widow, since she is equally bound by the same rule.[9] But there may be cases in which even the father-in-law may be held bound to maintain her out of his self-acquired property. As Norman, J., observed: "If she resides in the house of her father-in-law and is an infant, and for that or other reasons, is unable to maintain herself, there may be and probably is, both according to Hindu Law, and equity and good consience, a legal obligation on the part of the father-in-law, who has taken upon himself the care of her person and the charge of entertaining her as a member of his family, and on whose protection she is dependent, to provide her with food and the actual necessaries of life."[10]

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(1) *Kamini Dasi* v. *Chandra*, 17 C. 373 (377, 378).

(2) *Ramabai* v. *Trimbak*, 9 B.H.C.R. 283; *Savitri Bai* v. *Laxmi Bai*, 2 B. 573 F.B.; *Gangabai* v. *Sitaram*, 1 A. 170 F.B.; *Amrita Lal* v. *Manick Lall*, 27 C. 551; *Narasimham* v. *Venkatasubamma*, 55 M. 752.

(3) S. 92; *Srinivasa* v. *Lakshmi*, 54 M.L.J. 530: (1928) M. 216; *Ganseh* v. *Yemunabai*, (1878) B.P.J. 130; *Sakharam* v. *Janki Bai*, (1878) B.P.J. 139.

(4) *Srinivasa* v. *Lakshmi*, 54 M.L.J. 530: (1928) M. 216.

(5) *Ekradeshwari* v. *Homeshwar*, 8 Pat. 840 P.C.; *Harku Singh* v. *Nanda Kuar*, (1885) 5 A.W.N. 164; *Daulta Kauri* v. *Meghu*, 15 A. 382; *Vishnu* v. *Manjamma*, 9 B. 108; *Nagamma* v. *Virabadra*, 17 M. 392; *Rama Nath* v. *Rajommoni*, 17 C. 674.

(6) *Makhada* v. *Nundolal*, 28 C. 278.

(7) *Rajmoney* v. *Shibchander*, 2 Hyde. 103; *Khettramani* v. *Kashinath*, 10 W.R. 89 F.B.; *Savitri Bai* v. *Laxmi Bai*, 2 B. 573 F.B.; *Gangabai* v. *Sitaram*, 7 B. 127; *Janki* v. *Nand Ram*, 11 A. 194 (205, 206) F.B.

(8) *Rajani Kant* v. *Sajani Sundari*, 58 C. 745, O.A. 61 C. 221 (224, 225) P.C., (Dayabagh Case); *Janki* v. *Nand Ram*, 11 A. 194 (208) F.B.; *Kamini Dasi* v. *Chandra*, 17 C. 373; *Devi Pershad* v. *Gunwanti*, 22 B. 410; *Rangammal* v. *Sechammal*, 22 M. 303.

(9) *Rajani Kant* v. *Sajani Sundari*, 58 C. 745, O.A.: 61 C. 221 (224, 225) P.C.; *Janki* v. *Nand Ram*, 11 A. 194 F.B.; *Yamunabai* v. *Manubai*, 23 B. 608.

(10) *Khettur Mani* v. *Kashi Nath*, 10 W.R. 89 (95) F.B.; *Meenakshi* v. *Rama*, 37 M. 396 (402).

Daughter-in-law.

896. The right of the widow of a predeceased son to maintenance out of the ancestral property, devolving on her father-in-law, is unquestioned; but he is also, though only morally, bound to maintain such daughter-in-law out of his self-acquired property,[1] such moral obligation ripening into a legal obligation in the hands of his heir,[2] even though he takes it by gift or devise,[3] though in such case, the Bombay High Court would exonerate the heir on the ground that the liability is textual, and descends only to the heir *qua* heir, and not to him when he takes in any other character.[4]

Grandmother.

897. The grandmother is entitled to maintenance. As Sir William Macnaughten says: "She has a right to participate in all the comforts which are enjoined by the family in its undivided estate, and a legal as well as natural claim to that protection which may be derived from a union of her descendants. If, therefore, she is deprived of such advantages, it is but just she should be enabled to take care of herself, and not be obliged to go from door to door for her support."[5]

Holder of an Impartible Estate.

898. The manager of a joint family property being liable to maintain all its members, it follows that the same obligation cannot rest on one who, by reason of the impartibility of the estate, becomes entitled to exclude the other members.[6] In other words, since there can be no coparcenership in impartible estate, no member of the holder's family has, apart from custom, any right to maintenance. As such, the sons undoubtedly possess such right, and custom in their case is so well-known that it need not be proved. But the same customary right cannot be presumed in the case of a grandson, and there is no invariable or certain custom that any below the first generation from the last holder can claim maintenance as of right. Apart however, from custom, no one has any claim to maintenance by reason of his relationship to the owner. As the Privy Council said:—"An impartible zemindari is the creature of custom, and it is of its essence that no coparcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zemindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship."[7]

Sister-in-law.

899. It was at one time laid down that a person was legally bound to maintain his brother's destitute widow independently of all questions regarding union or separation or the existence of ancestral or self-acquired property,[8] but it is now settled that these cases go too far and that the

(1) *Khetur Mani* v. *Kashi Nath*, 10 W.R. 89 (95) F.B.; *Meenakshi* v. *Rama*, 37 M. 396 (402).

(2) *Janki* v. *Nand Ram*, 11 A. 194 (208) F.B.; *Kamini* v. *Chandra*, 17 C. 373; *Devi Persad* v. *Gunwanti*, 22 B. 410; *Rangammal* v. *Sechammal*, 22 M. 303; *Jai Nand* v. *Mt. Paran*, 4 Luck. 491 F.B.

(3) *Janki* v. *Nand Ram*, 11 A. 194 F.B.; *Gopal Chandra* v. *Kadambini*, (1924) C. 364; *Laxmi Bai* v. *Sambha*, 27 N.L.R. 347; *Babo* v. *Bolo*, (1933) Pesh. 61.

(4) *Parvati* v. *Tarwadi*, 25 B. 263; *Bhagirathi* v. *Dwarka*, (1933) B. 135.

(5) H. L. Partition cited in *Puddum Mookhee* v. *Rayee Monee*, 12 W.R. 409; *Rayee Monee* v. *Puddum Mookhee*, 13 W.R. 66.

(6) *Nilmoney* v. *Hingoolal*, 5 C. 256, *Vencatachala Reddiar* v. *Vencatachella*, 7 M.L.T. 31: 4 I.C. 302.

(7) *Rama Rao* v. *Raja of Pithapur*, 39 M. 396 affirmed O.A. 41 M. 78. P.C. following *Yarlagadda* v. *Yarlagadda*, 24 M. 147 (155) P.C.; *Nilmony* v. *Hingoo Lal*, 5 C. 256 (259) P.C.

(8) *Laxmi* v. *Lakshmidas*, 1 B.H.C. R. 13; *Chandrabhagabai* v. *Khashi Nath*,

liability of a person to maintain his brother's widow is dependent upon the existence of assets inherited by him from his father or her husband.[1]

Maintenance of disqualified heir.

97. Where a son or other heir is excluded from inheritance by reason of disability, he is entitled to maintain himself and his family out of the property which he would have inherited, but for his disability.[2]

900. **Analogous Law.**—The right of the disqualified heir and his family for maintenance, is not only expressly provided by the following text, but is one which the courts would have enforced as a matter of justice, even if there had been no text in favour of it:—

Manu.—201. "Eunuchs and outcasts, persons born blind or deaf, madmen, idiots, the dumb and such as have lost the use of a limb are excluded from share of the heritage."

202. "But it is just, that the heir who knows his duty should give all of them food and raiment for life without stint according to the best of his power; he who gives them nothing sinks assuredly to a region of punishment."[3]

901. **Maintenance of a Disqualified Heir.**—The text only provides for the maintenance of the excluded heir. But his family, which has the right of maintenance against him, has equally the same right against his estate from the enjoyment of which he is excluded by reason of his personal disqualifications. It cannot affect their primary right of maintenance.[4] As the Privy Council observed:—"The right of maintenance, so far as is founded on or is inseparable from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases."[5] Consequently, a member of a joint family, who could not sue for partition without the consent of certain other members of that family, was upon his being driven out of the family held entitled to maintenance out of the family property.[6]

Widow's right to maintenance.

98. (1) The widow who does not succeed to the estate of her husband as his heir is entitled to maintenance out of her husband's separate property,[7] or out of the property in which he was a coparcener at the time of his death.[8]

(2) Save and except as above, she has no absolute right of maintenance.

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2 B.H.C.R. 323; *Timmappa* v. *Parameshriamma*, 5 B.H.C.R. (A.C.) 140; *Chandrabhagabai* v. *Parameshriamma*, 5 B.H.C.R. (A.C.) 130; *Udaram* v. *Sonkabai*, 10 B.H.C.R. 483.

(1) *Prankoonwar* v. *Deokoonwar*, 1 Borr. 404 (2nd Ed.); *Dai* v. *Purshotum*, *Ib.*, p. 453; *Sheo Bai* v. *Gowreenund*, 2 Borr. 323 (2nd Ed.); *Ramabai* v. *Trimbak*, 9 B.H.C.R. 283; *Savitri Bai* v. *Luxmi Bai*, 2 B. 573 (623) F.B.; *Rango* v. *Yamunabai*, 3 B. 44; *Yamunabai* v. *Manubai*, 23 B. 608 (612, 613).

(2) Manu, IX-201, 202; Mit., Ch. II, S. 10-1, 3, 6. *See* Comm.

(3) Manu, IX-201, 202; Mitak., Ch. II, S. 10-1, 3, 6.

(4) Mitak., Ch. II, S. 10, 12-15; Mayukh, Ch. IV, Sec. 11-12; 3 Dig. 483; *Dai* v. *Purshotum*, 1 Borr. 453 (2nd Ed.); *Savitri Bai* v. *Luxmi Bai*, 2 B. 573 (591) F.B.; *Ram Soonder* v. *Ram Sahye*, 8 C. 919; *Rama Rao* v. *Raja of Pithapur*, 41 M. 778 P.C., affirming O.A. 39 M. 396.

(5) *Rama Rao* v. *Raja of Pithapur*, 41 M. 778 (784) P.C.

(6) *Bhupal* v. *Tavanappa*, 46 B. 435.

(7) *Bhagabai* v. *Kannailal*, 8 B.L.R. 225; *Brinda* v. *Radhica*, 11 C. 492; *Narmadabai* v. *Mahadeo*, 5 B. 99 (106).

(8) *Golab Koonwar* v. *Collector*, 4 M.I.A. 246 (258).

(3) Her right of maintenance is not forfeited by reason of her having lived apart from her husband in his lifetime without any justifying cause.[1]

(4) The widow does not forfeit her right of maintenance by reason of her living apart from her husband's relations unless she does so for immoral or improper purposes.[2]

(5) Continued chastity is a condition precedent to the widow's right to maintenance. But she is allowed a *locus penitentiae* so that if she reforms and leads a continent life, she becomes entitled to at least a starving maintenance.[3]

(6) Maintenance is not a charge upon the estate, but may be so made by contract or a court's decree.[4]

902. **Analogous Law.**—The general rule stated in clause (1) has long since been settled,[5] it being held that the widow is entitled to maintenance out of the whole of the estate in which her husband was interested as owner,[6] or coparcener,[7] though he may have been personally disqualified from inheritance,[8] whether she possesses property of her own or not, since it is an absolute right due to her membership of the family, and does not depend upon her necessity arising from her want of other means to herself, nor lose by her failure to demand it for a long time, though it may be taken into consideration in awarding arrears.[9] At a partition made by the husband during his lifetime between his sons, his wife was at one time entitled to an equal share with his sons. In course of time this right became lost, but in lieu thereof her absolute claim to maintenance has become established.[10] (§§ **894, 895, 912, 929**).

Clause (1).

903. Though the widow has no absolute right of maintenance except as provided in clause (1), the court is entitled to award her maintenance if equity and justice so demand it.[11] (**S. 102**).

Clause (2).

(1) *Ramabai* v. *Trimbak*, 9 B.H.C.R. 283; *Savitribai* v. *Laxmibai*, 2 B. 573 (588) F.B.

(2) *Pirthi Singh* v. *Raj Kuar*, 20 W.R. 21 P.C.; *Ekradeshwari* v. *Homeshwar*, 8 Pat. 840 (850) P.C.

(3) *Parami* v. *Mahadevi*, 34 B. 273 (283); *Satyabhama* v. *Kesavacharya*, 39 M. 658; *Ram Nath* v. *Rajanimoni*, 17 C. 674 (679).

(4) *See* S. 107.

(5) *Shib Dayee* v. *Doorga Pershad*, 4 N.W.P.H.C.R. 63 (71); *Bhagabati* v. *Kannailal*, 8 B.L.R. 225; *Brinda* v. *Radhica*, 11 C. 492 (494); *Narbadabai* v. *Mahadeo*, 5 B. 99 (106); *Subharayulu* v. *Kamalavallithayaramma*, 35 M. 147.

(6) *Bhagabati* v. *Kannailal*, 8 B.L.R. 225; *Brinda* v. *Radhica*, 11 C. 492 (494); *Narbadabai* v. *Mahadeo*, 5 B. 99 (106).

(7) *Golab Koonwar* v. *Collector*, 4 M.I.A. 246 (258); *Sheo Dyal* v. *Judoonath*, 9 W.R. 61 (67); *Hema* v. *Ajoodhya*, 24 W.R. 474; *Devi Prasad* v. *Gunwanti*, 22 C. 410; *Meherban* v. *Sheo Kunwar*, 1 Agra 106; *Shib Dayee* v. *Doorga Pershad*, 4 N.W.P.H.C.R. 63; *Lalti Kuar* v. *Ganga Bishem*, 7 N.W.P.H.C.R. 261; *Becha* v. *Mothina*, 23 A. 86; *Ramabai* v. *Trimbak*, 9 B.H.C.R. 283; *Amrit* v. *Manik*, 12 B.H.C.R. 79; *Savitribai* v. *Luxmibai*, 2 B. 573 (582); *Adhibai* v. *Cursandas*, 11 B. 199; *Manjappa* v. *Lakshmi*, 15 B. 234; *Jankibai* v. *Shrinivas*, 38 B. 120; *Visalatchi* v. *Annasamy*, 5 M.H.C.R. 150; *Subramania* v. *Kaliani*, 7 M.H.C.R. 226; *Jayanti* v. *Alamelu*, 27 M. 45; *Rattamma* v. *Seshachalam*, 52 M. L.J. 520: 101 I.C. 806: (1927) M. 502.

(8) Mit., Ch. II, S. X-5; Dayabhag, Ch. V-II, 14, 16; Smriti Chand, Ch. V-10-14, 20.

(9) *Ramarayudu* v. *Sitalakshmamma*, (1937) M. 915 (916).

(10) *Lingayya* v. *Kanakamma*, 38 M. 153; dissenting from *contra* in *Ramavati* v. *Manjhari*, 4 C.L.J. 74; *Radhabai* v. *Ragho*, (1878) B.P.J. 292.

(11) *Khetter Monee* v. *Kasheenath*, 10 W.R. 89 (95) F.B.; *Meenakshi* v. *Rama*, 37 M. 396 (402).

Clause (3).

904. It has already been stated that since the widow's right of maintenance arising out of the jural relations of the family is in lieu of her share, the mere fact that she had lived apart from her husband is no ground for disqualifying her for maintenance.[1]

Clause (4).

905. Still less is she disentitled merely because she chooses to live apart from her husband's relation, unless, she does so for immoral or improper purposes.[2] But in strict contemplation of law it is in the husband's family that the widow ought to reside.[3] And where the family property is insufficient for separate maintenance, the court may insist upon her maintenance in the family. So if she is a minor, her husband's relations are her natural guardians and she should live with them. So again, if the husband had expressly directed her to be maintained in the family, she cannot claim separate maintenance without a just cause.[4] Such cause might be furnished by the cruelty and ill-treatment to which she was subjected in her husband's home or her own desire to end her days in a sacred place, or any other cause which the court regards as valid and sufficient.

Clause (5).

906. This clause is based on the undernoted decisions,[5] though there are also cases to the contrary.[6]

This condition cannot be read into an agreement assigning certain income for her maintenance.[7]

Clause (6).

907. The following text also bears on the subject of maintenance conditional upon continence :—

Narad.—"Among brothers, if any one die without issue, or enter a religious order, the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise, the brethren may resume their allowance."[8]

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(1) *Ramabai* v. *Trimbak*, 9 B.H.C.R. 283; *Savitribai* v. *Laximibai*, 2 B. 573 (588) F.B.; *Sri Raja Bommadevara* v. *Naganna*, 87 I.C. 571: (1935) M. 737.

(2) *Pirthee Singh* v. *Raj Kower*, 20 W.R. 21 P.C.; *Ekradeshwari* v. *Homeshwar*, 8 Pat. 840 (850) P.C.; *Narayan Rao* v. *Ramabai*, 3 B. 415 (421) P.C.; *Kasturbai* v. *Shivajiram*, 3 B. 372 dissenting from *Rango* v. *Yamunabai*, 3 B. 44; *Gopibai* v. *Lakshmidas*, 14 B. 490; *Chandrabhagabai* v. *Kashinath*, 2 B.H.C.R. 341; *Parvati Bai* v. *Chatru*, 13 Bom. L.R. 1022; *Bai Appibi* v. *Khimji*, (1936) B. 138; *Mokhada* v. *Nundolall*, 28 C. 278 (287); *Siddessury* v. *Janardan*, 29 C. 557; *Ahollya* v. *Muckee Lonee*, 6 W.R. 37; *Visalatchi* v. *Annasamy*, 5 M.H.C.R. 150; *Surampalli* v. *Surampalli*, 31 M. 338; *Srinivasa* v. *Lakshmi*, 54 M.L.J. 530: (1928) M. 216; *Umrit Kowaree* v. *Kider Nath*, 3 Agra 182; *Sham Devi* v. *Mohan Lal*, 15 L. 591.

(3) *Raghunada* v. *Brozo Kishore*, 1 M. 69 (81) P.C.

(4) Vyavastha Chandrika, 261, followed in *Mulji* v. *Ujam*, 13 B. 218 (220); *Girianna* v. *Honamma*, 15 B. 236.

(5) *Parami* v. *Mahadevi*, 34 B. 273 (283); *Honamma* v. *Timanabhat*, 1 B. 559; *Sathyabhama* v. *Kesavacharya*, 39 M. 658; *Romanath* v. *Rajonimoni*, 17 C. 674 (679); *Ram Kuwar* v. *Bhagwanta*, 56 A. 392 (Rs. 15 given out of an estate paying Rs. 3,500 as land revenue.)

(6) *Valu* v. *Ganga*, 7 B. 84; in *Visalatchi* v. *Annasamy*, 5 M. H. C. R. 150, the question was considered as unsettled.

(7) *Lakshmi Chand* v. *Mt. Anandi*, (1935) P.C. 180 overruling (1933) A. 130.

(8) Narad, XIII-25, 26; cited in Dayabhag, XI-48.

Continued chastity is the condition precedent to the enjoyment of the right. Any lapse from virtue imperils her right to her former maintenance. But whether she is then entitled to starving maintenance is a question upon which there have been divergent opinions. On this subject there are three possible views and each of them has found supporters. The first view is that with her unchastity her allowance should be reduced but not cancelled altogether. The second view is that it is forfeited altogether; while the third view favours its suspension with the possibility of its resumption upon the widow reforming her ways.[1]

Starving maintenance.

908. According to the latest view of the Bombay High court, unchastity is a good ground for reducing maintenance to a starving allowance and may justify even its complete withdrawal.[2] But if the widow afterwards reforms and is repentant, she is entitled to a bare allowance.[3] So, on a review of the texts, Chandavarkar, J., said: "The general rule to be gathered from these is that a Hindu wife cannot be absolutely abandoned by her husband. If she is leading an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rights unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence."[4] This is one view, the other being that the widow's right to maintenance is dependent upon her continence and if she turns unchaste, then her allowance may be resumed.[5] The question whether a maintenance grant settled by the husband upon his wife on his death is resumable by reason of her subsequent unchastity depends upon whether chastity is a condition precedent to its continuance. If it is, then the grant would be forfeited. But if it is not, then it cannot be resumed.[6] Of course, such a term may be a part of the grant in which case the question is one of construction. So where the widow's claim was compromised by her husband's brother transferring her some land for her maintenance, it was held that the grant could not be resumed upon her unchastity, since if it were the intention it could have been so provided in the deed.[7] But accordng to the Madras view, such a term is implied in every grant for maintenance.[8]

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(1) *Shibi* v. *Jodh Singh*, 14 L. 759.

(2) *Bhikubai* v. *Hariba*, 49 B. 459 (472), following *Roma Nath* v. *Rajonimoni*, 17 C. 674; *Valu* v. *Ganga*, 7 B. 84; *Vishnu* v. *Mangamma*, 9 B. 108.

(3) *Bhikubai* v. *Hariba*, 49 B. 459 (472) following *Sathyabhama* v. *Kesavacharya*, 39 M. 658.

(4) *Parami* v. *Mahadevi*, 34 B. 278 (283); *Honamma* v. *Timanabhat*, 1 B. 559; *Roma Nath* v. *Rajonimoni*, 17 C. 674; *Kandasami* v. *Murugammal*, 19 M. 6; *Ram Kunwar* v. *Bhagwanta*, 56 A. 392; *Nagammal* v. *Chokki*, 3 Mys. L.J. 266.

(5) *Valu* v. *Ganga*, 7 B. 84; *Vishnu* v. *Mangamma*, 9 B. 108; *Muthammal* v. *Kamakshy*, 2 M. H.C.R. 337; *Sinthayee* v. *Thanakapudayan*, 4 M.H.C.R. 183; *Visalatchi* v. *Annaswamy*, 5 M.H.C.R. 150; *Nagamma* v. *Virabhadra*, 17 M. 392; *Sathyabhama* v. *Kesavacharya*, 39 M. 658; *Shibbi* (*Mt.*) v. *Johr Singh*, 14 L. 759; *Debi* v. *Doulta*, 39 A. 234; *Laxmi Bai* v. *Vishwanath*, 16 N.L.R. 140 (151): 58 I.C. 860.

(6) *Parami* v. *Mahadevi*, 34 B. 278; *Bhupsingh* v. *Luchman*, 26 A. 321.

(7) *Bhupsingh* v. *Lachman*, 26 A. 321 (325); *Luchmichand* v. *Anandi*, (1935) P.C. 180.

(8) *Sathyabhama* v. *Keshavacharya*, 39 M. 658.

Pleading of Unchastity.

909. Whatever may be the effect of unchastity upon the widow's right to maintenance, there can be no doubt that he who raises that plea is bound to prove it by clear and cogent evidence, and not merely by evidence which points to a vague suspicion which might be easily fastened upon a young widow by interested and jealous relatives or neighbours, or such as is easy to arouse by idle gossip. In one case, after the close of the plaintiff's case the defendant had applied for leave to amend his pleading so as to raise the issue about the plaintiff's unchastity which the defendant averred had just then come to their knowledge. The trial judge refused leave and the Privy Council upheld the refusal, the more so as the decree contained a *dum casta* clause.[1]

Clause (6).

910. The maintenance of a widow is commonly spoken of as a charge on her husband's estate, but it is only so in the sense that that estate is the primary fund out of which it is payable: otherwise it is not such a charge as is defined in S. 100 of the Transfer of Property Act,[2] though it may be so made by an agreement,[3] will,[4] or a decree.[5]

When widow disentitled to maintenance.

99. The widow has no right of maintenance in the following cases:—

(1) If she has sufficient *stridhan*, or other means of support, from the income of which she can maintain herself;[6]

(2) If she had once received sufficient allotment for her maintenance which she has since dissipated;[7]

(3) If she is remarried;[8]

(4) If she is leading an unchaste life;[9]

(5) If she is living apart from her husband's family for immoral or improper reasons, or without a just cause.[10]

911. **Analogous Law.**—All the clauses of this section are drawn from the decided cases.

Clause (1).

912. Under the first clause, no female can claim a separate maintenance if she is possessed of sufficient *stridhan* or other source of certain income from which she is able to maintain herself.[11] Such was held to be the case where the

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(1) *Dum casta vixerit*, "so long as she shall remain chaste"; *Saboo* v. *Ayeshabai*, 27 B. 485 P.C.

(2) *Bharatpur State* v. *Gopal*, 24 A. 160 (163); *Sorolah* v. *Bhoobun Mohun*, 15 C. 292 (307); *Digambari* v. *Dhankumari*, 10 C.W.N. 1074; *Sham Lal* v. *Banna*, 4 A. 296; *Ram Kunwar* v. *Ram Dai*, 22 A. 326; *Venkatrummal* v. *Andhuppa*, 6 M. 130; *Ramanadan* v. *Rangammal*, 12 M. 260 (272); *Jayanti* v. *Alamelu*, 27 M. 45 (49); *Parvati* v. *Shrinivas*, 23 Bom. L.R. 110: 55 I.C. 531; *Daulat* v. *Champa*, 55 I.C. 28; *Jamma Bhai* v. *Balakrishna*, 53 M.L.J. 176: 102 I.C. 101.

(3) S. 100, Transfer of Property Act, *Juggernath* v. *Odhiranee*, 20 W.R. 126; *Lakshman* v. *Sarasvatibai*, 12 B. H. C. R. 69 (75); *Yamnabai* v. *Nanabai*, 12 Bom. L.R. 1075; *Mahalakshmamma* v. *Venkataratnamma*, 6 M. 83 (86); *Baghirathi* v. *Anantha*, 17 M. 268.

(4) *Baharilaji* v. *Rajbai*, 23 B. 342.

(5) *Manshadevi* v. *Jiwanmal*, 6 A. 617 (621); *Krishna* v. *Sinnaponnu*, 16 M.L.T. 551: 25 I.C. 759.

(6) *Narayan Rao* v. *Ramabai*, 3 B. 415.

(7) *Savitribai* v. *Laxmi Bai*, 2 B. 573 (583) F.B.; *Gun Joshi* v. *Sagoona*, 2 Borr. 404 (416).

(8) S. 2, Hindu Widow's Remarriage Act, *contra* Allahabad, *see* comm. § 914.

(9) *Pirthee Singh* v. *Raj Kuar*, 12 Beng. L.R. 238 (247) P.C.: 20 W.R. 21 P.C.; *Moni Ram* v. *Keri*, 5 C. 776 (783) P.C.

(10) *Pirthee Singh* v. *Raj Kuar*, 12 Beng. L.R. 238 (247): 20 W.R. 21 P.C.

(11) *Narayan Rao* v. *Ramabai*, 3 B. 415 P.C.; *Golvi Bai* v. *Lakhmidas*, 14 B. 490.

widow had inherited considerable property from her father.[1] It has been already stated that where such property exists but is insufficient for her maintenance, then it will be taken into consideration in fixing the amount. But in doing so, her jewels and other non-productive property must be excluded.[2] And so must be the precarious income that she might be making on account of the charity of her relations or by the performance of menial work unsuitable to her rank and position.

Clause (2).

913. The mere gift of property by the husband does not deprive the widow of her right of maintenance.[3] But where the widow had received her full share of maintenance and squandered it, she was held not entitled to charge again the estate for another share of further maintenance. It would be against reason and a premium upon extravagance to hold that she would be so entitled.[4]

Clause (3).

914. Then again if the widow gets remarried she forfeits all right to maintenance out of her deceased husband's estate,[5] unless, it is said, she belongs to a class amongst whom remarriage was customary, independently of the enabling Act, in which case remarriage does not deprive the widow of her maintenance.[6] But it is submitted, that even amongst the *Shudras* where remarriages are customary, the effect of remarriage is to dissolve the relationship between the widow and the family of her first husband, and as the right of maintenance is founded on relationship, it must cease with the relationship put an end to by remarriage. This is the view of the other courts, though the Allahabad court had to maintain the contrary by reason of its adhesion to the *stare decisis*.[7]

Concubine's maintenance.

915. The general principles here set out equally apply to a continuous concubine,[8] and other females.

Widow's right of residence.

100 The widow is as of right entitled to reside in the family dwelling house.[9] This right cannot be defeated by a sale of the house to a purchaser with notice.[10] Even in the case of a purchaser without notice, she cannot be evicted unless she is provided with another residence.[11] But she has no such right where the sale is contracted by the husband[12] or is for her husband's debt[13] or is for any other debt binding upon her.[14]

(1) *Ramawati* v. *Manjihari*, 4 C.L.J. 74.

(2) *Shib Dayee* v. *Doorga Pershad*, 4 N.W.P.H.C.R. 63; *Chandrabhagabai* v. *Kashinath*, 2 B.H.C.R. 341; *Savitri Bai* v. *Luxmi Bai*, 2 B. 573 F.B.; *Joytara* v. *Ramhari*, 10 C. 638; *Shyama Bai* v. *Purushottam Das*, 90 I.C. 124: (1925) M. 645.

(3) *Joytara* v. *Ramhari*, 10 C. 638.

(4) *Savitri Bai* v. *Laxmi Bai*, 2 B. 573 (583) F.B.; *Gun Joshi* v. *Sagoona*, 2 Borr. 404 (446).

(5) S. 2, Hindu Widow's Remarriage Act; *Matungini* v. *Ram Rutton*, 19 C. 289; *Rasul* v. *Ram Sarun*, 22 C. 589; *Mahamed Umar* v. *Man Kuar*, 21 C.W.N. 906; *Vithu* v. *Govinda*, 22 B. 321; *Panchappa* v. *Sangambaswa*, 24 B. 87; *Murugayi* v. *Viramakali*, 1 M. 226.

(6) *Bhola Umar* v. *Kansilla*, 55 A. 24 F.B.; *Har Saran* v. *Nandi*, 11 A. 330; *Dharamdar* v. *Nand Lal*, (1889) A.W.N. 78; *Rangit* v. *Radha Rani*, 20 A. 476; *Gajadhar* v. *Kaunsilla*, 31 A. 161 (165).

(7) *Gajadhar* v. *Kaunsilla*, 31 A. 161 (165); *Bhola Umar* v. *Kansilla*, 55 A. 24 F.B.

(8) *Panchapakesa* v. *Kanaka*, 33 M.L.J. 455: 42 I.C. 344.

(9) *Devkore* v. *Sammukharam*, 13 B. 101.

(10) *Dalsukharam* v. *Lallubhai*, 7 B. 282; *Gauri* v. *Chandramani*, 1 A. 262; *Talemand* v. *Rukmina*, 3 A. 353; *Venkatammal* v. *Andayappa*, 6 M. 130.

(11) *Mangala* v. *Dinanath*, 4 B.L.R. (O.C.) 72.

(12) *Manilal* v. *Bai Tara*, 17 B. 398.

(13) *Venkatammal* v. *Andyappa*, 6 M. 130; distinguished in *Ramanandan* v. *Rangammal*, 12 M. 260 F.B.; *Jayanti* v. *Alamelu*, 27 M. 45; *Manilal* v. *Bai Tara*, 17 B. 398.

(14) *Johurra* v. *Shreegopal*, 1 C. 470 (475).

916. **Analogous Law.**—The widow's right of residence in the family dwelling house has been established by a necessary deduction drawn from a passage of Katyayan that "except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away whatever it be, whether fixed or moveable; otherwise it may not be given."[1] Referring to this passage, Sir Barnes Peacock said: "The meaning of that passage is, that he must not give away his whole estate without providing food and clothing for his family, and that he must reserve one house, without which he himself or his family might want a dwelling. . . . The most difficult question is whether the passage of Katyayan, which says that a dwelling house may not be given, is a mere moral precept or a restriction on a man's right to convey. It seems to me at present that it is a restriction, and not a mere moral precept, and that the son and heir of the father has not such a right in the dwelling of the family that he can at once, of his own pleasure, turn out all the females of the family, or sell it or give the purchaser a right to turn them out."[2] This was the case in which the adopted son had sold the house to a purchaser who sued to eject his adoptive mother but the court held that the purchaser had no such right at least without providing some other suitable dwelling. This case has been followed in the other courts and establishes the widow's right of residence in the family house which she can maintain even against a transferee with or without notice of her right.[3]

917. Strictly speaking, the owner is, according to Katyayan's text, legally, incompetent to sell the family dwelling house. If, therefore, he sells it, the purchaser acquires no title in law. But inasmuch as the prohibition to sell is coupled with the reason that the house should be preserved for the residence of the family, the courts modify the prohibition to that extent by requiring the purchaser to provide another suitable residence for the females of the family before taking possession of the house. But this is in the nature of an equitable concession to which the purchaser with notice or a volunteer with or without notice is not entitled.[4]

918. **Widow's Right of Residence.**—The widow is entitled as of right to reside in the dwelling house of her husband,[5] though she is not bound to reside therein if she is subjected to cruelty or ill usage. As the Privy Council observed: "If a widow from any other cause than unchaste purposes, ceased to reside in her husband's family and takes up her abode in her parent's family, her rights are not forfeited."[6] This is the right possessed equally by the widows of all coparceners,[7] and those whose husbands had that right. This right, however, cannot be

(1) Cited in 2 Dig. 133.
(2) *Mangala* v. *Dinanath*, 12 W.R. 35 (36, 37).
(3) *Mangala* v. *Dinanath*, 12 W.R. (O. C.) 35; followed in *Gouri* v. *Chandramani*, 1 A. 262; *Talemand* v. *Rukmina*, 3 A. 353; *Venkatammal* v. *Andyappa*, 6 M. 130; *Dalsukharam* v. *Lallubhai*, 7 B. 282 (286).
(4) *Imam* v. *Balamma*, 12 M. 334; *Rayawa* v. *Shivayaogappa*, 18 B. 679.
(5) *Prankoonwar* v. *Devkoonwar*, 1 Borr. 364; *Kumla* v. *Muneeshanker*, 2 Borr. 687; *Parvati* v. *Kisansingh*, 6 B. 567; *Dalsukhram* v. *Lallu Bhai*, 7 B. 282; *Devkore* v. *Sanmukhram*, 13 B. 101; *Mangala* v. *Dinanath*, 4 B.L.R. (O.C.) 72; *Gouri* v. *Chandramani*, 1 A. 262; *Talemand* v. *Rukmina*, 3 A. 353.
(6) *Jadumani* v. *Kheytramohan*, Sirkar's *Vyavastha Darpan* (2nd Ed.), 384; *Pirthee Singh* v. *Raj Koer*, 20 W.R. 21 P.C.; *Narayan Rao* v. *Ramabai*, 3 B. 415 P.C.; *Parvatibai* v. *Chatru*, 13 Bom. L.R. 1023.
(7) *Ganpatrao* v. *Shivprasad*, 4 Bom. L.R. 355.

enlarged by demanding on the death of the husband, a specified portion of the dwelling house for the purpose of separate residence. Nor can it be curtailed to anything less than what her husband may have prescribed in his will. So where he provided that his wife shall have the right to live in the three-storeyed portion of a certain house, she was held entitled to the whole of that portion for her life.[1] Her right of residence cannot be defeated by offering her a separate house to live in on the ground of her quarrelsomeness.[2]

Right against transferees with notice.

919. Her right of residence may be enforced by her not only against the members of her husband's family, but also against their transferees with notice of her right. The right of itself does not create any charge on the family house, though it is a right *in rem* as regards the house, which she is entitled to enforce against all comers possessing notice of her right.[3]

Right against transferee without notice.

920. Even where the transferee takes without notice of her right he cannot eject her from the dwelling house in which she lived at the time of her husband's death without providing her with another suitable residence.[4] This is the necessary outcome of Katyayan's text previously quoted and discussed (§§ **916, 918**).

Husband's bona fide transfer excepted.

921. Her right of residence cannot be defeated by any transfer made even by the husband in fraud of her rights, though it is a right which is not paramount to the necessity of the family, for which the house may be sold to a purchaser conferring on him a right to eject the widow, even though he should have taken with notice of her right.[5]

Or any transfer for necessity.

922. So again, she must subordinate her right to a transfer by whomsoever made for a family necessity.[6] So the house must go with the rest of the family assets on the manager's insolvency due to losses incurred in a family business.[7] And generally, the house may be sold for any purpose which would justify the sale of any other family property.[8]

Rule applied to unmarried daughters and sisters.

923. The rule applicable to the widow would appear to extend equally to the unmarried daughter and sister who also possess the right of residence in the family house. So an auction-purchaser of an ancestral house sold in execution of a money decree passed on a personal debt of the mother, who inherited the property

(1) *Ananda Prashad* v. *Ambika Prashad*, 53 C. 948 P.C.

(2) *Devkore* v. *Sunmukhram*, 13 B. 101 (105).

(3) *Dalsukhram* v. *Lallubhai*, 7 B. 282 (286).

(4) *Mangala* v. *Dinanath*, 12 W.R. (O. C.) 35.

(5) *Nana* v. *Rama*, (1886) B.P.J. 252; *Lakshman* v. *Satyabhamabai*, 2 B. 494 (511, 514); *Dalsukhram* v. *Lallubhai*, 7 B. 282; *Mani Lal* v. *Tara*, 17 B. 398; *Ganga Bai* v. *Janki Bai*, 45 B. 337; *Ramanandan* v. *Rungammal*, 12 M. 260; *Jayanti* v. *Alamelu*, 27 M. 45.

(6) *Champa* v. *Official Receiver*, 15 L. 9.

(7) *Johurra* v. *Sreegopal*, 1 C. 470 (475).

(8) S. 39, Transfer of Property Act (V of 1882); *Jayanti* v. *Alamelu*, 27 M. 45; *Nihal Devi* v. *Shib Dial*, (1907) P.R. 37; *Thamardas* v. *Gani*, 4 S.L.R. 978: 10 I.C. 905; *Kanta Mohini* v. *Nanchora*, 35 I.C. (C.) 566.

as heir to her son was held disentitled to oust the unmarried sister of the latter who resided therein.[1]

No forfeiture on loss of caste.

101 Mere loss of caste does not deprive a person of his right to maintenance.[2]

924. **Analogous Law.**—Maintenance is a right, and since no right is affected by the forfeiture of caste by reason of the Caste Disabilities Removal Act,[3] it follows that a mere loss of caste of a person by reason of his conversion or otherwise is no ground for depriving him of maintenance.

102. (1) The widow is entitled to such maintenance as would enable her to live with the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life-time.[4]

Amount of Maintenance.

(2) Subject as above, in fixing the amount, regard must be had to the following facts,[5] namely,—

(a) the income of the entire estate,[6]
(b) the position and the status of the deceased husband,[7]
(c) the value of the estate,[8]
(d) the *stridhan* in her possession,[9] and
(e) her reasonable wants;[10]

(3) Provided that the amount of maintenance shall, in no case, exceed the annual profits of the share to which the husband would have been entitled on partition.[11]

Explanation.—The rule herein stated applies *mutatis mutandis* to the maintenance of other female relations.[12]

925. **Analogous Law.**—The only text bearing on the *quantum* of maintenance is as follows:—

Yadnyavalkya.—"He who forsakes a wife, though obedient to his commands, diligent in household management, mother of an excellent son, and speaking kindly, shall be compelled to pay the third part of his wealth, or, if poor, to provide a maintenance for that wife."[13]

But this precept is merely illustrative of the right and has never been literally enforced, the Courts having laid down rules for their own guidance in this matter, which are summarized in the section.

926. **Amount of Maintenance.**—Maintenance does not imply merely the cost of food and raiment. It implies a provision for all wants having regard to the position, status and income of the family and

Clause (1).

(1) *Suryanarayana* v. *Balasubramania*, 43 M. 635.
(2) Caste Disabilities Removal Act, (XXI of 1850).
(3) XXI of 1850.
(4) *Ekradeshwari* v. *Homeshwar*, 8 Pat. 840 (846) P.C.; *Rajani Kant* v. *Sajani Sundari*, 61 C. 221 P.C.
(5) *Ekradeshwari* v. *Homeshwar*, 8 P. 840 P.C.
(6) *Nitto Kissoree* v. *Jogendra Nath*, 5 I.A. 55; 3 Suth. P.C. 505.
(7) *Ibid.*
(8) *Tagore* v. *Tagore*, 9 Beng. L.R. 377 (413).
(9) *Savitri Bai* v. *Luxmi Bai*, 2 B. 573 (584) F.B.; *Kishori Mohun* v. *Moni Mohun*, 12 C. 165 (167).
(10) *Nitto Kishoree* v. *Jogendra Nath*, 5 I.A. 55; 3 Suth P.C. 505.
(11) *Madhavrao* v. *Gangabai*, 2 B. 639; *Adhibai* v. *Cursondas*, 11 B. 199 (209); *Jayanti* v. *Alamelu*, 27 M. 45; *Shib Doyee* v. *Doorga*, 4 N.W.P.H.C.R. 63 (72).
(12) *Sobhanadramma* v. *Varahalaxmi*, 57 M. 1003, following *Ekradeshwari* v. *Homeshwar*, 8 Pat. 840 P.C., (a case of a deserted wife); *Mahesh* v. *Dirgapal*, 21 A. 232 (234); *Tagore* v. *Tagore*, 9 Beng. L.R. 377 (413).
(13) Ch. IV-76 (Mandlik), p. 171, cited in 2 Dig. 420; Mayukh, Ch. XX-1 (Mandlik), p. 153.

the claims of other persons thereto. As observed in a case:—"Where a widow has asked for separate maintenance, you look first at the mode of life of the family during her husband's lifetime, and you try to find out what amount will be sufficient to allow the widow to live, as far as may be consistently, with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime.[1] Then you see what the husband's estate is, and you also see how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family who also have their rights as heirs, or their rights to maintenance out of the estate."[2] The same principle governs the cases of other claimants to maintenance.[3]

Clause (2).

927. In estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate, regard should be had to the estate as gauged by the annual income derivable therefrom, to the position and status both of the deceased, and of the widow,[4] to the class or community to which the family belongs[5] and the expenses involved by the religious and other duties which she has to discharge.[6] So in a case where the widow sued her husband's uncle, the holder of an impartible Raj, for maintenance, upon the finding that the income of the estate was Rs. 22,000 per annum, the court decreed the widow a maintenance allowance of Rs. 3,000 per annum, charging it upon the Raj estate. In fixing this sum, the court took into consideration the fact that the parties were high caste Kshatriyas, and the widow was entitled to maintain herself in comfort and maintain a position suitable to her rank. The fact that the widow was childless in no degree altered her right to maintenance, or differentiated the principles upon which maintenance should be calculated.[7] It was pointed out that if the widow had only been fortunate enough not to lose her husband, he would have inherited the estate, and he would have been the owner of an income of Rs. 22,000 per annum. The fact that she lost her husband was no ground for sentimental considerations, but nevertheless, she was entitled to adequate provision sufficient to make her life, as far as possible, one of comfort.

928. While however, the widow is entitled to be suitably maintained, this does not mean that she should be maintained in the same state as her husband would have maintained her. So where there were other claimants for maintenance and there were debts, the court held Rs. 800 per annum sufficient to maintain a widow out of an estate, the net income from which was Rs. 10,000.[8] But in fixing a sum for maintenance, the court is not to be influenced by the Shastric injunction that the widow is to live the life of austerity, semi-starvation and wretchedness, since it is a matter of

(1) *Ekradeshwari* v. *Homeshwar*, 8 Pat. 840 (846) P.C.; *Rajani Kant* v. *Sajani Sundari*, 61 C. 221 P.C., affirming O.A. 58 C. 745.

(2) *Karoonamoyee* v. *Administrator-General*, 9 C.W.N. 651 (652, 653).

(3) *Mahesh Partab Singh* v. *Dirgpal Singh*, 21 A. 232.

(4) *Nitto Kissore (Sreemutty)* v. *Jogendra Nath*, 5 I.A. 55: 3 Suth. P.C. 505.

(5) *Adhibai* v. *Cursandas*, 11 B. 199 (210); *Srinivasa* v. *Lakshmi*, 54 M.L.J. 530: (1928) M. 216; *Punchakshara* v. *Pattammal*, (1927) M. 865.

(6) *Baisni* v. *Rup Singh*, 12 A. 558; *Rangathayee* v. *Nelimunisami*, 21 M.L.J. 706: 10 I.C. 110; *Srinivasa* v. *Lakshmi*, 54 M.L.J. 530: (1928) M. 216; *Rukhma* v. *Rango Bai*, 1 C.P.L.R. 33; *Ronno* v. *Laxmi*, (1877) C.P.S.C., Pt., VIII-72; *Raja Ratansingh* v. *Ram Beni Bae*, 1 N. L.R. 33.

(7) *Baisni* v. *Rup Singh*, 12 A. 558 (561); *Dalel* v. *Ambika*, 25 A. 266 (270).

(8) *Kaleepersaid* v. *Kupoor*, 4 W.R. 65.

religious or ceremonial observance rather than of law.[1]

929. In assessing the amount the court is not entitled to take into consideration the value of her jewels or other unproductive property in her hands, if they constitute her *stridhan*, and although forming part of her husband's estate, are suitable to the position of the family in society.[2] But it is submitted, and it has been held, that in assessing the amount the court is bound to take into consideration the *stridhan* possessed by the claimant[3] (§§ 902, 929, 935).

930. Where the court found that the widow—a *pardanashin* lady—needed a servant, and allowed her Rs. 150 per annum on that ground, the High Court reversed the order of the District Judge who, while admitting the necessity, had reduced the allowance on the ground that she could share that cost with a friend.[4]

931. The amount which the widow is entitled to recover is not only that required for her food, clothes and residence, but also that necessary for her comfort and the maintenance of her position,[5] as also the performance of religious and other ceremonies, *e.g.*, the *shradh* of her husband, the pilgrimage to Gaya and the performance of other rites necessary for the beatitude of her deceased husband, and her own salvation (§ 935).

Clause (3).

932. **Limits of her Right.**—Theoretically there is no limit as regards the amount which a woman may recover by way of maintenance. But in practice, this amount is never allowed to exceed the profits of the share to which the husband would have been entitled on partition, if living.[6] "A Hindu wife's right to maintenance has been attributed to a kind of identity with her husband in proprietary right, though her right may be of quite a subordinate character, but it is by virtue of this right that she gets a share equal to that of a son when partition takes place at the instance of male members."[7] While the claim of the widow for maintenance is, as already stated, subject to the maximum amount which represents the annual income from her husband's estate or interest, it is also said to be subject to the rule that, ordinarily, it should not fall much less than one-third of such interest.[8]

933. **Conditional Maintenance.**—Although the Shastras enjoin on the widow the duty of residing with her husband's relatives, it is only a moral precept which the courts do not insist on as a condition of her receiving maintenance. But though she is free to choose her own residence, there are two limitations upon her choice: (*a*) if her husband has directed that she shall be maintained in the family house, she is not entitled

(1) *Hurry Mohan Roy* v. *Nyantara*, 25 W.R. 474 (476); *Promotho* v. *Nagendra Bala*, 12 C.W.N. 808; 8 C.L.J. 489 (496); *Umrit* v. *Kidernath*, 3 Agra 182; *Narayan Rao* v. *Ramabai*, 3 B. 415 P.C.; *Ram Chandra* v. *Sagunabai*, 4 B. 261.

(2) *Shib Dayee* v. *Doorga Pershad*, 4 N.W.P.H.C.R. 63; *Shyam Bhai* v. *Purushottam Das*, (1925) M. 645 (659).

(3) *Per* Westropp, C.J., in *Savitribai* v. *Luxmibai*, 2 B. 573 (584) F.B.; *Mahadrao* v. *Gangabai*, ib., p. 639; *Jodoonath* v. *Brijonath*, 12 B.L.R. 386; *Kishori Mohun Ghose* v. *Moni Mohun*, 12 C. 165 (167); *Poorendra* v. *Hemangini*, 36 C. 75 (84).

(4) *Krishnabai* v. *Babaji*, (1805) B.P.J. 444.

(5) *Srinivasa* v. *Lakshmi*, 54 M.L.J. 530: (1928) M. 216.

(6) *Mahadrav* v. *Gangabai*, 2 B. 639; *Adhibai* v. *Cursandas*, 11 Bom. 199 (209); *Jayanti* v. *Alamelu*, 27 M. 45 (49); *Shib Doyee* v. *Doorga*, 4 N.W.P.H.C.R. 63 (72).

(7) *Srinath* v. *Probodh Chunder*, 11 C.L.J. 580 (587); *Jamna* v. *Machul*, 2 A. 315.

(8) *Ramabai* v. *Trimbak*, 9 B.H.C.R. 283 followed in *Adhibai* v. *Cursandas*, 11 B. 199 (209, 210).

to maintenance if she resides elsewhere, without cause;[1] (*b*) in no case can she take up a separate residence for the purpose of unchastity.[2] Again, where the family property is insufficient to admit of an allotment of separate mainenance[3] then the court may allot to her a portion of the land, not exceeding one-third, whatever may its value.[4] Such was the case of the widow who sued the defendants who were the widows of her husband's brothers for maintenance. The court found that the income from the family lands averaged only Rs. 40 per annum, and thereupon the court assigned to the plaintiff one-third of the vacant site for her residence, but declined to award her separate maintenance.[5]

934. The husband is not entitled to limit his widow's maintenance by will, since the right is paramount or superior to his power of testamentary disposition.[6] She was in a subordinate sense a co-owner with him in the property, and her right to maintenance is, in a limited way, a charge on his property.[7] But of course, though neither she nor the court is bound by the allowance so fixed, it is, nevertheless, entitled to great weight as evidence of what a lady in the position of his widow should need.[8]

935. It has already been seen that her *stridhan* and other property which yields no income cannot be taken into account in fixing her allowance (§ 929). But the court cannot ignore her *stridhan* and other sources of her certain income, since these circumstances, and even the position and conduct of the claimant, may reduce the maintenance.[9] Such would be the case, if the widow had lived apart for purposes of immorality, or if she had concealed a portion of her husband's assets. But the court is not justified in punishing the claimant by reducing her allowance, for making vexatious defences in the suit.[10]

Change of maintenance.

103. The amount of maintenance is liable to variation with the change of circumstances of the family and the value of the estate.[11]

936. Analogous Law.—The amount of maintenance must naturally bear close relation to the income of the estate and the necessities of the claimant from time to time.[12] It is consequently liable to be increased

(1) Vyavastha Darpan, 310; cited in *Pirthee Singh* v. *Raj Koer*, 12 B.L.R. 238 (243) P.C.; *Ananda Prashad* v. *Ambika Prashad*, 53 C. 948 P.C.; *Mulji* v. *Ujam*, 13 B. 213; *Goki Bai* v. *Lakshmi Das*, 14 B. 490 (496, 497); *Giranna* v. *Honama*, 15 B. 236.

(2) *Kasturbai* v. *Shivajiram*, 3 B. 372; *Romanath* v. *Rajomni*, 17 C. 674; *Bhoba Tarini* v. *Peary Lall*, 24 C. 646.

(3) *Savitri Bai* v. *Luxmi Bai*, 2 B. 573; *Kasturbai* v. *Shivajiram*, 3 B. 372; *Ramachandra* v. *Saguna Bai*, 4 B. 261 (263); *Godavaribai* v. *Saguna Bai*, 22 B. 52.

(4) *Godavaribai* v. *Saguna Bai*, 22 B. 52.

(5) *Promotho* v. *Nagendra Bala*, 12 C.W.N. 808: 8 C.L.J. 489 (497).

(6) Restriction 1 of Sch. III of the Indian Succession Act, 1925. *Promotho* v. *Nagendra Bala*, 12 C.W.N. 808: 8 C.L.J. 489 (497) citing *Jamna* v. *Machul*, 2 A. 315; *Becha* v. *Mothini*, 23 A. 86; contra *Joytara* v. *Ramhari*, 10 C. 638; *Kaki Narasamma* v. *Venkataraju*, 93 I.C. 686: (1926) M. 534; *Mahasabht* v. *Anna Sohan Lal*, 104 I.C. 119: (1927) R. 256.

(7) *Promotho* v. *Nagendra Bala*, 12 C.W.N. 808: 8 C.L.J. 489; *Srinath* v. *Probodh Chunder*, 11 C.L.J. 580: 6 I.C. 244.

(8) *Promotho* v. *Nagendra Bala*, 12 C. W.N. 808: 8 C.L.J. 489 (498).

(9) *Tagore* v. *Tagore*, 18 W.R. 359 (373) P.C.; *Laxmi Bai* v. *Vishwanath*, 16 N.L.R. 140: 58 I.C. 860.

(10) *Nitto Kishore* v. *Jogendra*, L.R. 5 I.A. 55.

(11) *Ibid.*

(12) *Ibid.*; *Devi Persad* v. *Gunwanti*, 22 C. 410; *Ratnamala* v. *Kamakshaya*, 31 C.L.J. 351: 57 I.C. 9; *Narhar* v. *Dirgnath*, 2 A. 407; *Basini* v. *Rupsingh*, 12 A. 558; *Ramabhai*, v. *Trimbak*, 9 B.H.C.R. 283; *Savitri Bai* v. *Luxmi Bai*, 2 B. 573 F.B.; *Apaji* v. *Gangabai*, *ib.*, p. 632; *Gopika Bai* v. *Dattatraya*, 24 B. 386 (392, 393).

or decreased or discontinued altogether according to circumstances.[1] Even where maintenance is awarded by a decree which contains no clause as it should, in favour of modification according to change of circumstances, that condition is to be implied and it is competent to any party, to maintain a separate suit for its enhancement or reduction.[2]

937. **Case for Increase.**—A case for increased maintenance may be justified not only on the ground that, since the decree, the value of the estate had greatly increased, or apart from any such increase, there has been a material increase in the cost of living which renders the money allowance insufficient to give the widow the means of maintenance suitable to her decree and the circumstances of the family.[3]

938. **Case for Reduction.**—To raise a case for reduction, it is necessary to show that the value of the estate upon which maintenance was charged had been reduced not by any default of the holder or of those through whom he claims, but by the act of God and owing to circumstances beyond his control.[4] In such a case, a sum fixed even by a compromise of the widow's claim to the estate is liable to variation.[5]

939. But where in a suit for the reduction of maintenance, the court found "that the reduction of income was entirely due to the laches of the plaintiffs themselves, having been brought about by acts of fraud, undertaken with a view to defeat the defendant's lawful claim," the High Court threw out the suit for reduction holding that the plaintiff could not be permitted to take advantage of his own laches.[6] A case for reduction must be founded upon circumstances anterior to the suit. The fact that the widow had made a vexatious claim is no ground for reducing maintenance by way of punishment.[7] It would seem that the court is loath to modify an allowance except upon a clear case calling for its interference. It will not act upon vague and indefinite assertions.[8] So, again, there must be substantial grounds for reduction. Any reduction in the family income will not justify reduction of maintenance. So where in a case the court had awarded Rs. 25 per mensem for maintenance and Rs. 2-8 for residence out of an estate valued at Rs. 35,000 in which the widow's husband's share would have stood at Rs. 8,750; about Rs. 3,000 of the estate was held in the Post Office Savings Bank which allowed 3½ per cent. interest subsequently reduced, whereupon the plaintiff sued for a corresponding reduction. But the court held that cause insufficient to modify the decree.[9] In another case, the court refused to discriminate between the widow with a son and one without, holding that the question in each case was what was a reasonable sum to be awarded, due regard

(1) *Sreeram* v. *Puddomookhee*, 9 W.R. 152; *Nubo Gopal* v. *Amrit*, 24 W.R. 428; *Gopika Bai* v. *Dattatraya*, 24 B. 386; *Sansar Chand* v. *Shanti*, 96 I.C. 255: (1926) L. 539; *Kewal Ram* v. *Isri Bai*, 93 I.C. 353: (1926) S. 135.

(2) *Vijaya* v. *Sripathi*, 8 M. 94; *Bangaru* v. *Vijayamachi*, 22 M. 175; *Rukabai* v. *Ganda Bai*, 1 A. 594; *Mootilal* v. *Bai Kasi*, 17 B. 45; *Gopikabai* v. *Dattatraya*, 24 B. 386, 392; *Laxmi Bai* v. *Vishwanath*, 16 N.L.R. 140: 58 I.C. 860; *Bhagwanti* v. *Mani Ram*, (1925) L. 543; *contra* where grant made in her own right; *Lakhmi Chand* v. *Anandi*, (1935) P.C. 180, 181.

(3) *Bangaru* v. *Vijayamachi*, 22 M. 175; *Bhuttacharjee* v. *Puddomookhee*, 9 W.R. 152.

(4) *Greeschund* v. *Sumbhoo*, 5 W.R. 98 (99) P.C.

(5) *Rajender* v. *Pulto Soondry*, 5 C.L. R. 18 (20); to the same effect *Vijaya* v. *Sripathi*, 8 M. 94; *Subramaniam* v. *Vembammal*, 14 M.L.J. 339; *Ruka Bai* v. *Ganda Bai*, 1 A. 594; *Narhar Singh* v. *Dirgnath*, 2 A. 407; *Munna* v. *Kabutra*, (1881) A.W.N. 12.

(6) *Munna* v. *Kubutra*, (1881) A.W.N. 12.

(7) *Nitto Kishoree* v. *Jogendro*, L.R. 6 I.A. 55.

(8) *Greeschund* v. *Shumbhoo*, 5 W.R. 98 (99) P.C.

(9) *Bhagirathi Bai* v. *Ravji*, (1896) B. P.J. 694.

being had to all the circumstances of the case.[1] Where maintenance is fixed by an instrument for life, it is a question of construction and intention whether it was fixed without advertence to the increase or decrease necessitated by altered circumstances.[2]

940. Case for Suspension.—So the widow's right for maintenance may be suspended if she has become possessed of sufficient means of her own. It was so held in a Mitakshara case in which she had been allowed maintenance from her husband's coparceners who obtained his property by right of survivorship. Subsequently she inherited property worth at least 2 lacs from her father, whereupon the court dismissed her suit for arrears for maintenance holding that by common law the right to maintenance was one accruing from time to time according to the wants and exigencies of the widow.[3]

Priority of debts.

104. Debts due from the family take precedence over a widow's claim for maintenance.[4]

941. Analogous Law.—Maintenance has, sometimes, been loosely spoken of as a charge on the family assets.[5] But it is now settled that a mere claim to maintenance, though justifying a charge, does not of itself amount to a charge on the property from which maintenance is payable.[6] It, therefore, follows that if it is not charged by a contract or decree it might be defeated by an alienation made for family necessity and in the case of a trading firm in payment of its debts without reference to any necessity.[7] And even as an unsecured claim, the debts of the family take precedence over maintenance[8] on the ground that such debts were equally binding upon her.[9] Consequently, she cannot enforce her right to maintenance against a purchaser of the family property sold for such debts,[10] even though he had notice.[11]

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(1) *Narahar Singh* v. *Dirgnath*, 2 A. 407.

(2) *Subramanian* v. *Vembammal*, 14 M. L.J. 339.

(3) *Ramawati* v. *Manjhari*, 4 C.L.J. 74 (78) following *Narayan Rao* v. *Rama Bai*, 3 B. 415 P.C.; *Goki Bai v. Lakhmidas*, 14 B. 490.

(4) *Sham Lall* v. *Banna*, 4 A. 296 (300); *Jayanti* v. *Alamelu*, 27 M. 45; *Jawahar* v. *Pardumant*, 14 L. 399, and cases cited in f.n. 10, *infra*.

(5) *Khakro* v. *Jhoomucklall*, 13 W.R. 263; *Tarunginee* v. *Dwarkanath*, 20 W.R. 196; *Har Dayal* v. *Radhan*, (1871) P.R. 7; *Heeralal* v. *Kaunssilah*, 2 Agra 42.

(6) *Ram Kunwar* v. *Ram Dai*, 22 A. 326; *Bharatpur State* v. *Gopal Dei*, 24 A. 160; *Beer Chunder* v. *Raj Coomar*, 9 C. 537; *Digambari* v. *Dhanak Kumari*, 10 C. W.N. 1074; *Kuleda* v. *Jageshar*, 27 C. 194; *Mahalakshamma* v. *Venkatarathnamma*, 6 M. 83; *Mutiah* v. *Virammal*, 10 M. 283 F.B.; *Bhagirathi* v. *Anantha*, 17 M. 268; *Parvathi* v. *Shrinivas*, 22 Bom. L. R. 110: 55 I.C. (B.) 531; *Daulat* v. *Champa*, 55 I.C. 28. See this question fully discussed in Gour's Law of Transfer, (6th Ed.), 695-703.

(7) *Ramlal* v. *Lakmichand*, 1 B. H. C.R. (App.) 51; *Johurra* v. *Sree Gopal*, 1 C. 470; *Joykisto* v. *Nityanund*, 3 C. 738; *Bemola* v. *Mohun*, 5 C. 792; *Ram Partab* v. *Fooli Bai*, 20 B. 767; *Bishahar* v. *Fateh Lal*, 29 A. 176; *Ragunathji* v. *Bank of Bombay*, 34 B. 72; *Morrison* v. *Verchyoele*, 6 C.W.N. 429.

(8) *Sham Lall* v. *Banna*, 4 A. 296 (300); *Gur Dyal* v. *Kaunsilla*, 5 A. 367; *Jayanti* v. *Alamelu*, 27 M. 45; *Jawahar* v. *Parduman*, 14 L. 399.

(9) *Adhiranee* v. *Shona Molee*, 1 C. 365; *Natchiarammal* v. *Gopalkrishna*, 2 M. 126; *Jayanti* v. *Alamelu*, 27 M. 45; *Jamnabai* v. *Nanabhai*, 12 Bom. L.R. 1075.

(10) *Adhiranee* v. *Shona Malee*, 1 C. 365; *Johurra* v. *Sree Gopal*, *ib.*, p. 470; *Soorja Koer* v. *Nath Baksh Singh*, 11 C. 102; *Lakshman* v. *Satyabhamboi*, 2 B. 494; *Balsukhram* v. *Lallubhai*, 7 B. 282; *Natchiarammal* v. *Gopalakrishna*, 2 M. 126; *Venkatammal* v. *Audyappa*, 6 M. 130; *Ramanadan* v. *Rangammal*, 12 M. 260 F.B.; *Shamlal* v. *Banna*, 4 A. 269 (299) F.B.; *Jamna* v. *Machul*, 2 A. 315; *Gur Dyal* v. *Kaunsilla*, 5 A. 367.

(11) *Daulat* v. *Champa*, 55 I.C. 28.

Maintenance a personal right.

105. (1) **The right to maintenance is a personal right and cannot be transferred.**[1]

(2) A right to maintenance cannot be attached in execution of a decree, though arrears of maintenance may be so attached or transferred.[2]

942. Analogous Law.—The right to maintenance was at one time spoken of as a charge on the estate[3] but it is now clear since the passing of the Transfer of Property Act, which has defined a charge for the first time,[4] that it is not so unless it is fixed and charged on a specific portion of the estate by contract or decree.[5] Even prior to the passing of the Transfer of Property Act it was held in several cases that maintenance merely created a personal right and did not enure against a *bona fide* transferee without notice.[6] though it could be enforced against one who took with notice.[7] The correct view, and one which accords with the statutory law, must be that maintenance, as such, merely creates a personal right, which might be secured by a charge, but till it is so secured, it is no more than a claim enforceable in any of the ways open to an unsecured creditor, and as such, subject to all the provisions of the Transfer of Property Act regarding a claim against a transferee with notice of the claim and of the fact that a transfer was made to defeat or defraud a person of his rights[8] but not otherwise. In other words, apart from fraud, such a claim does not avail against a *bona fide* transferee for value, even though he had notice of the claim.[9] On the other hand, it would be enforceable against a volunteer without notice.[10]

The law is now embodied in S. 39 of the Transfer of Property Act, *see* S. 101.

943. Maintenance Right Untransferable.—The right of a widow to maintenance and residence is a personal right, and is, as such, from its very nature, untransferable[11] for the husband's or heir's duty of maintaining the wife or the widow is one which he cannot owe to another.[12] But though this is true of a right,[13] the arrears of maintenance may be transferred,[14] attached and sold as soon as they become debts, *i.e.*, are ascertained and fixed[15] but not till then[16] and where property is given in lieu

(1) *Narmada* v. *Mahadev*, 5 B. 99 (103, 104); *Annapurni* v. *Swaminatha*, 34 M. 7; *Subroya* v. *Krishna*, 46 M. 659 F.B.; *Tara Sundari* v. *Sarodacharan*, 12 C.L.J. 146; contra *Asad Ali* v. *Haidar Ali*, 12 C.L.J. 130.

(2) S. 60, Cl. (*n*), C. P. Code, *Haridas* v. *Baroda*, 27 C. 38; *see* comm.

(3) *Heeralal* v. *Kausillah*, 2 Agra 42; *Ramchandra* v. *Savitribai*, 4 B.H.C.R. (A. C.) 73.

(4) *Tarunginee* v. *Dwarkanath*, 20 W.R. 196.

(5) *Coomara* v. *Venkataswara*, 5 M.H. C.R. 405; *Subramania* v. *Kaliani*, 7 M.H. C.R. 226.

(6) *Mutuswamy* v. *Vencataswara*, 12 M.I.A. 203; *Lakshman* v. *Sarasvatibai*, 12 B.H.C.R. 69; *Anund Moyee* v. *Gopal Munder*, (1864) W.R. 310; *Bhagabati* v. *Kanai Lall*, 17 W.R. 433 *note*; *Jugger Nath* v. *Odhiranee*, 20 W.R. 120; *Adhiranee* v. *Shona Malee*, 1 C. 365.

(7) *Geluck Chunder* v. *Obilia*, 25 W. R. 100.

(8) S. 53, Transfer of Property Act. *Bharatpur State* v. *Gopal Dei*, 24 A. 160; *Beharilalji (Shri)* v. *Rajbai*, 23 B. 342.

(9) *Ram Kunwar* v. *Ram Dai*, 22 A. 326; *Beer Chunder* v. *Raj Coomar*, 9 C. 435; *Seerja* v. *Koer Nath Buksh Singh*, 11 C. 102; *Bank Bai* v. *Bilase*, (1877) P.R. 14.

(10) *Jamna* v. *Machul*, 2 A. 315.

(11) *Narbada* v. *Mahadeo*, 5 B. 99 (103, 104); *Annapurni* v. *Swaminatha*, 34 M. 7; *Subraya* v. *Krishna*, 46 M. 659 F.B.; *Tara Sundari* v. *Saroda Charan*, 12 C.L.J. 146; *contra* in *Asad Ali* v. *Haidar Ali*, 12 C.L.J. 130.

(12) *Bhurub Chunder* v. *Nubo Chunder*, 5 W.R. 111; *Annapurni* v. *Swaminathan*, 6 I.C. (M.) 439; *Narbada* v. *Mahadeo*, 5 B. 99 (104); *see* the subject further discussed in 1 Gour's Law of Transfer (6th Ed.), § 233.

(13) S. 60 (*n*), C. P. Code.

(14) *Endori* v. *Venkata Chainula*, 33 M. 80.

(15) *Rajarav* v. *Nanarav*, 11 B. 528 (533), contra *Gulab Kuar* v. *Bansidhar*, 15 A. 371.

(16) *Ramabai* v. *Ganesh*, (1876) B.P.J. 188; *Tuffazul Hoosein* v. *Raghunath*, 7

of maintenance it is *prima facie* alienable during the life time of the grantee.[1]

106. (1) The right of maintenance of a female relation cannot be defeated by a person disposing of his property by gift or devise and it may be enforced against the donee[2] or devisee,[3] as the case may be, with or without notice.

Maintenance cannot be defeated by Gift or Devise.

(2) But such right is not enforceable against a *bona fide* transferee for valuable consideration without notice of the claim or right[4] or a transferee, with or without notice, for consideration supported by legal necessity[5] or for a purpose binding on the family.[6]

Explanation.—The right of residence of a female relation is liable to be defeated in the same circumstances as the right of maintenance, provided that no transfer, even if made for legal necessity or benefit of the family, can defeat the right of residence, if it was made to defeat, or in fraud of, her right; and the transferee had taken with notice thereof.[7]

Illustration.

A a Hindu transfers Sultanpur to his sister-in-law *B*, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, *A* will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. *A* sells the specified villages to *C*, who buys in good faith, without notice of the agreement. *B* is dispossessed of Sultanpur. She has no claim on the villages tranferred to *C*.

944. Analogous Law.—This section merely carries the provisions of S. 39 of the Transfer of Property Act a step further in that it protects a right though it may not be ascertained and its amount made payable from the profits of immoveable property, "and whether the right is enforced against a transferee" or a "devisee." But in other respects this rule must be regarded as merely supplementary to that enacted in S. 39 of the Transfer of Property Act.

945. Transfer in Fraud of Maintenance.—This section is intended to crystallize the rule of Hindu law, which is much wider than that assumed in S. 39 of the Transfer of Property Act, the terms of which do not protect that right to the extent it is entitled to protection under that law, since while S. 39 is limited to a right realizable out of the profits of immoveable property, a claim for maintenance is enforceable otherwise than out of such profits, since it may have to be met by sale of such property itself. Secondly, under the statute the claim is only enforceable against a gratuitous transferee or one without notice, but under Hindu law, it is equally enforceable against the

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B.L.R. 187; *Bhyrub Chunder* v. *Nubo Chunder*, 5 W.R. 111; *Kashee Shuree* v. *Ganesh Chunder*, 6 W.R. (M. R.) 64; *Hoymobutty* v. *Keroona*, 8 W.R. 41.

(1) *Dhup Nath* v. *Ram Charita*, 54 A. 366.

(2) *Narmadi* v. *Mahadeo*, 5 B. 99 (108, 109); *Ramcharan* v. *Jusooda*, 2 Agra 134.

(3) *Krishna Rao* v. *Bhagwant Rao*, 2 Bom. L.R. 1082.

(4) S. 39, T. P. Act, 1882.

(5) *Suriyanarayana* v. *Balasubramania*, 43 M. 635; *Mani Lal* v. *Bai Tara*, 17 B. 398, (Burden on the claimant to show necessity); *Asu Debi* v. *Bashi Ram*, 56 I.C. 198; *Bhagat Ram* v. *Sahib Devi*, 3 L. 55.

(6) *Champa* v. *Official Receiver*, 15 L. 9.

(7) *Venkatammal* v. *Andyappa*, 6 M. 130; *Gauri* v. *Chandramani*, 1 A. 262; *Talemand* v. *Rukmina*, 3 A. 353.

devisee[1] or one taking a part of the estate by partition, both transactions being outside the scope of the Transfer of Property Act. Again, such claim is, in some cases, enforceable against any property in the hands of the male member of the family, whether the property be ancestral or self-acquired,[2] but the extent to which it is enforceable depends not so much upon the claim as upon its character and the relationship between the two parties.

946. Widow's Claim Against Transferee.—It is settled that the widow's claim for maintenance and residence in the family house may be enforced not only against the heir but equally against a donee or devisee. It may, in fact, be enforced against all transferees with or without consideration except a transferee without notice of her claim or against a purchaser for a family necessity in which case the question of notice does not arise.[3] Assuming, however, that he is not such a purchaser, the question then arises when is the transferee deemed to have such notice. From the trend of decided cases it is apparent that the notice spoken of in this connection is such notice as is defined in the Transfer of Property Act[4] and the Trusts Act.[5] Accordingly, it has been held that where the transferee purchases out of an ample estate there is no need for him to enquire. But if he purchases out of a small and insufficient estate, it is his duty to enquire from what property the widow is receiving her maintenance. If he fails to so enquire and purchases the estate, he will be deemed to have had notice of the fact which he could have ascertained by enquiry.[6]

Explanation.

947. The right of maintenance and residence is a right by no means as good, or even comparable with, that of a coparcener, and is, therefore, liable to be defeated in the same circumstances as a coparcenary right, with this difference that a right of residence, being tangible, a transferee, taking with intent to defeat or defraud it, cannot be permitted to do so. Otherwise the dual right is a floating right, and till it is crystallized by the creation of a charge is liable to be destroyed with the higher right of coparcenership, and even where the special rules of Hindu law do not apply, still the equitable rule enacted in S. 39 of the T. P. Act suffices to protect a transferee for consideration without notice.

Transfer Pendente Lite.

948. A transfer made during the pendency of a suit in which a charge on specific property is claimed, is, of course, subject to the doctrine of *lis pendens* enunciated in S. 52 of the Transfer of Property Act.[7]

Charge for maintenance.

107. Maintenance is payable out of, and may be charged on, any property of the person personally liable for it; otherwise it may be charged on, and is payable

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(1) *Ram Churn* v. *Jusooda*, 2 Agra 134; *Narbadi* v. *Mahadeo*, 5 B. 99 (108, 109).

(2) *Krishna Rao* v. *Bhagwant Rao*, 2 Bom. L.R. 1082.

(3) *Suriyanarayana* v. *Balasubramania*, 43 M. 635; *Mani Lal* v. *Bai Tara*, 17 B. 398 (Burden on the claimant to show want of necessity); *Asa Debi* v. *Bashi Ram*, 56 I.C. 198; *Bhagat Ram* v. *Sahib Devi*, 3 L. 55.

(4) S. 3 of Act IV of 1882.

(5) S. 3 of Act II of 1882.

(6) *Lakshman* v. *Satyabhamabai*, 2 B. 494.

(7) *Dose Thimmamma* v. *Krishna*, 29 M. 508 following *Bazayat Hoosain* v. *Doolichund*, 4 C. 402 (409) P.C.

out of, the joint family or inherited property according to the nature of the right.

949. Analogous Law.—The question to what extent, if at all, maintenance is a charge on the estate, has been often considered and by no means satisfactorily decided in several cases. Prior to the passing of the Transfer of Property Act, the word "charge" was a loose expression used to convey not only a definite incumbrance but a fund out of which a claim is payable. Hindu Law does not discriminate between these two notions of a charge.[1] But the fact that it provides for maintenance of disqualified heirs and others out of the property has naturally led to the view that maintenance must be a charge upon the estate. And this view was enunciated in several cases,[2] though the contrary was equally maintained in others.[3] 1882, the Transfer of Property Act, for the first time formulated a definition of the term "charge" as akin to mortgage, and though even the Privy Council have since spoken of the maintenance of a mother as a "charge upon the whole estate,"[4] still it is clear from the context that what their Lordships implied by that expression is no more than that it was a burden upon the estate as against the sons and not a charge in the statutory sense of the term. Such a claim is, to use the language of the Madras High Court, no more than "a mere equity to a provision,"[5] and whether it is an equitable charge or not, the fact remains that in its effect it does not possess all the attributes of a charge as described in the Transfer of Property Act. And even as a debt it has no precedence over other debts of the family.[6]

950. This is conceded in the very cases in which maintenance is held to constitute a charge upon the inheritance. In 1877 Sir Raymond West had to consider the nature of the burden created by maintenance upon the estate, and upon a review of the texts and earlier cases, laid down, that such a claim did not operate as a charge upon the inheritance, unless it was reduced to certainty by a legal transaction,[7] and that it was not a burden on the estate in the hands of a purchaser with or without notice for a consideration binding upon the family.[8] But in another case, Westropp, C.J., held past and future maintenance to be a charge on her husband's estate in possession of her step-sons.[9] So it has been held in Madras that a purchaser of the family house for value cannot eject the mother of the judgment-debtor, unless the sale bound her interest.[10] Where maintenance of the widow is to be charged on what would be her husband's share or estate, since if it is charged on the entire estate of the heir it would place an undue fetter on his power of alienation.[11]

951. But this is an uncertain fact and whatever may be the widow's right of residence, it does not solve the real difficulty. Is the right to

(1) *See* the authorities set out and discussed *per* Westropp, C.J., in *Lakshman* v. *Satyabhamabai*, 2 B. 494 (503).

(2) *Ramachandra* v. *Savitribai*, 2 Agra 42; *Lakshman* v. *Sarasvatibai*, 12 B.H.C. R. 69 (71); *Golab Koonwar* v. *Collector*, 4 M.I.A. 246; explained in *Lakshman* v. *Sarasvatibai*, 12 B.H.C.R. 69; *Guga* v. *Administrator-General*, 2 I.J. (N.S.) 124.

(3) *Nistarini* v. *Makhan Lal*, 9 B.L.R. 27; *Mangala* v. *Dina Nath*, 4 B.L.R. (O. C.) 27, following *Prankoonwar* v. *Devkoonwar*, 1 Borr. 404; *Bhagabati* v. *Kanailal*, 8 B.L.R. 225.

(4) *Hemangini* v. *Kedarnath*, 16 C. 758 (766) P.C.

(5) *Lakho* v. *Lachman*, 94 I.C. 181: (1926) L. 241.

(6) *Kalpagathachi* v. *Ganpathi*, 3 M. 184 (191).

(7) *Lakshman* v. *Satyabhamabai*, 2 B. 494 (521).

(8) *Ibid.*

(9) *Narbada Bai* v. *Mahadeo*, 5 B. 99.

(10) *Ramanadan* v. *Rangammal*, 12 M. 260 (272) F.B.

(11) *Ramarayudu* v. *Sitalakshmamma*, (1937) M. 915 (918).

maintenance a charge on the general estate? If so it must be subject to all its incidents as now defined in the Transfer of Property Act. If it is not a charge in this sense, but is a charge in some other and more limited sense, then that term will have to be again defined and its incidents set out with specific reference to its meaning in this connection. For the present it will suffice to state that maintenance is not a charge on the inheritance within the meaning of the Transfer of Property Act, inasmuch as it is not *secured* thereon by any rule of Hindu Law so as to have the same effect as a mortgage.[1] But it is a right which is a fit one to be charged upon the estate, inasmuch as it is a right which is a good substitute for ownership and is in fact closely allied thereto. And it has been held that when it is so charged it would take precedence of other charges,[2] except for a claim which is paramount thereto.[3] As such, where it is specifically charged on some property it is necessarily payable thereout; but on that property being exhausted, the charge holder is entitled to execute her decree against the other properties of the judgment-debtor, provided they are otherwise liable for maintenance, without obtaining a supplementary decree as provided in O. XXXIV, R. 6 of the Code of Civil Procedure.[4]

952. Maintenance Grants.—The question whether a maintenance grant enures for the life of the grantee, or of the grantor or for ever, depends upon the nature of the right and claim, the character of the estate, the sex of the grantee and the terms and incidents of the grant. A grant by a male to a female relation is presumably held to be a grant only for her maintenance and as such terminable with her life.[5] But where the grantee is a male, the fact that the grant purports to be and is expressly declared to be for maintenance does not carry with it any limitation. Such a grant may be perpetual or precarious. It depends upon its terms. The fact that the grantor is the holder of an impartible estate does not limit his right to carve out maintenance grants enuring beyond his own lifetime. Such is the *babuana* grant which is a grant for maintenance of the grantee and his family descendible to his male descendants,[6] with the reversionary right in the grantor on failure of heirs.[7] An agreement by a person to pay certain allowance for the maintenance of his son-in-law is valid and creates a liability in the nature of a debt which may be recovered out of the estate in possession of his son and grandson.[8]

Suit for maintenance.

108. A person entitled to maintenance may sue for a declaration of his right, and combine therewith a claim for past and future maintenance, with or without a charge to be created on any property liable to the claim.

953. Analogous Law.—It being settled that a right to maintenance as such, creates no charge on any specific property, it follows that a per-

(1) *Shamlal* v. *Banwa*, 14 A. 296; *Ramkunwar* v. *Ram Daia*, 22 A. 326; *Bharatpur State* v. *Gopal Dei*, 24 A. 160 (163); *Digambari* v. *Dhan Kumari*, 10 C.W.N. 1074; *Venkatammal* v. *Audyappa*, 6 M. 130; *Ramanadan* v. *Rangammal*, 12 M. 260 (271, 272) F.B.; *Jayanti* v. *Alamelu*, 27 M. 45 (49); *Parvati* v. *Shrinivas*, 22 Bom. L.R. 110: 55 I.C. 531; *Daulat* v. *Champa*, 55 I.C. 28.

(2) *Somasundaram* v. *Unnamalai*, (1920) M.W.N. 458.

(3) *Asa Debi* v. *Basbi Ram*, 56 I.C. 198.

(4) *Sia Shachari* v. *Ram Kishori*, 2 Pat. 796.

(5) *Sorabjit* v. *Indrajit*, 2 A.L.J. 720; *Kasho Prasad* v. *Madho Prasad*, 3 Pat. 880.

(6) *Durgadut* v. *Rameshwar*, 36 C. 943 P.C.

(7) *Ramchandra* v. *Muliwan*, 33 C. 1158.

(8) *Madhusudan* v. *Ramji*, 5 Pat. L.J. 516: 57 I.C. 341.

son entitled to maintenance may or may not sue only for maintenance, since he may also claim that any sum decreed on that account shall be secured by a charge declared on a specified property, out of which it is legally payable. As such, a right must depend upon the nature of the estate and the claimant's right thereto, the decision of the question must depend upon the nature of the relationship of the plaintiff to the party sued. For instance, the right of the wife to maintenance against the husband stands on a different footing to the claim of his widow against his heirs. And similarly, the right of a disqualified heir is to be distinguished from that of the junior member of the family of the holder of impartible property. In the case of the wife suing for maintenance, the question that arises is whether she has made out a case for maintenance at all, and at any rate, for a separate maintenance. If she has, then the court has to consider the further question whether the demands of justice require that her claim should be further protected by a charge on her husband's estate. So far as this rule is concerned, it is intended to set out the nature of the claim that is possible in law. The plaintiff may sue for arrears of maintenance, in which case the court may have to ascertain the rate at which it should be allowed. Consequently in a case where this has not been previously agreed upon, the proper course would seem to be one for the settlement of the right and a decree charging the sum decreed for past and future maintenance upon the estate. A mere personal decree for maintenance does not create a charge[1] and is subject to all the uncertainties of such a decree. From the fact that maintenance is regarded as arising out of a subordinate co-ownership in the estate, it is eminently a case in which the court will charge the estate unless some very strong reasons appear to the contrary.

954. Cause of Action.—A suit for maintenance by the wife against the husband will not lie in the absence of any allegation that the husband has refused or has ceased to maintain her.[2] In any case, the plaintiff must have no means for her maintenance. So where the plaintiff sued for maintenance and it appeared that she was then in possession of funds belonging to her husband's family estate sufficient to maintain her for five years, the court threw out her suit on the ground that no cause of action had accrued to her inasmuch as the court could not decree a claim in anticipation of her wants.[3] It has, sometimes, been said that there is no cause of action for maintenance, unless there is a demand and refusal, but maintenance cannot be refused on that account.[4] At any rate, the mere withholding of maintenance is sufficient and it amounts to a refusal.[5] This question was considered by the Privy Council in a case in which the plaintiff's failure to prove a wrongful withholding was argued as disentitling the plaintiff to maintain a suit, but their Lordships negatived the contention, holding that "if the defendant had been misled into the belief that the claim for maintenance was abandoned and had, in consequence, not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action. But, without some such ground of defence, it is impossible to hold that the younger brothers of the defendant had forfeited an undoubted right

(1) *Brinda* v. *Radhika*, 11 C. 492.
(2) *Punnabibi* v. *Radhakissan*, 31 C. 476.
(3) *Dattatraya* v. *Rakhamabai*, 33 B. 50.
(4) *Jivi* v. *Ramji*, 3 B. 207; *Narayanrao* v. *Ramabai*, 3 B. 415 (421) P.C., in which the point was disposed of even on the assumption that refusal was necessary; *Ambabai* v. *Ramchandra*, (1895) B.P.J. 44; *Parwati Bai* v. *Chhatru*, 36 B. 131; *Bangu Bai* v. *Subaj*, 36 B. 383.
(5) *Narayan Rao* v. *Ramabai*, 3 B. 415 (421) P.C. contra in *Motilal* v. *Kashi*, 17 B. 45 overruled in *Yarlagadda* v. *Yarlagadda*, 24 M. 147 (156) P.C.

merely because they were, in the first instance, advised to institute a wrong suit and did not claim their maintenance, as it fell due.[1] In other words, apart from any surprise or prejudice to the defendant, the mere failure of the plaintiff to prove a refusal or withholding does not imperil his suit.

Limitation.

955. But since the denial of a right is a starting point for limitation,[2] it is necessary that it should be stated by the plaintiff, at least in answer to the plea of limitation, since it is an established rule that when the defendant pleads limitation to a suit it lies on the plaintiff to show that it is in time. If, therefore, in such a case the plaintiff fails to prove the defendant's denial within 12 years, then his suit would be barred by time.[3] On the other hand, the defendant may show that he had denied the right more than 12 years before suit which would suffice to defeat the claim otherwise maintainable.

956. **Provisions for Maintenance.**—In a suit for maintenance, the cause of action may arise under the common law or under a contract or provision of a will. It is the duty of the plaintiff to state in what right he claims to maintain the suit. A widow, with a right of maintenance reserved under a will, is entitled to contest its *factum*. Under S. 50 of the Probate and Administration Act[4] the amount of maintenance fixed by the husband testator himself, if not a nominal amount, and not fixed contrary to any provision of Hindu Law, cannot be varied by the court. But a widow cannot be deprived of her right of maintenance by any provision in the will denying her right or excluding her by devising the property to another. But the husband is entitled to provide for reasonable restrictions as to her residence which she is bound to obey, unless she has "just cause" to the contrary. So where the testator had devised a monthly allowance of Rs. 125 to his widow on condition that she lived in his houses "at Madhupur or Benares", and it appeared that the house at Madhupur was unfit for human habitation, while his house at Benares was in the occupation of his concubines, the court held it to be a just cause on the part of the wife for not complying with that provision of the will, and as her residence elsewhere necessitated a larger expenditure, it raised the testamentary allowance of Rs. 125 to Rs. 320, making it a charge on the estate.[5] In another case, the widow of a predeceased son was awarded maintenance of Rs. 140 *per mensem*, payable by the father and son belonging to a trading family who possessed an estate worth 4 lacs and made an annual income of Rs. 12,000.[6]

Where a charge is created by agreement or will, the plaintiff may sue to enforce the charge or abandon it and sue merely for a money decree.

957. **Recovery of Arrears.**—It is not in the discretion of the court to refuse arrears, as it is a legal right, and the only discretion it possesses is in fixing the amount.[7] It may be recovered for any period not exceeding

(1) *Yarlagadda* v. *Yarlagadda*, 24 M. 147 (157) P.C.

(2) Art. 129, Limitation Act; *Ude Singh* v. *Daulat Kuar*, 16 L. 892 (900)—a case of delay not of limitation.

(3) As to the law under the Limitation Act, XIV of 1852 and IX of 1871, *see Jivi* v. *Ramji*, 3 B. 207 (209); *Chhaganlal* v. *Bupubhai*, 5 B. 68.

(4) *Brinda* v. *Radhika*, 11 C. 492 (494).

(5) *Promotho* v. *Nagendra Bala*, 8 C.L.J. 489 (498, 499): 12 C.W.N. 808.

(6) *Pushpa* v. *Raghaviah*, 15 M.L.J. 95: 23 I.C. 413.

(7) *Lakshmiamma* v. *Subhammal*, (1893) B.P.J. 387; *Ambabai* v. *Ramchandra*,

12 years.[1] In a suit for arrears there is no necessity, though it is advisable, to prove the withholding of the amount. But a formal demand and refusal need not be proved, and the failure to prove the withholding or refusal is of itself no ground for refusal to decree the claim,[2] unless the defendants can plead and prove surprise or prejudice, as that, if they had known of the demand, they would have made provision for its payment[3] and that, from the absence of demand, they had reason to believe that the right had been waived or abandoned, as where the widow was living with her well-to-do father out of her husband's family and did not make any demand for a considerable period.[4] But where, in such a case, the plaintiff had lived with her father-in-law for several years, but demanded maintenance only for 3 years before suit, but claimed it for 6 years, the court allowed it only for 3 years on the ground that she had been living with her father and had not made any demand before 3 years.[5] Adverting to this case, the Privy Council said: "In that case the learned Judges of the High Court of Bombay admitted that a withholding of maintenance might be proved otherwise than by a demand or refusal, and if they intended moreover to decide that non-payment of maintenance when due, does not constitute *prima facie* proof of such withholding, their Lordships are unable to agree with the decision."[6]

No release.

958. A widow cannot release her claim to future maintenance.[7] At any rate he who relies upon such release must prove its execution in the same circumstances as would bind a minor. But a woman may waive her claim to arrears of maintenance and a defendant, pleading such waiver, must show not only that the plaintiff had agreed to waive her right but also that she had led the defendant to believe as a reasonable man that she would not claim arrears.[8] Waiver of right to maintenance cannot be inferred from separate residence. There must be justifiable grounds for the defendant's belief that the plaintiff had abandoned her right to have maintenance, and the defendant must, in consequence, have not set aside any portion of the income to meet such claim.[9] The removal of the widow from the husband's home by her relations is not by itself sufficient to establish waiver.[10]

(1895) B.P.J. 44; *Pirthee Singh* v. *Raj Koer*, 20 W.R. 21 P.C. affirming 2 N.W.P. H.C.R. 170; *Venkopadhyaya* v. *Kavari*, 2 M.H.C.R. 36; *Sinthayee* v. *Thanakaudapyan*, 4 M.H.C.R. 183; *Sobhanadramma* v. *Varahalakshmi*, 57 M. 1003 (1010) contra *Karbasappa* v. *Kallava*, 43 B. 66. The general remarks were *obiter*, as the decree of the lower court awarding arrears for 6 years at Rs. 75 per cent. was maintained.

(1) Art. 128, Limitation Act; *Venkopadyaya* v. *Kavari*, 2 M.H.C.R. 36; *Subramania* v. *Kaliani*, 7 M.H.C.R. 226; *Jivi* v. *Ramji*, 3 Bom. 207; *Narbadabai* v. *Mahadeo*, 5 B. 99.

(2) *Parvati* v. *Chatru*, 36 B. 131; *Karbasappa* v. *Kallava*, 43 B. 66; *Bholi* v. *Chimni*, (1919) P.R. 147; 55 I.C. 2: *Subramania* v. *Muthammal*, 21 M.L.J. 482: 9 I.C. 614; *Rangathai* v. *Nelli*, 21 M.L.J. 706: 10 I.C. 110; *Sobhanadramma* v. *Varahalakshmi*, 57 M. 1003 (1010).

(3) *Mallikarjuna* v. *Durga Prasad*, 17 M. 362, O.A. *Yarlagadda* v. *Yarlagadda*, 24 M. 147 P.C.; *Subramania* v. *Muthammal*, 21 M.L.J. 482: 9 I.C. 614; *Parvatibai* v. *Chatru*, 36 B. 131.

(4) *Seshamma* v. *Subharayudu*, 18 M. 403.

(5) *Motilal* v. *Kashi*, 17 B. 45.

(6) *Yarlagadda* v. *Yarlagadda*, 24 M. 147 (155, 156) P.C.; followed in *Sobhanadramma* v. *Varahalakshmi*, 57 M. 1003 (1010).

(7) *Bhyrub* v. *Nubo Chunder*, 5 W.R. 111; *Narbada* v. *Mahadeo*, 5 B. 99 (104); *Gangabai* v. *Krishnaji*, (1879) B.P.J. 2; *Annapurni* v. *Swaminathan*, 6 I.C. (M.) 439.

(8) *Subramania* v. *Muthammal*, 21 M. L.J. 482: 9 I.C. 614; *Manikka* v. *Soubagiammal*, 27 M.L.J. 291: 25 I.C. 897.

(9) *Pushpavali* v. *Raghaviah*, 15 M.L. J. 95; 23 I.C. 413.

(10) *Rangathai* v. *Nelli*, 21 M.L.J. 706: 10 I.C. 110; *Subramania* v. *Muthammal*, 21 M.L.J. 482: 9 I.C. 614.

Rate of arrears.

959. Ordinarily, the court should allow arrears at the same rate as future maintenance.[1] But it is not an inflexible rule and the court has discretion to decree her claim according to her wants and exigencies.[2] If the widow has supported herself in the past without incurring any debt, then there is no occasion to grant maintenance, "since the right of a widow to maintenance is one occurring from time to time according to her wants and exigencies."[3] But upon this point the courts are at variance, since the Madras Court upholds the widow's right to maintenance by reason of her interest in land[4] while the Calcutta and Bombay courts ground it upon her necessity.[5]

960. **Defence in a Maintenance Suit.**—Besides the usual defences available to a defendant, a suit for maintenance may be defended on the ground that the plaintiff had already received a share of the property in lieu of her right. But the mere fact that the husband had made a gift of *stridhan* is not equivalent to a provision for maintenance.[6] The defendant may also plead plaintiff's unchastity as disentitling her to maintenance[7] and no court will decree a claim made by one found steeped in vice at the time of the suit.[8] Even after the decree, the defendant may maintain another suit for its cancellation or modification on that account.[9] The question whether remarriage is a ground for forfeiture of maintenance has been already considered (§ **914**). But it is always a good defence, since a remarried woman has the first claim upon her husband for maintenance and she who claims maintenance must preserve unsullied the bed of her lord.[10]

961. Where the husband had left an express direction in his will that his widow is to be maintained in his own house, it is a defence to a suit by the widow, who has left that house to make a home of her own. She may override her husband's wishes for a just cause,[11] but if she fails to plead and prove such cause she will lose her action. It is within the competence of the testator to impose suitable restrictions when providing for maintenance, and it is upon the court to consider whether the restriction is unreasonable or such as it should not give effect to.[12]

962. No suit for maintenance will lie so long as the plaintiff has in her possession an unexpended balance of her husband's property,[13] or property otherwise inherited as from her father[14] sufficient to maintain her for the period for which she claims. Though it is the duty of the wife to live with her husband, and of his widow to live with his family, it is not a *sine qua non* to her maintenance. Even the wife may live

(1) *Raghubans* v. *Bhagwant*, 21 A. 183; *Karbasappa* v. *Kallava*, 43 B. 823.
(2) *Rangu* v. *Sinhaji*, 39 B. 383; *Karbasappa* v. *Kallava*, 43 B. 66.
(3) *Narayan Rao* v. *Ramabai*, 3 B. 415 P.C.; *Rangubai* v. *Subaji*, 36 B. 383.
(4) *Lingayya* v. *Kanakamma*, 36 M. 153 followed in *Utharankat* v. *Utharankat*, 30 I.C. (M.) 897; *Manikha* v. *Sobagia*, 27 M. L.J. 291: 25 I.C. 897.
(5) *Siddessury* v. *Janardhan*, 29 C. 557; *Krishna* v. *Broja*, 25 C.W.N. 403; *Rangu* v. *Sinhaji*, 36 B. 383.
(6) *Jaytara* v. *Rambari*, 10 C. 638.
(7) *Vishnu* v. *Manjamma*, 9 B. 108; *Daulata* v. *Meghu*, 15 A. 382; *Nagamma* v. *Virabhadra*, 17 M. 392.
(8) *Debi Saran* v. *Daulata*, 39 A. 234.
(9) *Vishnu* v. *Manjamma*, 9 B. 108.
(10) *See* § 907.
(11) *Bidhu Mudhi* v. *Satischandra*, 9 I.C. (C.) 534.
(12) *Kannu* v. *Parvaty*, (1890) B.P.J. 182.
(13) *Ramawati* v. *Manghari*, 4 C.L.J. 74.
(14) *Sita Bai* v. *Ramchandra*, 12 Bom. L.R. 373.

apart from her husband if driven to adopt this course by his cruelty and immorality,[1] or if she is deserted by her husband.[2] An when she becomes a widow she is entitled to live apart at her own discretion, provided only she does not do so for the purpose of unchastity or for any other improper purpose.[3]

963. Charge for Maintenance.—Hindu Law recognizes the creation of a charge on the property for the payment of the annual maintenance which is called a "Nibandh" or corrody.[4] But maintenance of itself is a personal right, and is not as such a charge on the property, unless a charge thereon is formally created. It is, however, a fit claim to be so charged.[5] Not only the property in the hands of her husband's co-parceners but also that in possession of their transferees who have taken with notice of her claim may be so charged,[6] the only exception being a transferee for consideration paid for a purpose paramount to the charge, *e.g.*, legal necessity.[7] A maintenance-charge has, of course, priority over the other debts due by the last owner.[8] (§ 951).

Parties to a maintenance suit.

109. (1) A suit by the widow for maintenance may be brought against all or any of the heirs in possession of the estate liable to the claim:[9]

(2) But if the suit be to declare or enforce a charge then all persons interested in the estate must be joined.[10]

964. Analogous Law.—The nature of the claim made must determine the persons arrayed as defendants. If the suit is to enforce a pre-existing charge then the rule as to the joinder of parties laid down in Or. XXXIV, R. 1 of the Code of Civil Procedure should apply. If, on the other hand, the suit is one for maintenance to be charged upon the estate, even then persons interested in the estate should be made parties. But if the suit relate merely to a money claim, then the plaintiff is entitled to sue any one through whom he can reach the estate ultimately liable to his claim. If, for instance, the claim is made against the joint family, then a suit might be instituted only against the manager who represents it. But in point of law the plaintiff is not bound to implead all persons equally liable to her claim[11] though they will be all liable to contribute,[12] and may, if so desired by the defendant, be impleaded as party defendants.

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(1) *Pirthee Singh* v. *Raj Kooer*, 20 W.R. 21 P.C.

(2) *Sita Bai* v. *Ramchandra*, 12 Bom. L.R. 373; *Ude Singh* v. *Mt. Daulat Kuar*, 15 L. 892.

(3) *Pirthee Singh* v. *Raj Kooer*, 20 W.R. 21 P.C.; *Narayan Rao* v. *Ramabai*, 3 B. 415 (421) P.C.; *Kassurbai* v. *Shivajiram*, 3 B. 372 (*contra* in *Rungo* v. *Yamunabai*, 3 B. 44, dissented from); *Surampalli* v. *Surampalli*, 31 M. 338; *Mokhada* v. *Nundo Lall*, 28 C. 278 (287); *Siddessury* v. *Janardhan*, 29 C. 537.

(4) *Rajeshwar* v. *Sundara*, 42 M. 581 P.C.

(5) *Ekradeshwar* v. *Ganeshwari*, 42 C. 582 (607) P.C.; *Daulat Ram* v. *Champa*, (1920) P.W.R. 32; 55 I.C. 28: *Somasundaram* v. *Unnamalai*. 43 M. 800: *Sowbaaia* v. *Manika*, 33 M.L.J. 601: 42 I.C. 975.

(6) *Kuloda* v. *Jogeshar*, 27 C. 194; *Manika* v. *Ellappa*, 19 M. 271; *Dose* v. *Krishna*, 29 M. 508.

(7) *Sham Lal* v. *Banna*, 4 A. 296 (298) F.B.; *Gurudayal* v. *Kaunsila*, 5 A. 367; *Lakshman* v. *Satyabhama*, 2 B. 494.

(8) *Somasundaram* v. *Unnamalai*, 43 M. 800.

(9) *Ramchandra* v. *Savitri Bai*, 4 B.H. C.R. 73.

(10) O. XXXIV, R. 1, C. P. Code.

(11) *Ramchandra* v. *Savitri Bai*, 4 B.H. C.R. 73; explained in *Nistarini* v. *Makhanlal*, 9 B.L.R. 11 (27). But the case is one of doubtful authority for it assumes that maintenance is a charge and as such only the eldest brother need be sued, which is contrary to Or. XXXIV, R. 1 of the Civil Procedure Code.

(12) *Ramchandra* v. *Savitri Bai*, 4 B.H. C.R. 73.

Maintenance Decree.

110. (1) A decree for maintenance must fix dates for the periodical payments of the amounts decreed, giving directions for its execution, and where it is charged on any estate, it must contain directions for a sale of the property charged, so far as may be, in accordance with Order XXXIV, Rules 4 and 5 of the Code of Civil Procedure.

(2) A decree charging any property for maintenance may be executed in accordance with the law regulating the enforcement of a charge.

Form of Decree.

965. Analogous Law.—A decree for maintenance differs from an ordinary money or mortgage decree in that it provides for the satisfaction of a periodically-recurring right, and is, as such, executable from time to time. It must be self-contained and provide for every contingency of satisfaction and non-satisfaction, partial and complete, and where it is charged on any estate it must provide for its sale in case of non-payment of the amount thereby charged.

966. The following form should suffice in ordinary cases: This suit coming on this day, etc., it is hereby declared as follows:—

(1) That the defendant do pay to the plaintiff the sum of Rs. 50 on or before the 15th day of October, 1928 and thereafter the same amount every year on or before the same date during the lifetime of the said plaintiff or until the further orders of this Court.

(2) That the defendant do also pay Rs. on account of the arrears of maintenance on or before the date aforesaid and if the said payment be delayed then the amount so due shall carry interest at 6 per cent. per annum until payment.

(3) That as a security for the due discharge of the said amounts hereinbefore ordered to be paid by the said defendant to the said plaintiff the undermentioned property be and is hereby charged and will continue to be so charged till it is discharged by an order of this Court.

(4) That in the event of the defendant failing to pay all or any portion of the said amount hereby charged, the plaintiff shall be entitled to apply for a decree absolute for sale of the property so charged and she may so apply from time to time as the occasion may arise on each default being made in payment of the amount of maintenance hereby decreed.

(5) That the defendant will provide suitable residence to the plaintiff in his family-house, and should the plaintiff be for any sufficient reason dissatisfied with it, she will be entitled to demand from the defendant another suitable residence, or in lieu thereof, recover Rs. 36 per annum in addition to the sum hereinbefore fixed for her maintenance which shall be deemed to be enhanced to that extent for the purpose of recovery from the property charged.

967. It has been suggested by Parsons, J., that in "decrees where maintenance is awarded, courts should insert words which would enable them, on application, to set aside or modify their orders, as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved."[1] But it is submitted that this is a course, which, if adopted, would detract from the finality of a decree, and would, on the other hand, be a standing invitation to contest it, every time that it comes up for execution. It would unnecessarily delay recovery, and it may neutralize its effect upon the parties who are pre-

(1) *Gopika Bai* v. *Dattatraya*, 24 B. 386 (390).

sumed to abide by its terms till it is set aside or modified in a separate suit which the contestant might otherwise never institute.

968. There cannot be a decree merely declaratory of the plaintiff's right of maintenance without determining its amount. Even where the plaintiff sues for such declaration the court as a court of Equity is bound to enquire into and afford the plaintiff adequate relief.[1] The decree which merely declares the right of maintenance is not capable of execution.[2] The court should discourage a multiplicity of suits for the maintenance of one person and should, if possible, make a complete decree providing for past and future maintenance.[3]

969. Maintenance Decree.—A decree for maintenance without charging any estate may be executed in the manner of an ordinary money decree. It creates no priority over other similar decrees. Such a decree becomes executable from time to time as therein provided and if it fails to specify the dates of payment, as where it merely awards payment "of Rs. 36 every year" the decree being dated 7th September 1865, then that amount would be payable on the 7th September of every year: "The decree was as to each year's annuity, to be regarded as speaking of the day upon which for that year it became operative, and separately for each year."[4] In other words, such a decree is a composite decree comprising as it does annual decrees for payment of specific sums, and if, therefore, there is no execution for any number of years, it would not bar execution of the decree for subsequent years.[5]

Without Charging an Estate.

970. Charge Decree.—As regards a charge decree it must be framed in accordance with the provisions of S. 100 of the Transfer of Property Act and Order XXXIV, rules 4 and 5 of the Code of Civil Procedure. Such a decree is little distinguishable from a simple mortgage decree. It must, however, be so framed as to be capable of execution without further suit. Where the charge extends to several properties in the hands of different members, it should not apportion the amount charged on them, but should declare a general charge on all of them,[6] unless of course, the claimant agrees to the apportionment of her claim.

111. A suit for a declaration of a right of maintenance must be brought within 12 years from the time when the right is denied,[7] and a suit for arrears within the same period from the time when the arrears are payable.[8]

Limitation for recovery.

971. Analogous Law.—The limitation for maintenance suits is subject to Articles 128 and 129 of the Limitation Act which allow 12 years for a suit "for arrears of maintenance" from "when the arrears are payable" and in a suit for a declaration of a right to maintenance the same period from "when the right is denied."

(1) Or. VII, R. 7, C.P.C.; *Nistarini* v. *Mukhun Lall*, 17 W.R. 432 (439); *Eshanchunder* v. *Shama Churn*, 11 M.I.A. 7; Mhd. *Zahoor Ali* v. *Rutta Koer*, 7 M.I.A. 468.

(2) *Venkamma* v. *Aitamma*, 12 M. 183.

(3) *Per* Westropp, C.J., in *Lakhman* v. *Satyabhamabai*, 2 B. 494 (497, 498), followed in *Vishnu* v. *Manjamma*, 9 B. 108 (110).

(4) *Lakshmi Bai* v. *Madhavrav*, 12 B. 65 (67).

(5) *Ashutosh* v. *Lukhemonio*, 19 C. 139 F.B.

(6) *Sarasuti* v. *Nandan*, 60 I.C. (A.) 99.

(7) Art. 128, Sch. I, Limitation Act, 1908.

(8) Art. 129, *Ibid.*

Starting Point.

972. **Limitation.**—A suit for maintenance contemplated in Articles 128 and 129 of the Limitation Act may be a suit for a declaration of one's right to maintenance, as well as for the recovery of arrears. In either case, law allows 12 years for the suit, but the starting point in the first case is most material. That point is reached only when the right is denied and not when it accrues. For instance, the widow may acquire a right to maintenance on the death of her husband, but limitation does not commence to run against her as from that date. She may not care to put her right in suit or she may have other means of maintenance, in which case her suit would be thrown out as premature, as was the suit of the lady who had in her possession funds sufficient for her maintenance for five years on the ground that the court was not in a position to forecast events or to anticipate the position of affairs five years later.[1]

973. It will be noticed that limitation counts only from the moment of refusal. Now, since there may be a demand without refusal, and a refusal without demand, the fact that is material is not so much the demand as the refusal. But since ordinarily a refusal implies and is preceded by a demand, the two together contribute the plaintiff's cause of action. The denial of the right must be unqualified. Mere non-payment is not such a denial,[2] and it does not entitle the claimant to sue.[3] Her right to maintenance is one accruing from time to time according to her wants and exigencies. The fact that she had not received it for some time does not prejudice her when her wants and exigencies oblige her to demand it.[4] "A statute of limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable."[5]

974. **Claim for Arrears.**—Though the period of limitation for maintenance commences from the date of refusal, that for arrears counts from when they were payable, and since they are ordinarily and presumably payable every year, it follows that arrears for twelve years may always be recovered if they are otherwise recoverable,[6] even if a suit for declaration contemplated in Article 129 be barred.[7] A decree declaring a person's future right to maintenance must declare the sum recoverable periodically and it may then be executed at any time within 12 years.[8]

975. **Suit on Contract.**—The larger limitation prescribed in Articles 128 and 129 of the Limitation Act has been held to apply only to a suit instituted on the basis of Hindu Law, and not to one instituted on the basis of a contract for maintenance, which would be subject to the shorter limitation prescribed in Article 115 or 120.[9]

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(1) *Dattatraya* v. *Rukmabai*, 33 B. 50.

(2) *Narayan Rao* v. *Ramabai*, 3 B. 415 P.C.; *Yarlagadda* v. *Yarlagadda*, 24 M. 147, P.C.

(3) *Punna Bibe* v. *Radha*, 31 C. 476 (479).

(4) *Narayan Rao* v. *Ramabai*, 3 B. 415 P.C.; *Siddessury* v. *Janardhan*, 29 C. 557 (568).

(5) *Narayan Rao* v. *Ramabai*, 3 B. 415 (420) P.C.

(6) *Venkopadhyaya* v. *Kavari*, 2 M.H. C.R. 36; *Sinthayee* v. *Thanakapudayee*, 4 M.H.C.R. 183; *Jivi* v. *Ramji*, 3 B. 207; *Narayan Rao* v. *Ramabai*, 3 B. 415 (420) P.C.; *Siddessury* v. *Janardhan*, 29 C. 557 (572) contra *Jeewun* v. *Putto*, (1871) P. R. 67 was wrongly decided.

(7) *Ratnamasari* v. *Akilandammal*, 26 M. 261 (313) F.B.

(8) *Narendra* v. *Nalini*, 26 I.C. (C.) 939.

(9) *Girjanund* v. *Sailajanund*, 23 C. 645 (663, 664).

CHAPTER VIII.

THE JOINT FAMILY.

976. **Topical Introduction.**—It has been already seen (§§ 1, 16, 17) that the primitive social group was the patriarchal family in which the father owned all the members and things comprised in the family. There was then no distinction between his wives, sons and slaves and his cattle. They were all equally his property.

977. The next stage was reached when the patriarch, instead of being the proprietor of them all, became their representative. This altered conception of familial rights necessarily involved recognition of some rights in its component members. When this stage was reached, the patriarchal family became the joint family. In the one the patriarch possessed all the rights, the other members had neither any individuality of their own, nor possessed any capacity to possess any rights or property, in the other, the members had acquired rights to the same extent as the patriarch lost them. Both in India as in Rome, the primary social unit was the family. In both places the father originally exercised the power of life and death over his children and dependents. All their acquisitions belonged to him. But the filial revolt against this paternal mastery had the inevitable result of curtailing the proprietary privileges of the parent.[1]

978. The Secularization of law and the speedy growth of individualism, fostered by the establishment of free institutions, very soon made the joint family system and its allied institution a memory of the past. But in India, the growth of individualism was halting owing to the persistence of sacerdotal authority and its alliance with temporal power. In Rome, the early secularization of law led to its development. In India, its merger with religion has paralyzed its growth. As such, the joint family system in India of to-day is the survival of a ruder age for which no parallel now exists in the Western countries. But at one time, some two thousand years ago, such families were a part of the social system of many ancient peoples, in which the father or the manager wielded the same power over the junior members of his household as the father or the manager of a joint Mitakshara family possesses at the present day. He could modify their personal condition at pleasure; he could give a wife to his son; he could give his daughter in marriage; he could transfer them to another family by adoption. And all this the Hindu father can do to-day. Similarly, as regards the right of property, the modern Hindu Law bears a close analogy to the laws of ancient Rome. Under both these systems, the father or the manager possesses certain rights both over the person and the property of the other members of the joint family. His rights over their persons entitle him to act as the guardian of all minor males and all minor females except as regards their *peculium* or *stridhan*.

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(1) *See* Maine Ancient Law, p. 141.

He arranges for their marriage and provides them with maintenance. He may, subject to the rules already set out, give away his son in adoption and thereby terminate his interest in the joint family.

As regards their property he is entitled to manage it, represent them in suits, incur debts and transfer the joint property for the purpose of family necessity.

979. In the original conception of a joint family, the family, would consist of the aggregate of individuals, without reference to their relationship. But in course of time it became limited to those who were born therein or who became its members by affiliation or marriage. The members of the family will necessarily fluctuate from time to time, not only added to by births and diminished by deaths, but added to by marriages and adoptions and diminished by the same process. The members of this fluctuating body are, however a corporate body with a traditional head and manager who exercises over them his modified *patria potestas* and is the protector of its women, the guardian of its infants and the representative and accredited spokesman of them all.

980. The strength of the joint family lies in the joint family property. Without such property a joint family is conceivable but then its jointness would have no meaning, since such families may possess certain personal rights in common, but they are comparatively of little account. The importance of a joint family, therefore, lies in the fact that it possesses all its property in common. As such, members have mutual rights and obligations with reference to it. But while Hindu Law postulates and presumes the existence of joint family, it does not either postulate or presume the existence of joint family property, the result being that where a member of a joint family sues another in respect of any property admittedly in possession of the family, he starts with no presumption in his favour as to its jointness. If he alleges it is joint he must prove it. But here the fact that he is a member of a joint family may assist him. For it may be that he is unable to prove that the property is joint by any direct evidence. In that case, if he establishes a nucleus of joint property, then, another rule of Hindu Law would again come into play, namely, that whatever is acquired with the aid of joint funds becomes joint property.

981. The law of joint property and partition fills an important, though diminishingly important, place in Hindu Law. It has been the subject of prolonged controversies and many of its points have not even yet emerged from that cloud land. But the differences themselves have not become crystillized into distinct principles so that there is no difficulty in stating their leading principles in a codified form. Both the terms "joint property" and the "right of survivorship" do not belong to Hindu Law, but have now become an integral part of it. They are terms applicable to the English real property which furnished to the early European writers apt analogies drawn from their own system. In course of time the analogy was forgotten and the singularly inappropriate terms such as "joint tenants" and "tenants in common" began to be used as if they were a part of the Hindu system. It is, of course, well-known that under the feudal system, which still prevails in England, all land belongs to the Crown and the utmost that a tenant is capable of holding is a tenancy in freehold. But in India, land may be, and is usually held

by, private owners. Consequently, when an English lawyer speaks of a "joint tenant" or a "tenant in common" of land held by several owners, he is merely using an expression not to define the extent of his right in the land but merely to define its incidents. There is, of course, much in common between an English joint tenant and a Hindu coparcener, since while they differ as to the mode of their creation, they closely correspond as to the mode of their enjoyment and devolution. For instance, (1) the estates held under both are of the same duration, or nature and quantity of interest, (2) joint tenant as well as coparceners are both entitled to possession over the whole of the joint property, and (3) if one member dies, his right passes to the rest by survivorship. The beneficial acts of one of them respecting the joint estate enure equally to the advantage of all.

982. But here the analogy ends. For while the joint tenancy can only be created by a deed or will, it is one of the modes for destroying the Hindu coparcenary which can only arise by birth. Then again, while the interest of a joint tenant must extend over the whole with equal intensity, it is the very reverse in a Hindu coparcenary where the quantity of interest is ever fluctuating with the births, adoptions, renunciations and deaths of other coparceners. Since a joint tenancy is created by a deed or will, it may be created in favour of two strangers, whereas such a thing is impossible under Hindu Law.

983. Analogies drawn from the English Law of Real Property are apt to be misleading, and however useful they might have been at one time to grasp the leading principles of Hindu coparcenership, they belong to two different systems which are both radically different in their inception and effect. For instance, the tendency of English Law is towards separation of property and interest, whereas that of the Hindu Law is towards jointness, so that while the moment the three unities of title, time and extent are destroyed, the joint tenancy becomes a tenancy in common, whereas under Hindu Law, an estate separate in the hands of the father immediately becomes joint upon its inheritance by his sons.

984. Again, the wife and children of the joint tenant have not any right of maintenance which is accorded to the wife and children of a coparcener. And the fact is, that apart from the common attributes already stated, they have nothing else in common. But the terms "joint tenants" and "tenants-in-common" have unfortunately become too deeply embeded into the Anglo-Indian Law to be altogether ignored, though their constant misuse is apt to engender confusion in understanding the meaning of legal concepts which now require no mnemonic aid for study.

985. The joint family is at times spoken of as a corporation,[1] but it is a corporation in the sense that it has a perpetual existence but a corporation is a creature of statute, while a coparcenership is a creature of common law. The corporation, as such, is a judicial person, having a collective existence and rights. So is a coparcenership. But there the analogy ends. A corporation is subject to fluctuations in its membership due to other causes than a coparcenary body. Any one may join a corporation; but no one can do so in a coparcenary which is an aggregate of relations born and to be born into the family. Again a

(1) *Chuckun Lall* v. *Poran Chunder*, 9 W.R. 483 (484); *Sokkanadha* v. *Sokkanadha*, 28 M. 344 (345).

member of a corporation cannot dissolve it all at will, which a coparcener may do by forcing a partition which is acknowledged to be his vested right.

986. Similarly, the manager of a joint family is often spoken of as a trustee. And so Lord Lindley, delivering the judgment of the Privy Council in a case held, that the manager was "not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such a person is not that of principal or agent, or of partners; it is much more like that of trustee and *cestui que trust.*"[1]

987. But this was, again, merely a simile and it should not be pushed too far. As will be presently seen, the joint family possesses peculiar incidents of its own and its manager similarly possesses certain rights and powers which are in some respects the survival of his plenary powers, which he enjoyed in the patriarchal age, which in so far as they have been curtailed by the growing rights of the junior members, they may be at times those of a trustee, guardian and even an agent; but his complex powers cannot be more compendiously described otherwise than by setting them out in detail.

988. Both the Mitakshara as well as the Dayabhag families are joint and have coparceners. But their incidents differ. For instance, while the Mitakshara coparcener is entitled to the right of survivorship, no such right can be claimed by a Dayabhag coparcener. This is again indicated by the borrowed phraseology of English Law, the one being designated joint tenants and the other, tenants-in-common. Again the right of the Mitakshara coparcener arises on his birth, while the right of the Dayabhag coparcener arises on the death of his father, leading to far reaching results as regards the right of the father. Under the Mitakshara law, he is merely a manager of the joint estate and his rights are limited by those of his son and other coparceners, whereas under the Dayabhag, the father is the absolute owner of all his estate, whether self-acquired or ancestral, and he can deal with it in any manner he likes irrespective of the consent of his sons.[2] Again, the vested right of the Mitakshara coparcener entitles him to call for the partition of his share, but the Dayabhag son having no vested interest in his patrimony, has no right to any partition against his father, who, may, however, make a partition if he so chooses, and in that case, he is entitled to a double share of the son.

989. Again, since the Dayabhag father is the owner of his estate he is entitled to transfer or bequeath it to any one he likes by his will.[3] Then as regards the extent of the coparcener's right, while under the Mitakshara, it is distributed over the whole estate, that under the Dayabhag is restricted to that fraction of the property which he would get on partition. In other words, while the share of the Mitakshara coparcener is neither fixed nor defined, that of the Dayabhag coparcener is both.[4] On the death of the father the right in the one case passes to the son by

(1) *Annamalai* v. *Murugasa*, 26 M. 544 (553) P.C.; to the same effect, *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (447, 448) P.C.; *Chuckun Lall* v. *Pooran Chunder*, 9 W.R. 483 (484); to the same effect, *Garu Savank* v. *Narayan*, 7 B. 467.

(2) *Dharma Das* v. *Amulyadhan*, 33 C. 1119 (1124).

(3) *Debendra* v. *Brojendra*, 17 C. 886.

(4) *Soorjemoney* v. *Denobundoo*, 6 M. I.A. 526 (553); *Rajkishore* v. *Gobind*, 1 C. 27 P.C.; *Sheo Soondary* v. *Pirthee Singh*, 4 I.A. 147.

survivorship, in the other case by inheritance or devise. On the death of the father the sons may call for a partition or remain joint. In that case the coparcenary will be subject to the rules applicable to the Mitakshara coparcenary as regards its management and the rights of the manager and the coparceners, *inter se*,[1] with this difference that while the right of the Mitakshara coparcener to alienate his share for value is not universally conceded, and his right to alienate otherwise is universally denied, the Dayabhag coparcener, having his share fixed, is free to device or transfer it for or without consideration. He may further sue or be sued individually in respect of his share. But he cannot, without partition, appropriate any portion of it to his exclusive use or enjoyment.

990. The law of joint family may be classified under four heads: (*i*) the joint family, its constitution, and property, (*ii*) the rights and duties of its manager, (*iii*) the rights and duties of coparceners, *inter se*, and (*iv*) in relations to strangers.

It is discussed in this order in the sequel.

112. In this and the next three following chapters, unless there is something repugnant in the subject or context—

Joint Family: Father: Son: Issue: Coparcener.

"Joint family" means a joint family of all members lineally descended from a common ancestor including their wives and unmarried daughters.[2]

"Father," wherever used, includes also the paternal grandfather and the paternal great-grandfather by legitimate descent or by valid adoption:

"Son" includes also the paternal grandson and the paternal great-grandson in the male line by legitimate descent or by valid adoption:[3]

"Issue" means and includes the son, the paternal grandson, and the paternal great-grandson by legitimate descent or by valid adoption.[4]

"Coparcener" means a male member of the joint family entitled to a share of the joint property:[5] and

"Joint property" means the joint property of such persons.

991. **Analogous Law.**—A Hindu joint family consists not only of the males descended from a common ancestor with a common residence, food and worship, but also their wives and unmarried daughters. As such, such family may consist of only a single male and his wife and daughters.[6] Male members entitled to a share of the joint property are called its "coparceners" while all property jointly held by them, or out of which the female members have their right of maintenance, is their joint family property. (§§ **120, 121**). A coparcener who ceases to be entitled to a share, whether by reason of the fact that his share has been attached and sold or that he has already acquired it by partition or renounced it as a consequence of this irrevocable retirement from the family by taking to

(1) *Abhayachandra* v. *Pyari Mohan*, 13 W.R. 75 F.B.; *Dwarka Nath* v. *Bungshi*, 9 C.W.N. 882.
(2) *See* S. 120.
(3) *Rutcheputty* v. *Rajunder*, 2 M.I. I. 132 (156, 157, 167); *Masitullah* v. *Damodar*, 48 A. 518 (525) P.C.; *Ananda* v. *Nownit*, 9 C. 315 (319).
(4) *Ib.*
(5) *See* S. 121.
(6) *Vedathanni* v. *Commissioner, Income-Tax*, 56 M.L.; followed in *Commissioner, Income-tax* v. *Gomedally*, (1935) B. 412.

monastic life[1] ceases to be a coparcener. Hindu Law regards the son, the son's son and the son's son's son as in reality the same person in different bodies.[2] As such, the three take by their birth the wealth and the spiritual debts of their three ancestors. So the term "*putra*" is used in the Sanskrit texts in that generic sense as comprising the next three male descendants. In this chapter, this term has been eschewed as liable to be misunderstood. But its definition here is intended to obviate misapprehension of the texts quoted.

992. It is well to add that Hindu Law recognizes the existence of the issue not only from the moment of his birth, but from the moment of his conception. Consequently, whenever the law declares any right as accruing to the son, the latter becomes entitled to enforce his right if he was *en ventre sa mère* at the date of the accrual of his cause of action. For example, though the father's improper alienation may not be challenged by an after-born son, it can be challenged if the son was then *en ventre sa mere*.[3] So in the cases of succession, partition and will, a son in the womb is regarded as one *in esse*.[4] But it is said that an unborn child, though treated as born when it is for its benefit to be so considered, is not ordinarily so regarded as born for the benefit of third persons.[5]

Ancestral property defined.

113. (1) "Ancestral property" means property which a person inherits from his father, or father's father, or father's father's father.[6]

(2) All property acquired out of the income of such property.

993. **Analogous Law.**—The under-noted texts[7] have since been rendered obsolete by legislation[8] and judicial pronouncements.[9]

The second clause states the general rule that accretions and accumulations follow the corpus;[10] *Accessorium sequitur sum principale*. But this rule may be varied by custom.[11]

(1) Property inherited from Father, etc.

994. **What is Ancestral Property?**—The term "ancestral property" is a technical term, and bears a special meaning as denoting only such property as a person inherits from his father, father's father, and father's father's father.[12] But he must

(1) *Krishnaji* v. *Hanmareddi*, 58 A. 536 (540).

(2) *Ratcheputty* v. *Rajunder*, 2 M. I. A. 132 (156, 157, 167); *Ananda* v. *Nownit*, 9 C. 315 (319); *Masitullah* v. *Damodar*, 48 A. 518 (525) P.C.

(3) *Kalidas* v. *Krishna*, 2 B.L.R. 103 F.B.; *Sabapathi* v. *Somasundaram*, 16 M. 76; *Datla* v. *Gattem*, 27 M.L.J. 580 : 26 I.C. 61; *Deo Narayan* v. *Ganga Prasad*, 13 A.L.J. 69 : 26 I.C. 871; *Parasram* v. *Lakshmichand*, 57 I.C. (N.) 578; *Dwarka* v. *Krishna*, 2 L. 114; *Busum* v. *Dasarathi*, 34 C.L.J. 323.

(4) *Hanumant* v. *Bhimacharya*, 12 B. 105; *Minakshi* v. *Virappa*, 8 M. 89.

(5) *Busum* v. *Dasarathi*, 34 C.L.J. 323.

(6) *Attar Singh* v. *Thakur Singh*, 35 C. 1139 P.C.; *Venkata* v. *Court of Wards*, 23 M. 383 P.C.; *Mhd. Husain Khan* v. *Krishva*, I.L.R. (1937) A. 655 (663) P.C. *Bishmanalli* v. *Gangadaer*, (1917) Pat. 356.

(7) Yad. II-121; Mitak. I, I, 27.

(8) Hindu Gains of Learning Act (XXX of 1930).

(9) *Attar Singh* v. *Thakur Singh*, 35 C. 1139 P.C. and cases cited *post*.

(10) *Umrithnath* v. *Goureenath*, 13 M. I.A. 542 (546); *Sudanund* v. *Soorjoo*, 11 W.R. 346; *Krishnappa* v. *Ramaswamy*, 8 M.H.C.R. 25.

(11) *Nawabuddin* v. *Kami*, (1901) P. R. 12.

(12) *Attar Singh* v. *Thakur Singh*, 35 C. 1139 P.C.; *Venkata* v. *Court of Wards*, 23 M. 383 P.C.; *Mhd. Husain Khan* v. *Krishva*, I.L.R. (1937) A. 655 (663) P.C.; *Bishmanalli* v. *Gangadaer*, (1917) Pat. 356.

acquire it by descent, and not by devise or a gift *inter vivos*. Property so acquired would be the donee's or devisee's self-acquired and not ancestral property.[1] It is not necessary that the property which the son acquires from his ancestor should be "ancestral" in the hands of the latter. For it may be his own acquisition, or it may have been acquired by him by descent or devise. The mode of its acquisition is immaterial except for the purpose of his own enjoyment. The position is then this. A man may possess property, partly inherited, partly devised and partly his own separate acquisition. As to the first, his right of disposition is controlled by his issue, since it is his ancestral property. As to the second, his issue have no vested right and the property, though it may have been acquired from his ancestor, does not, by reason of the mode of his acquisition, bear upon it the impress of "ancestral property." It is, so long as he is alive, his self-acquisition, and as such indistinguishable from his property of the third class, which is the product of his own unaided industry. It will be thus seen how all property in the hands of a Hindu has a constant tendency to become ancestral property, and the only means of preventing it from assuming that character is to gift or devise it, while it remains a separate property.

995. There is, however, another possibility for the ancestral property to lose its character, which it does when it is not inherited by the son, grandson or great-grandson, but by or through a female, a collateral, an uncle, a brother,[2] nephew, or the like. So property acquired from a mother's father or mother's grandfather or the maternal grandfather after the mother's death[3] is not ancestral property.[4] In such cases the property though obtained by descent is in the hands of the heir his separate property. Sanskrit text-writers speak of the former as *Apratibandh*, or unobstructed property, and of the latter, as *Sapratibandh*, or obstructed property, implying that in the one case, the heir has a vested interest, while in the other it is merely contingent and dependent upon the failure of issue. These terms will be further considered in the sequel. (§§ 1199, 1200, 1201.)

996. For the purpose of ancestral property it is immaterial whether the issue was born before or after its acquisition by descent, provided that it vested in him some time. But as regards the father's separate property, if the son predeceased the father it would not be ancestral property in the hands of his heir. This may be illustrated by the following case: A father with two sons *A* and *B* had self-acquired property. *A* predeceased his father leaving a widow, and upon his father's death, *B* took the property. *A's* widow claimed maintenance out of it as ancestral property. The court admitted that in any question between *B* and his sons, it would be ancestral property. But it was not so as regards *A*. During his lifetime the property was absolutely at the disposal of the father. As regards *A*, it was neither ancestral nor coparcenary property, and on his death his widow had no higher claim over it than her husband. Her rights were not enlarged by its change of character when it reached the hands of *B*.[5] But suppose in this case, the property in the

(1) *Jug Mohan Das* v. *Mangal Das*, 10 B. 528 (554, 578).
(2) *Gurumurthi* v. *Gurammal*, 32 M. 86 (88).
(3) *Shantee* v. *Abhai Singh*, (1931) L. 708.
(4) *Mhd. Husain* v. *Kishva Nandan*, I.L.R. (1937) A. 655 P.C.; *Jamna Prasad* v. *Ram Partap*, 29 A. 667 (669); *Bhishwanath* v. *Gajadhar*, (1917) Pat. 146.
(5) *Janki* v. *Nand Ram*, 11 A. 194 (198) F.B.

hands of the father had not been his self-acquisition but ancestral property, then the widow's claim for maintenance would have stood upon a higher ground, for her husband would then have had a vested interest in his father's property, of which he could have forced a partition even during his father's lifetime.[1]

Clause (2). Accretions to Ancestral Property.

997. Secondly, any accretion made to the ancestral property becomes also ancestral, though this rule is held to be subject to customary law in the Punjab.[2] But such accretion must be made with the aid of ancestral property.[3] If it is so acquired, it becomes incorporated with the ancestral property and the son acquires equally a vested right thereto, whether he was born before or after the accretion is made.[4] The question what "aid" the ancestral property should give, so as to make all acquisitions made accretions to it, has been considered in several cases in which it is laid down that it must be material and not merely nominal.[5] The mere fact that a person had received his general education out of the ancestral funds is not enough to make all his subsequent acquisitions ancestral.[6] So the Privy Council denounced as a startling proposition of law "that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever incapable of acquiring, by his own skill and industry, any separate property."[7]

Such accessions ordinarily comprise properties purchased out of the income received from ancestral property.[8]

But ancestral property recovered by a person as by purchase from a stranger loses its character as ancestral property in accordance with an express text of the Mitakshara.[9]

998. In one case, one Paras Das, the head and manager of a joint family banking business, owning a large amount of joint ancestral property, sued for the recovery of certain property which he claimed to inherit by collateral succession. He borrowed some Rs. 9,000 out of the joint fund for the expenses of the litigation, but this money he repaid in the course of a year without interest. The litigation ended in a compromise in favour of the manager, and the question being raised that the property so acquired had become an accretion to the joint property of the family, the court held that it was no accretion, merely because the manager had utilized a portion of the balance of the family's banking business which would have otherwise lain dormant: "The joint estate suffered no appreciable detriment by the transaction and it would

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(1) *Devi Pershad* v. *Gunwanti*, 22 C. 410 (415).

(2) *Nawabuddin* v. *Kami*, (1901) P. R. 12.

(3) *Gur Charanlall* v. *Badri Narain*, 17 A.W.N. 187; *Sufa Chund* v. *Hemraj*, (1869) P.R. 59.

(4) *Jugmohan Das* v. *Mangal Das*, 10 B. 528.

(5) *Ram Pershad* v. *Sheochurn*, 10 M. I.A. 490 (505).

(6) *Dhunookdharee* v. *Gunpat Lall*, 10 W.R. 122; *Krishnaji* v. *Moro*, 15 B. 32.

(7) *Pauliem* v. *Pauliem*, 1 M. 252 (261) P.C.; *Chala Konda* v. *Chala Konda*, 2 M.H.C.R. 56 (76); *Mancha* v. *Narotam Das*, 6 B.H.C.R. (A.C.) 1 (6); *Lakshman* v. *Jamnabai*, 6 P. 225 (241) (case of a Vakil); *Ahmedbhoy* v. *Cassumbhoy*, 13 B. 534 (545, 548); *Krishnaji* v. *Moro*, 15 B. 32 (37); *Dwarka Prasad* v. *Jamna Das*, 13 Bom.L.R. 133 (137).

(8) *Bissessur* v. *Lachmessur*, 5 C.L.R. 477 P.C.; *Sudanand* v. *Bonamalee*, 6 W.R. 258; *Bono* v. *Bolee*, 8 W.R. 182.

(9) Cited in *Balakee* v. *Court of Wards*, 14 W.R. 34.

be, we think, unduly extending the principles of Hindu Law applicable to acquisitions by the aid of joint funds or joint exertions, if we were to hold that the property which came to Paras Das from a collateral branch of the family became joint family property."[1] In another case, the plaintiff, his brother and his father, all living in union, purchased a house, the price of which they raised by pledging the ornaments of their wives. The sale-deed was taken in the name of the father. The ornaments were redeemed by the plaintiff alone out of his own earnings, and he returned the ornaments of his father and brother. On a partition, this house was allotted to the plaintiff who pulled it down and adding to its site by purchasing some more land, he built a new house. It was attached in execution of a decree against the plaintiff's son to which the plaintiff objected. Parsons and Ranade, JJ., admitted his objection but on different grounds. Parsons, J., held that as the house had been acquired with the assistance of joint family, it became joint but not ancestral property, and that, therefore, on its allotment in a partition to the plaintiff, it became his self-acquired property, in which his son had no vested interest. Ranade, J., however, held that the house did not become the plaintiff's self-acquired property because it had been allotted to him in a family partition, but he upheld the plaintiff's claim on an assignment which he had taken from his son.[2]

999. **Burden of Proof.**—There is of course no presumption that any property in possession of a member of a joint family is his *ancestral* property. That it is so must be proved like any other fact. As will be presently seen, Hindu Law presumes that a family is joint; but the presumption does not go any further. For instance, it does not extend to the presumption that all its members possess joint property, and *a fortiori* that any of them possesses ancestral property.[3]

Joint property defined.

114. (1) The joint property of a joint family comprises the following property, namely:—

(a) Ancestral property inherited by a member of the family from a direct male ancestor not exceeding three degrees higher than himself;[4]

(b) Acquisitions to the property made with the help of joint ancestral property;[5]

(c) Save as provided by the next section, property acquired by members of the joint family.[6]

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(1) *Bachho* v. *Dharam Das*, 28 A. 347 (355).

(2) *Khandubai* v. *Pirbhai*, 2 Bom.L.R. 76.

(3) *Shadi Lal* v. *Lal Bahadur*, (1933) P.C. 85; *Attar Singh* v. *Thakur Singh*, 35 C. 1039 P.C., followed in *Fateh* v. *Imamuddin*, 2 L.L.J. 188; *see* S. 113 (1).

(4) *Chelikani* (*Raja*) v. *Chelikani*, 5 M. 678 P.C.; *Kuruppai* v. *Shankarnarayan*, 27 M. 82; *Vyatinath* v. *Yeggia*, *ib.*, 300 (312, 314); *see* S. 113 (2).

(5) *Radhakant* v. *Nazina*, 45 C. 733 P.C.; *Methasam* v. *Rewachand*, 45 C. 666 P.C.

(6) *Laximon* v. *Mullar Row*, 2 Kn. 60 (63); *Prit Koer* v. *Mahadeo*, 22 C. 85 P.C.; *Soshi Kumar* v. *Chandra Kumar*, 35 C.L.J. 348 (354); *Ram Ghulam* v. *Ram Behari*, 18 A. 90; *Gopal* v. *Jawand Singh*, (1919) P.W.R. 30 : 49 I.C. 1007; *Lala Jagan* v. *Mathura Prasad*, 39 I.C. (O.) 498; *Muniswami* v. *Maruthammal*, 34 M. 211.

(d) Save as provided by the next section, property acquired with the help of the nucleus of ancestral property:[1]

(e) Property which, though separately acquired, is thrown into the common stock.[2]

(2) Such property may be called coparcenary property;

(3) And members of the family possessing a share therein may be called coparceners.

1000. Analogous Law.—This section is supported by case law. The terms "Joint property," "Joint family property" and "Joint ancestral family property" are generally used to designate property which belongs to the members of the family. But these three terms do not always convey the same thing. As pointed out by Beaman, J., the term "joint property" connotes to an English lawyer merely the sense it bears in English Law, namely, that the property is held by any two or more persons jointly, and its characteristic is survivorship. But in India, the term "joint property" conveys a good deal more, since it means that it is the property of members of a joint Hindu family. Then again, the term "joint family property" is not the same thing as the term "joint ancestral property" since family property may be joint as in clauses (*b*) to (*e*) without being ancestral, and it may be ancestral without being joint. There must have been a nucleus of joint family property before joint ancestral property can come into existence. Because the word "ancestral" connotes descent and therefore, of course, its pre-existence. Such nucleus is, however, by no means necessary for a joint family property.

The courts draw some distinction between these two species of property, holding that, in joint ancestral property, the members acquire a right by birth; whereas no such presumption is made in respect of property which is merely joint without being ancestral. But there is really no real difference between the two. As Beaman, J., said: "Bating all presumptions, I state as my opinion without much fear of serious contradiction, that where property is admitted or poved to have been joint family property, it is subject to exactly the same legal incidents in every respect as property which is admitted or proved to be ancestral joint family property."[3]

Clause (a). Joint Ancestral Property.

1001. Then again joint ancestral property is not the same thing as "ancestral property" which means property which a person inherits from a direct male ancestor not more than three degrees higher than himself, that is to say, from his father, his father's father, and his father's father's father. Property inherited by him from his other relations is his separate property. The essential feature of the one is that if the person inheriting it has sons, grandsons or great-grandsons, they all become joint owners with him, whereas in the case of the other, they acquire no such interest. In other words, the son of the heir of unobstructed heritage acquires in his father's inheritance an interest by

(1) *Methasam* v. *Rewachand*, 45 C. 666 P.C.; *Gobinda* v. *Radha*, 31 A. 477.

(2) *Radhakant* v. *Nazina*, 45 C. 733 P. C.; *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 (1416, 1418) P.C.; *Laldas* v. *Motibai*, 10 Bom.L.R. 175 (177); *Hari Das* v. *Velji*, 16 Bom.L.R. 584 : 20 I.C. 476; *Indat Shai* v. *Shiam Bahadur*, 17 C.W.N. 509 P.C. : 17 I.C. 760 P.C.; *Chelasami* v. *Chelasami*, (1922) M.W.N. 487 : (1922) M. 423.

(3) *Karsandas* v. *Gangabai*, 32 B. 479 (491).

birth, so that his power of alienation is subject to his rights, whereas in property which he has inherited by obstructed succession he has the same unrestricted right of alienation as he possesses over his self-acquisitions.[1] This distinction is conveyed by the text-writers by designating the two properties as *apratibandh* or *sapratibandh*, terms which have been translated as unobstructed and obstructed, but which connote the same sense as the terms "vested" and "contingent" of English Law.

"Apratibandh" and "Sapratibandh" Properties.

These terms are thus explained in the Mitakshara: "Heritage is of two sorts: unobstructed (*apratibandh*) or liable to obstruction (*sapratibandh*). The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons in the right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest, upon the demise of the owner, if there be no male issue, and thus the actual existence of the son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction. The same holds good in respect of their sons and other descendants."[2]

Nilkanth describes the same terms as follows:

"Where the life of the owner of the property or that of his sons, etc., is interposed, the wealth is called obstructed heritage (*sapratibandh*); for example the wealth of uncles and the like; but where ownership accrues to sons, etc., from relationship to the owner, without the necessity of having recourse to other means of acquiring wealth, that is unobstructed heritage (*apratibandh*); for example, the father's wealth."[3]

Dayabhaga.

1002. This division of heritage is not recognized by Jimut Vahan according to whom the right to succession accrues only on the death of the previous owner.[4] The result being as previously stated, that while the heir in Bengal has the unrestricted right of alienation uncontrolled by his son, the heir under the Mitakshara cannot alienate his unobstructed heritage without reference to the rights of his issue. For this reason property acquired by unobstructed heritage is called "ancestral property" and whereas property acquired otherwise, as by inheritance, from any other relation, such as an ancestor more than three degrees remote, or from or through a female, as for instance, a daughter's son, a collateral relation or from a maternal ancestor is not ancestral property nor are the heirs or male descendants coparceners with him in respect of such property.[5]

It will be thus seen that property which may be self-acquired of the father will become ancestral upon its inheritance by his son,[6] and such ancestral property must necessarily be coparcenary as regards his own

(1) *Nund Coomar* v. *Ruzeeooddeen*, 18 W.R. 477; *Rayadar*, (In re), 3 M.H.C. R. 455; *Jawahir* v. *Guyan Singh*, 4 Agra 78. The rule is the same whether the son be one by adoption; *Babu* v. *Ratnoji*, 21 B. 319 (325).

(2) Mit. I-I-3; *see* these terms explained *per* Couch, C.J., in *Nund Coomar* v. *Ruzeeooddeen*, 18 W.R. 477.

(3) Mayukh, IV-II-2 (Mandlik), p. 37.

(4) Mandlik's H.L., 359, 360.

(5) *Nund Coomar* v. *Ruzeeooddeen*, 18 W.R. 477; *Gurumurthi* v. *Gurammal*, 32 M. 88; *Mhd. Husain* v. *Kisva*, I.L.R. (1937) A. 655.

(6) *Ram Narain* v. *Pertum Singh*, 20 W.R. 189; *Chaturbhooj* v. *Dharamsi*, 9 B. 438 (450).

issue, though it is not so as regards his own collaterals, since they have not interest in it by birth.[1]

Both the terms, "ancestral property" as well as "coparcenary property" are thus technical terms and bear a special meaning at variance with their etymological sense.

What Ancestral Property Comprises.

1003. "Ancestral property" not only includes the property inherited from an ancestor, as previously stated, but by accession it includes all the profits therefrom which may have been added to the corpus.[2] So where a person blended in his account profits made from ancestral and those made from his self-acquired property, the court held that augmentations which blended, as they accrued, with the original estate partook of the character of that estate.[3] All property acquired out of the income of ancestral property is itself ancestral, whether acquired before or after the birth of a son.[4]

Clause (b).

1004. It is now settled that in order to stamp a property acquired with the aid of joint property with that character the aid must be substantial and not merely illusory.[5] If, suppose, a coparcener errects a substantial house costing Rs. 30,000 on an ancestral site upon which stood a thatched house which had fallen into disrepair, it would not on that account become the joint property of the family.[6] The case would, however, be different if the building was erected in spite of the protest of the other coparceners.[7]

Clause (c).

1005. **Joint Acquisition.**—The question whether property acquired by members of a joint family without the aid of ancestral nucleus would be their joint or the self-acquired property is not free from doubt. In one case Birdwood, J., *held it to be the self-acquired property*;[8] *but this case has been dissented from in a case in which the contrary was held possible if the property was treated as joint family property, which would be presumed from the mere fact of their jointness as members of a joint family.*[9] In this view the question resolves itself into one of presumption which may, however, be rebutted.

Property may become joint if it is acquired by the joint exertions of the members of the joint family, though there be no nucleus to assist in its acquisitions.[10] Such property becomes joint property of the family and not only of those who acquire it. Nor can they set up amongst themselves a sub-coparcenary for the purpose of acquiring and

(1) *Janki* v. *Nand Ram*, 11 A. 194 (198); *Gurumurthi* v. *Gurammal*, 32 M. 88 (90).

(2) *Goroo Churn* v. *Golukmoney*, Fult. 166; *Lakshman* v. *Jamnabai*, 6 B. 225; *Mahomed Siddick* v. *Haji Ahmed*, 10 B. 11 (16).

(3) *Mahomed Siddick* v. *Haji Ahmed*, 10 B. 11 (16, 17); *Tulsamma* v. *Guntupalli*, 48 M. 597.

(4) *Jugmohan Das* v. *Mangal Das*, 10 B. 528.

(5) *Babubhai* v. *Ujamlal*, I.L.R. (1937) B. 708, following *C. Sankaranarayana* v. *Tangaratna*, (1930) M. 662.

(6) *Peria Karuppan* v. *Arunachelam*, 50 M. 582 (587), following *Vithoba* v. *Hariba*, 6 B.H.C.R. (A.C.) 54; *Upendra Nath* v. *Umesh Chunder*, 12 C. L.J. 25.

(7) *Subbiah* v. *Gundlapudi*, 46 M. 104, explained in *Peria Karuppan* v. *Arunachelam*, 50 M. 582 (589).

(8) *Chatturbhooj* v. *Dharamsi*, 9 B. 438 (445).

(9) *Haridas* v. *Devkuvar*, 50 B. 443 (448), following *Laldas* v. *Motibai*, 10 Bom.L.R. 175; *Karsondas* v. *Gangabai*, 32 B. 479, dissenting from *contra* in *Chatturbhooj* v. *Dharamsi*, 9 B. 438 (445); *Krishnamurthi* v. *Seetama*, (1937) M. 29 (30, 31).

(10) *Haridas* v. *Devkuvarbai*, 50 B. 443.

enjoying the result of their joint labour to the exclusion of other members. As Bhashyam Ayyangar, J., said, a joint undivided Hindu family is purely a creature of Hindu Law and cannot be created by act of parties save in so far as the act of adoption may have that effect.[1]

Clause (d).

1006. It has already been seen that property acquired with the help of nucleus of joint property becomes joint only when the joint nucleus is substantial and not merely nominal.

For further commentary, *see* under next section.

Clause (e).

1007. Property Blended.—Separate property may become joint if it is "blended" or "thrown into the common stock." Where a member of a joint family blends his self-acquired property with property of the joint family, either by bringing his self-acquired property into joint family account, or by bringing joint family property into his separate account, all the property so blended becomes joint family property.[2] But where it is denied that any property is joint, the burden of proving it to be so will naturally be upon him who asserts it. The question when property is "blended" or "thrown into the common stock" does not depend upon physical blending or intermixture, since this may be impossible. What those words mean is merely this that the member, by his own volition and intention treats his separate acquisition as joint, waiving or surrendering his own special right in it as separate property. It is a question of intention manifested by his acts and conduct,[3] as also the acts and conduct of his coparceners. No consideration of motive is required or need be proved to establish this mode of jointness; since members of a joint family, it may be, out of affection and regard for one another, desire to treat their individual acquisitions as joint. As already observed, the question is one of intention, deducible from the words, act and conduct of the parties. But in this connection, the two principles may at times be in conflict. The one is whether the conduct points to the blending, and the other whether it is not a mere evidence of affection and kindness from which no inference detrimental to the rights of a person could be fairly drawn. If two relations having some such property of their own blend it and treat it as joint, the case presents no difficulty; but if a relation having little or nothing to offer is treated by another with kindness, it could not of itself be regarded as amounting to the admission of his coparcenary right. As the Privy Council in one case remarked: "It would not be reasonable or conducive to the peace and welfare of families to construe acts, done out of kindness and affection, to the disadvantage of the doer of them by inferring a gift when it is plain that no gift could have been intended."[4] There is, of course, no presumption in favour of blending. On the other hand, there is presumption that property of which a person is in possession is his self-

(1) *Sudarsanam* v. *Narasimhulu*, 25 M. 149.

(2) *Rajni Kanta* v. *Jaga Mohan*, 50 C. 439 (444, 445) P.C., followed in *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 (1418) P.C.; but see *Atar Singh* v. *Thakur Singh*, 35 C. 1039 (1045, 1046) P.C., to the same effect, *Chabil Das* v. *Ram Das*, 11 Bom.L.R. 606 (613), following *Lal Bahadur* v. *Kanhai Lal*, 29 A. 244 P.C; *cf.* S. 66, Trusts Act (II of 1882).

(3) *Atar Singh* v. *Thakur Singh*, 35 C. 1039 (1046) P.C.

(4) *Muddun Gopal* v. *Khikhinda*, 18 C. 341 P.C.; *Janki Nath* v. *Janki Nath*, 2 A.L.J. 223.

acquisition.[1] Consequently, he who sets up blending must prove it.[2] There is of course no blending where all moneys are kept in one bank, but the parties concerned have separate accounts.[3]

Property treated as joint.

1008. Blending refers to properties, whether ancestral or self-acquired, but property acquired by the joint labours of two or more members of a joint family may still become joint, if they intend that it shall be so treated. In the one case, there might be blending without intention, in the other there must be proof of intention on the part of the acquirers. There is still another case, in which property owned or acquired by one member might become joint, if he intends that it shall be so treated. In this case, there is need of a greater caution in not too readily inferring jointness from an act of mere affection and kindness, since the characteristic of this property consists not in the contribution of joint labour to its acquisition, as in the conduct of one against whom the right is claimed. An extreme case of this kind arose where one *N* had four sons—*A*, *B*, *C* and *D*—all residents of the village of Dongre in the Ratnagiri District where they had a small house, but no lands or other property. About 40 years ago one of them *A*, left his native village and set up a school at Bhynder in the Thana District where he afterwards opened a shop and commenced trading in salt. A year or two later, his brother *B* joined him, opened a school in a neighbouring village and commenced to act as broker at Bhynder where he died leaving the defendant then a year old. Later on he was removed to his native village and on coming of age he managed his household business. Two other brothers *C* and *D* later on joined *A* and assisted him in his business. All the three *A*, *C* and *D* used to remit money to their parents at Dongre where their children were married. *C* and his sons then separated in mess and sued *A* and his sons, *D* and *B's* son for partition, in which *B's* son equally claimed a quarter share. *A* defended the suit on the ground of his separate acquisition but on the decree being passed against him, he did not appeal. The claim of *B's* son was rejected, but the High Court decreed his claim on the ground that he had been treated by his brothers as a member of the joint family, like one of their own sons, and that he had been placed in management of their family property and dealings at Dongre. The court held that the right to share did not depend upon the establishment of the fact of actual help having been rendered at the principal place of business. The fact that *B's* son was treated as standing in the place of his father *B* and served the common interests of the family by staying at home to look after the household with the consent of all the three brothers entitled him to a share which was decreed.[4]

1009. It will be observed that in this case emphasis was laid more on the contribution of labour than on the fact of treatment. So it has been observed in another case: "For the formation of a coparcenary in Hindu Law such a nucleus is not absolutely necessary, provided the persons constituting it stand in the relation of father and son or other relationship requisite for a coparcenary system, and these persons by living, messing and worshipping together and throwing all the property

(1) S. 110, Evidence Act.
(2) *Hemchandra* v. *Matilal*, 60 C. 1253. (A Dayabhaga Case.)
(3) *Nutbehari* v. *Nanilal*, (1937) P.C. 61.
(4) *Raghunath* v. *Mahadev*, (1896) B. P.J. 503. To the same effect, *Krishnaji* v. *Moro*, 15 B. 32; *Muddun Gopal* v. *Khikhinda Koer*, 18 C. 341 (348) P.C.

jointly into one common stock manifest their intention to deal with one another and with outsiders as members of a coparcenary system under the Hindu Law.[1] It must not be an act merely done out of kindnesss and affection.[2] (§ 1007.) A case on the other side of the line was decided by their Lordships, in which one Ram Narain, a junior member of joint family, had, as a pleader, amassed a fortune, out of which he purchased properties at Hardoi in the name of his son-in-law, the husband of his only child. He maintained an omnibus account book in which he blended his professional earnings with his receipts and payments on account of joint properties from 1864-90, when he became manager of the joint family. In 1889 he had made a statement to the effect that he had gifted the Hardoi villages to his son-in-law. On his death in 1900, the question arising whether the properties gifted were his self-acquisitions, the Privy Council held that they were so, and in upholding the gift they were influenced by the fact that Ram Narain had abundant moneys of his own to purchase those villages and that "the fact that he blended those that were not otherwise used does not mean that every entry of a purchase in the book is an entry of the transaction so dealt with, that it must be garded as joint property."[3] In other words, the entry in the books was merely a piece of evidence to prove a fact which might otherwise be disproved.

1010. **No Blending.**—To create a title upon the ground that the owner of a property threw it into the common stock abandoning his exclusive title in favour of his brothers, it is necessary for the latter to show a clear intention on the part of the owner to abandon his separate rights and throw it into the common stock.[4] Such was the case in which the evidence showed that the names of the brothers of a single donee under a deed of gift had been entered in the revenue papers along with his own, that on certain occasions the donee associated with his brothers in suits relating to the property in question, and that the donees made certain payments out of the income of the property to his brothers; but the court held that these facts did not support an inference as a matter of law that the donee had thrown the property gifted to him into the common stock, or that the donee was estopped from questioning his brother's rights.[5] Such was the case of one Kuldip who treated his younger brother Sadhu Ram, who was born deaf and dumb and so incapable of inheriting property, as if he had been under no incapacity. His name was entered as joint owner in the revenue record, and documents were issued and taken in his name. For a number of years his case had been treated by the family as one which might be cured. Ultimately there being no hope of his cure, a family arrangement was entered into by which he was set aside as disqualified. Sadhu Ram's collateral sued for his estate. The High Court upheld the claim on the ground that Kuldip had by his conduct admitted Sadhu Ram's title and that it was good even as a family arrangement or by virtue of the law of limitation. But their judgment was reversed by the Privy Council who held that acts of kindness should not be construed into acts to the disadvantage of the doer and that Kuldip's conduct was throughout that of a brother who

(1) *Lal Das* v. *Moti Bai*, 10 Bom. L. R. 175 (177).

(2) *Muddun Gopal* v. *Khikhinda Koer*, 18 C. 341 (348) P.C.; *Janki Nath* v. *Janki Nath*, 2 A.L.J. 223.

(3) *Suraj Narain* v. *Ratan Lal*, 40 A. 159 (173) P.C.

(4) *Dharam Chand* v. *Amba*, (1898) B.P.J. 308.

(5) *Muddun Gopal* v. *Khikhinda Koer*, 18 C. 341 P.C.; *Uma Shankar* v. *Aisha Khatun*, 45 A. 729.

was anxious to secure to his younger brother the share to which he would have been entitled if not disqualified: "Kuldip naturally and properly treated this afflicted brother as a member of the family and entitled to equal rights until it became absolutely clear that his malady was incurable. Their Lordships think that it would not be reasonable or conducive to the peace and welfare of families to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift when it is plain that no gift could have been intended."[1]

1011. In another case, the plaintiff sued the defendant, his paternal uncle for possession of the impartible estate of which the plaintiff's deceased brother had been the last holder. On his death the defendant took possession of the estate and sat upon the gaddi with the plaintiff's consent and his name was duly recorded in mutation proceedings. He afterwards sued to eject the defendant who relied upon the plaintiff's conduct and mutation in his favour as displacing his title. Their Lordships held that the mutation did not amount to a transfer, nor did it create an estoppel against him in that the plaintiff made no misrepresentation to the defendant altering his position in any way to his prejudice, nor was there anything in the transaction to create a trust, though it might have set in motion the bar of limitation which was not sufficient to displace his title. Turning next to the plaintiff's admissions their Lordships said: "It is not now contended that the mutation operated as a transfer. It would be absurd to suppose that the plaintiff made any misrepresentation to the defendant; neither was the situation of the defendant altered in any way to his prejudice. No consideration was given by the defendant, nor is there anything in the transaction to create a trust. Possibly, it might have given the defendant a possession on which time would run; but if so, time has not run long enough to create a bar.... A gratuitous admission may be withdrawn unless there is some obligation not to withdraw it; and there is not here any title on which such an admission can rest. If then there is no transfer, no estoppel, no bar by time, no trust, why should not the plaintiff assert his legal rights, whatever he may, in ignorance of the facts or in deference to his uncle or for any other cause not injurious to the defendant, have admitted."[2]

But this was a case of Moslems not subject to the joint family law. But in the case of a Hindu family where a self-acquisition might be made a part of joint property, an admission before the Settlement Officer was treated by their Lordships as altering the incidents of a separate estate.[3]

The same view guided their Lordships' decision in another case where they found the acquirer to have blended his income with that of the joint family.[4]

1012. The mere blending of two accounts with a common banker does not have that legal effect if the relations keep separate accounts, and the

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(1) *Muddun Gopal* v. *Khikhinda Koer*, 18 C. 341 (348) P.C.

(2) *Muhammad Imam Ali* v. *Hussian Khan*, 26 C. 81 (100, 101) P.C.

(3) *Kedar Nath* v. *Ratan Singh*, 32 A. 415 (426) P.C.

(4) *Lal Bahadur* v. *Kanhaiyalal*, 29 A. 244 (255) P.C., distinguished in *Suraj Narain* v. *Ratan Lal*, 40 A. 159 (164) P.C.

blending is more due to convenience rather than the intention to obliterate evidence of separateness.[1]

1013. Government grant.—Property acquired from a grant from Government is unquestionably self-acquired,[2] unless it was merely restoration of a confiscated grant intended to be for the benefit of the family[3] or is a grant made in consideration of the services rendered by the family or at its expense. But a party cannot sue Government for the modification of its grant.[4] By an order of Government known as Lord Canning's Proclamation of 1858, all property in the soil of Oudh was confiscated by Government, out of which an estate was transferred to one Gouri Shanker, the head of a banking firm which had supported Government in suppressing the mutiny. In holding that the grant enured for the benefit of his family, the Privy Council said: "As regards that part of the property granted to Gouri Shankar which, if any, was not previously part of the family estates, it cannot be held to have been the separate self-acquired property of Gouri Shanker within the meaning of Hindu Law. It was granted as a reward for loyalty and for the support and assistance rendered to British officers; such services as those referred to in Gouri Shanker's petition could not have been rendered without the use of funds which must be presumed to have been those of the joint family."[5] So where an estate was allowed to continue in possession of its manager, and was at the settlement, granted to "the loyal members of his family," the Privy Council held the grant to be for the grantee's family generally, and not to any persons as *persona designata*.[6] The question whether a Government grant was personal to the grantee or to him and his family is one of construction and intention to be inferred from the terms of the grant and its surrounding circumstances.[7] It may be that the grant is personal. Even then it is open to the grantee to treat it as a joint family asset and it becomes so if the grantee constitutes himself as trustee for his family[8] or by a family arrangement[9] or by a family custom.[10]

1014. Impartible Estate.—The law of joint family as necessarily modified by the law of the impartibility of an estate would be found set out in Chapter XVI.

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(1) *Nutbehari* v. *Nanilal*, (1937) P.C. 61 (66), approving *Periakaruppan* v. *Arunachelam*, 50 M. 582 (591, 592).

(2) *Katama Nachiar* v. *Rajah of Shivagunga*, 9 M. I. A. 543 (610); *Beer Pertab* v. *Rajender*, 12 M.I.A. 1 (34), followed in *Ram Nundun* v. *Janki Koer*, 29 C. 828 (851) P.C.; *Sookraj* v. *Government*, 14 M.I.A. 112; *Bahu Rani* v. *Rajendra*, 8 Luck. 121 P. C.; *Hurpershad* v. *Sheo Dyal*, 26 W.R. 55 P. C.; *Brij Indar* v. *Janki*, 5 I.A. 1; *Shere Bahadur* v. *Dario*, 3 C. 645; *Jagannatha* v. *Ramabhadra*, 11 M. 480; *Mallan* v. *Purshothama*, 12 M. 287; *Subbaraya* v. *Kamu*, 23 M. 47; *Gunnaiyan* v. *Kamachi*, 26 M. 339 (and cases cited); *Poona* v. *Nirpat Singh*, 2 C.P.L.R. 133.

(3) *Hurpershad* v. *Sheo Dyal*, 26 W. R. 55; *Kedar Nath* v. *Ratan Singh*, 32 A. 415 P.C.; *Beer Pertab Singh* v. *Rajendar*, 12 M.I.A. 1 (37); *Sookraj* v. v. *Government*, 14 M.I.A. 112 (125); *Narayana* v. *Chengalamma*, 10 M. 1 (8) P.C. (really a case of release of its reversionary rights by the Crown); *Ram Nundun* v. *Janki Koer*, 29 C. 828 P.C.

(4) *East India Co.* v. *Syed Ally*, 7 M. I.A. 555 (578).

(5) *Hurpershad* v. *Sheo Dyal*, 26 W. R. 55 (58) P.C.

(6) *Govindrao* v. *Sita Ram*, 21 A. 53 P.C.

(7) *Baijnath* v. *Tej Bali Singh*, 38 A. 590 (608).

(8) *Sookraj* v. *Government*, 14 M. I. A. 112 (127); *Hardeo Bux* v. *Jawahir Singh*, 3 C. 522 (538) P.C.; *Shere Bahadur* v. *Darbao Kuar*, 3 C. 645 (652) P.C.; *Ramanand* v. *Raghunath*, 8 C. 769 (782) P.C.

(9) *Kedar Nath* v. *Ratan Singh*, 32 A. 415 (426) P.C.; *Periasami* v. *Periasami*, 1 M. 312 P.C.

(10) *Bhujangrav* v. *Malojirav*, 5 B. H.C.R. 161 (169); *Madhavrav* v. *Atmaram*, 15 B. 519 (524).

Acquisition under father's will.

1015. Where the father gifts or devises his ancestral property to his son, he cannot impart to the donee more than what he has got, and as such, his gift or devise does not convert the property, ancestral in the hands of the father, to self-acquired property in the hands of the son. But where the property he donates or bequeaths is self-acquired property, the question whether it assumes that character in the hands of the son had been, at one time, the subject of sharp textual[1] and judicial conflict[2] upon which the Privy Council remained non-committal,[3] but this conflict has now been set at rest by the force of the Legislature that has placed all gifts and devises under the statute law.[4]

Self-acquired property defined.

115. (1) The following property constitutes the self-acquisition of a member of a joint family:—

(*a*) Property acquired by inheritance from a lineal ancestor more than three degrees remote or from a collateral or from or through a female relation;[5]

(*b*) Property acquired by gift or devise;[6]

(*c*) Property acquired without detriment to the joint estate;[7]

(*d*) Property which is the gains of learning or science, except that saved by S. 4 of the Hindu Gains of Learning Act, 1930;[8]

(*e*) Property which by its nature or extent or the mode of its acquisition is incapable of joint ownership.

(2) Where self-acquired property is blended with joint property in such a manner that it is impossible to separate the two, the whole may be presumed to be joint property.[9]

Illustrations.

(*a*) *A*, a member of a coparcenary, receives the gift of a village from his father-in-law as his marriage dowry. The village is his self-acquisition.

(*b*) The father of a coparcenary gives half of his self-acquired estate to his son *A*, and the other half to his daughter *B*, using appropriate words to convey an absolute estate. The estate is the self-acquisitions of *A* and the *stridhan* of *B*.

(*c*) *A*, a member of a coparcenary, insured his life and paid the insurance premia out of his salary. The insurance money is his self-acquisition.[10]

(*d*) *A*, who had received a special education out of the joint funds, acquires property out of his savings made in the practice of his business, as a civil servant, vakil, contractor, or an astrologer. The property is his self-acquisition.

(*e*) *A* purchased land at a court auction in execution of a decree for money against a coparcenership. It is his self-acquisition, for under S. 66 (1) of the Civil Procedure Code no evidence is admissible to show that the purchase was on account of the joint family.

(*f*) A member of a coparcenary receives a grant of an impartible estate. The estate is his self-acquisition as by its nature it is incapable of joint ownership.

1016. Analogous Law.—The following texts support this section:—

(1) *See* Hindu Code, (3rd Ed.), §1221, pp. 609, 610.

(2) *Ib.*, §§ 1229, 1230, pp. 615, 616.

(3) ***Lal Ram Singh*** v. ***Deputy Commissioner***, 45 A. 596 (604, 605).

(4) S. 2 (*d*), Transfer of Property Act; *cf.* S. 57 of the Succession Act as amended by Act XVIII of 1929, *cf. Ib.*, S. 95.

(5) Mit., Ch. I-I-3.

(6) Mit., Ch. I-I-27; Mit., I, IV, 2 Manu, IX-206. §§ 1015, 1022.

(7) Manu, IX-207; Mit. I-IV, 2, 6

(8) Act XXX of 1930, which came into force on the 25th July, 1930.

(9) § 1007.

(10) *Mahadeva* v. *Rama*, 13 M. L. J. 75; *Rajamma* v. *Ramkrishnayya*, 29 M. 121.

Manu.—"206. Wealth, however acquired by learning, belongs exclusively to any one of them who acquired it: so does anything given by a friend or received on account of marriage or presented as a mark of respect to a guest."

"207. What a brother has acquired by labour or skill without using the patrimony, he shall not, unless by his free will, put it into parcenary with his brethren since in fact it was acquired by himself."[1]

Narad.—"6. Property gained by valour or belonging to a wife and the gains of science are three kinds of wealth not subject to partition and so is a favour conferred by the father exempt from partition.

"7. When the mother has bestowed a portion of her property on any of her sons from affection, the rule is the same in that case also, for the mother is equal to the father as regards her competence to bestow gifts."[2]

Yadnyavalkya.—"Whatever is acquired by the coparcener himself, without detriment to the father's estate[3] as a present from a friend, or a gift at nuptials does not appertain to the co-heirs. Nor shall he, who recovers hereditary property which had been taken away give it up to the parceners nor what has been gained by science."[4]

"The wealth which is given to one by parents belongs to him alone."[5]

"2. That which had been acquired by the coparcener himself without any detriment to the goods of his father or mother, or which has been received by him from a friend, or obtained by marriage shall not appertain to the co-heirs or brethren. Any property which had descended in succession from ancestors and had been seized by others and remained unrecovered by the father and the rest through inability or for any other cause, he among the sons who recovers it with the acquiescence of the rest shall not give up to the brethren or other co-heirs: the person recovering it shall take such property."

Mitakshara.—"6. Here the phrase 'anything acquired by himself without detriment to the father's estate' must be everywhere understood and it is thus connected with each member of the sentence, what is obtained from a friend without detriment to the paternal estate, what is received in marriage without waste of the patrimony, what is redeemed of the hereditary estate without expenditure of ancestral property, what is gained by science without use of the father's goods consequently obtained from a friend as return of an obligation conferred at the charge of the patrimony, what is received at a marriage concluded in form, termed *Asur*, or the like, what is recovered of the hereditary estate by the expenditure of the father's goods, what is earned by science acquired at the expense of ancestral wealth, all that must be shared with the whole of the brethren and with the father."[6]

1017. It will be seen from the foregoing quotations that the texts on the subject of self-acquisition are conflicting—one text gives the acquirer all the gains of his learning though not of science, while another gives him only that which he had acquired without detriment to the father's estate. The Mitakshara explains that the latter text underlies the former and that nothing belongs to the acquirer whether acquired by learning or science unless it is acquired without detriment to the patrimony. There was some reason, though not a very strong one, for this distinction, since an education given by the father out of his income stands on a different footing to that given by funds procured by mortgage or sale of his estate. Apart from this, a distinction was made

(1) Manu, IX-206, 207.
(2) Narad, XIII-6, 7.
(3) Includes also the estate of any undivided coparcener.—Smriti Chandrika, VII-28.
(4) II-119, 120, cited and explained in Mit., I-IV,—1-31. Dayabhag likewise devotes a whole chapter to this subject; VI-II-40.
(5) Yad., II-123 (Mandlik), p. 216 Virmitrodaya amplifies this by saying "that any gifts within due bounds made by the father to his separated sons out of affection are not to be disputed by the son born after partition, and that the same rule applies in the case of affectionate gifts by the father to his sons before partition. These gifts are to be considered as the peculiar property of the sons and as such impartible."—I-222, cited Mandlik, p. 216, *f.-n.*
(6) Mit., I-IV, 2-12.

between "learning" and "science" it being held that a property acquired by one who had merely received a general education stood on a different footing to that acquired by one who had received technical education out of the family funds. But this distinction was artificial and anomalous and was commented on by the Privy Council who said, "In each case the member of the joint family is indebted to the family funds for something; in the former, for the nurture, which has made him strong to labour; in the latter, for the professional education in addition, which has made him also skilled in art. Conversely, the dull coparcener who learns but turns his learning to poor account, must share his gains such as they are, while his brother, who learns without teaching and acquires professional skill by intuition only, keeps his greater gains for himself."[1]

The distinction between a general and a technical education has been eliminated by the legislature which ensures to the acquirer the fruit of all his labour, irrespective of the nature of the education he had received out of the family funds.[2] But the Act omits to resolve other doubts; for one thing it does not expressly repeal the rule as to detriment, while being declaredly not retrospective it will affect only acquisitions made since its enactment and thus while removing one anomaly create another. Further it does not affect the burden of proof which is the source of great hardship to the acquirer's heirs who are called upon to rebut the presumption of jointness of an estate so acquired long after the acquirer is dead.

1018. Both the Mitakshara and the Dayabhag devote a chapter each to the subject of self-acquisition. Their substance is to exempt all acquisitions made without detriment to the joint estate. The rest is merely illustrative and most of the illustrations refer to occupations now no longer pursued. Thus the Dayabhag gives the following list as constituting the "gains of science"[3]:—

(1) Prize for the solution of a difficulty.
(2) Fee for teaching a pupil.
(3) Fee for officiating as a priest.
(4) Prize for solving a scientific question.
(5) Deciding a litigated question.
(6) Prize won in a literary debate.
(7) Prize won in a reading competition.
(8) Games of artists and artizans.
(9) Gambling gains.
(10) Gains of valour and soldier's booty.[4]
(11) Marriage presents.
(12) Personalia.[5]
(13) Books.
(14) House, garden, and the like, constructed on the site of the old family dwelling.
(15) Lost ancestral property, recovered by one's labour, ability and exertion.[6]

Jimut Vahan emphasizes the fact that anything gained by a person as a reward for learning or valour or by the application of knowledge or skill[7] is his own.

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(1) *Gokalchand* v. *Hukamchand*, 2 L. 40 (51) P.C.
(2) Act XXX of 1930 which came into force on the 25th day of July, 1930.
(3) Dayabhag, VI-II, 2-12.
(4) Dayabhag, VI-II, 20.
(5) "Clothes, vehicles, ornaments prepared food, water, woman, and furniture for repose or for meals are declared not liable to distribution."—*Ib.*, § 23.
(6) All the text writers quote similar instances; *see* Mayukh, IV-IV, §§ 1-4 (Mandlik), pp. 39, 40, 214-216.
(7) Dayabhag, VI-II § 17.

1019. What is a Self-acquisition?—The question when any property acquired by a member of a coparcenary becomes joint property of the family has already been considered. And in considering that question references have been made to cases when such acquisitions fail to become a part of the corpus of the joint estate. But the law of self-acquisition had attained sufficient importance even in the medieval age, when separate chapters were devoted to the subject. It has since assumed much greater importance, and therefore, calls for separate notice. So far as the sacred texts are concerned, their conjoint effect is to put all acquisitions, howsoever made, to the single test—were they made without detriment to the joint estate, which means that if they were made without material draft on the family fund, then they cannot be treated as an accretion to the family estate and must be regarded as the separate property of the coparcener.

Early cases and the Present Rule.

1020. The precepts on the subject of self-acquisition were somewhat narrowly interpreted in the early cases in which the courts were inclined to the view that any assistance from the joint estate, however indirect and inconsiderable, was a "detriment to the estate" within the meaning of the texts, so as to render the product of all such individual effort equally joint property.[1] But it was pointed out that the law must not be divorced from common-sense and the acquirer deprived of his self-acquisition, unless it involved material detriment to the estate, or to put it differently, that all self-acquisitions should be held to belong to the acquirer, unless it could be shown that they were made with the material assistance of the joint fund.[2] Such question was considered with reference to the more general principle whether individual acquisitions could be regarded as accretions to the joint estate. In other words, a coparcener's acquisitions cannot be treated as joint merely because they were the result of a general education imparted to the acquirer at the family expense, but only when he received the special education or training which enabled him to acquire them. The special training given at the family expense and the acquisitions must be interrelated to each other as cause and effect. As the Privy Council observed: "Partly in the hands of the commentators and partly under the decisions of the courts, changes may be traced in the rules laid down with regard to gains of science, and these changes have been in the direction of narrowing the category of partible gains. From maintenance out of

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(1) *Chalakonda* v. *Chalakonda*, 2 M. H.C.R. 56; *Gangadharudu* v. *Durasulu*, 7 M.H.C.R. 47; *Mancha* v. *Narotari Das*, 6 B.H.C.R. (A.C.) 1.

(2) *Nana Narain* v. *Huree Punth*, 9 M.I.A. 96; *Pauliem* v. *Pauliem*, 1 M. 252 P.C.; *Lal Bahadur* v. *Kanhaiyalal*, 29 A. 244 P.C.; *Suraj Narain* v. *Ratan Lal*, 40 A. 159 P.C.; *Sobunslal* v. *Harbuns Lal*, 1 B.S.R. 121; *Partab* v. *Tilakdharee*, 1 B.S.R. 236; *Koul Nath* v. *Jagrup*, 5 B.S.R. 14; *Muddan Gopal* v. *Ram Buksh*, 6 W.R. 71; *Bishen Perkash* v. *Bawa Misser*, 10 W.R. 287 O. A. 20 W.R. 137; *Rameshwar* v. *Lachmi Prasad*, 7 C.W.N. 688; *Subhayya* v. *Surayya*, 10 M. 251; *Gunnaiyan* v. *Kamakshi*, 26 M. 339 (353); *Tottempudi* v. *Tottempudi*, 27 M. 228; *Avayambal* v. *Kamalambal*, 19 M.L.J. 65; *Gangabai* v. *Vamanaji*, 2 B.H.C.R. 301; *Narottam* v. *Narsandas*, 3 B.H.C.R. (A.C.) 6; *Purshotam* v. *Vasudeo*, 8 B. H.C.R. (O.C.) 196; *Lakshman* v. *Jamnabai*, 6 B. 225 (240, 243); *Jugmohandas* v. *Mangal Das*, 10 B. 528 (578, 580); *Hanmantapa* v. *Jivubai*, 24 B. 547; *Chabildas* v. *Ramdas*, 11 Bom.L.R. 66; *Lachmi* v. *Debi Prasad*, 20 A. 435; *Durg Dat* v. *Ganesh Dat*, 32 A. 305.

family funds during the period of education, the basis of partibility changed to the receipt of the education itself at the family expense, and then education generally was narrowed to specialised education, which is now the basis.''[1]

Cl. (a) Obstructed Inheritance.

1021. It is agreed that all acquisitions made by what is known as ''obstructed heritage'' must be regarded as falling into this class (§§ **995-1006.**). Now, since all inheritance to a male ancestor more than three degrees remote from the heir is an obstructed heritage, it follows that property inherited from an ancestor other than the father, grandfather and the great-grandfather becomes a person's separate property and similarly would be the property, inherited from any collateral such as a brother or a paternal cousin,[2] uncle,[3] grand-uncle and the like; or that inherited from or through a female such as the mother[4] a maternal grandfather[5] maternal great-grandfather, father-in-law[6] or the like[7]

It has already been stated that such property is only the self-acquired property in the hands of the heir, and that it would become joint property in the hands of his own heir, unless it was acquired by a gift or devise (§§ **1015-1022**). This is in accordance with clause (*b*).

Cl. (b) Acquisition by Gift or Devise.

1022. All property from whomsoever acquired by a gift or devise becomes self-acquired property in the hands of the donee or devisee. Consequently, property so obtained even from the father, grandfather or the great-grandfather would be self-acquired, though if the same property be obtained by inheritance, it would be ''ancestral'' and ''joint''[8] (§ **1015.**) But, of course, in such a case the question may arise whether the gift or devise was intended to be made to a *persona designata* or to a family. There is no presumption that such acquisi-

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(1) *Gokal Chand* v. *Hukkam Chand*, 2 L. 40 (51) P.C.; *Metharam* v. *Rewachand*, 45 C. 666 P.C.

(2) *Rayadur* v. *Rayadur*, 3 M. H. C R. 455; *Karuppai* v. *Sankara*, 27 M. 300 F.B. (explaining *Venkayyama* v. *Venkataramanayyama*, 25 M. 678 P. C.); *Gurumurthi* v. *Gurammal*, 32 M. 88; *Timanacharyan* v. *Balacharya*, 4 Bom. L. R. 383; *Harihar Pershad* v. *Bholi Pershad*, 6 C.L.J. 383; *Hardwar* v. *Ram Milan*, 20 O.C. 271: 42 I.C. 812; *Nund Coomar* v. *Razeeooddeen*, 10 B. L. R. 183; *Jawahar* v. *Gayan Singh*, 3 Agra 78; *Pitamsingh* v. *Ujagarsingh*, 1 A. 652.

(3) *Rajkishore* v. *Madan Gopal*, 13 L. 491.

(4) *Muttayan* v. *Zemindar of Sivagiri*. 6 M. 1 (16) P.C., reversing *contra* O. A. from *Muttayan* v. *Virapandia*, 3 M. 370 (373); *Sivaganga Zemindar* v. *Lakshmana*, 9 M. 188; *Saminatha* v. *Thangathanni* 19 M. 70; *Chelikhani* v. *Appa Rau*, 20 M. 207 (218); *Venkayamma* v. *Venkataramanayyama*, 25 M. 678 P. C.; considered and explained in *Karuppai* v. *Sankaranarayanan*, 27 M. 300 (312-315) F.B.; *Jogeswar* v. *Ramachandra*, 23 C. 670 (679) P.C.; *Parson* v. *Somli*, 36 B. 424; *Raj Kishor* v. *Madan Gopal*, 13 L. 491.

(5) *Mhd. Husain* v. *Kisva*, I. L. R. (1937) A. 655.

(6) *Bcharee Lal* v. *Lall Chand*, 25 W. R. 307.

(7) *Adhar Chandra* v. *Nobin Chandra*, 12 C.W.N. 103; *Atar Singh* v. *Thukur Singh*, 35 C. 1039 P.C.; *Jawahir Singh* v. *Gayan Singh*, 3 Agra 78; *Pitamsingh* v. *Ujagar Singh*, 1 A. 651; *Nallatambi* v. *Mukunda*, 3 M.H.C.R. 455; *Saminatha* v. *Thangathani*, 19 M. 70; *Nund Coomar* v. *Razeeooddeen*, 18 W.R. 477; *Lochun Singh* v. *Nemdharee*, 20 W.R. 170; *Gurumurthi* v. *Gurammal*, 32 M. 88 (90); *Parson* v. *Somi*, 14 Bom. L.R. 400; *Man Singh* v. *Nawlakhbatt*, 2 Pat. 607 (643).

(8) *Jugmohandas* v. *Mandaldas*, 10 B. 528 (551, 574, 577); *Diwali* v. *Braherdas*, 26 B. 445; *Parsotom Rao* v. *Janki*, 29 A. 354 (363); *Kishori* v. *Mundra*, 33 A. 655; *contra* in *Janakiram* v. *Nagamani*, 49 M. 98 (Krishnan, J., *contra* pp. 113-115); *Indoji* v. *Kothapalli*, 54 I.C. (M.) 146.

tion made by a joint member, or even by the head of a joint family[1] is presumably joint. The presumption is the other way[2] If it is to a person for and on behalf of his family, then the property would unquestionably become joint. The question is often one of construction and intention.[3] If, for example, the village is given to *A* and *B* jointly without limitation, by words purporting that they were to take it in distinct shares, the result would be, both according to the English as well as the Hindu Law, that they take the whole of the joint property by right of survivorship.[4] (§ **1015.**)

1023. So where the father left a will devising one of his three houses to his three sons, adding: "Therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without power to give as gift or sell the same"—and as regards his other two houses, the will provided that out of a total income of Rs. 530 (being the total amount of the income of rent per month) deducting the aforesaid expenses of Rs. 181, "the remaining amount whatever it may be, shall be divided by my executors to my three sons in equal shares... My executors shall divide and give away these properties to my own grandsons being my son's sons after my sons according to their respective shares. My sons shall have no right whatever to give as gift or to sell these properties"; and one of the testators' sons sued for the construction of the will, the court held that as to the first house, it vested absolutely in the three sons as members of a joint Hindu family, and that the law of inheritance in undivided Hindu families applied, and that as to the second and third houses the sons took a limited estate as tenants-in-common in the income of the houses, in the nature of an estate for lives, which would subsist till the death of the last survivor, when the limited estate would come to an end and the provision for the division of the corpus could be carried out; that as to the first house, on any of the donees dying, the other sons would take by survivorship excluding the widow of the deceased and that as to the other two houses, the limited estate of each son would, on his death, pass to his legal representatives, and not to the survivors.[5] In another case, decided by a Full Bench some land had been transferred to his wife and her children in accordance with the nuncupative will of the owner. The family was subject to the Marumakkatayam law under which land was impartible. The court held that as the donor had expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption was that he intended that they should take them as properties acquired by their branch, or as the exclusive properties of their own branch, with the usual incidents of *tarwad* property in accordance with the Marumakkatayam usage which governed the donees.[6]

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(1) *Mahaidei* v. *Bahu*, 6 O.L.J. 53; 50 I.C. 180; *Battoo Lal* v. *Himmat Singh*, 49 I.C. (O.) 912.

(2) *Bahu Rani* v. *Rajendra*, 8 Luck. 121 P.C.; *Annamalai* v. *Subramanian*, (1929) P.C. 1.

(3) *Radhabai* v. *Nanarav*, 3 B. 151 (153); *Ahmedbhoy* v. *Petit*, 11 Bom. L. R. 545; 3 I.C. 124; *Viswesra* v. *Varahanarasimham*, (1937) M. 631.

(4) *Radhabai* v. *Nanarav*, 3 B. 151 (153); *see*, now Ss. 106, 107, Succession Act.

(5) *Yethirajulu* v. *Mukunthu*, 28 M. 363.

(6) *Kunhacha* v. *Kutti Mami*, 16 M. 201 (207) F.B., following *Soorjeemoney Dossee* v. *Denobundhoo*, 6 M.I.A. 526; *Mahomed Shumsool* v. *Shewakram*, L.R. 2 I.A. 7; *Moidin* v. *Ambu*, 16 M. 202, overruling *Narayanan* v. *Kaman*, 7 M. 315.

Personal Gift.

1024. Marriage gifts and other friendly offerings are excepted from partition even by the Sanskrit texts[1] which all quote Manu who excepted from partition "anything given by a friend received on account of marriage, or presented as a mark of respect to a guest." So where a person gifted to his son-in-law a shop and business in which the latter employed his brother as a servant, the court had no hesitation in overruling his pretension of jointness on the short ground that what the brother had received as a present from his father-in-law was his self-acquisition,[2] So nuptial gifts to a member of a joint family made out of the joint fund became his separate property.[3] On this principle the court upheld a gift of 8 acres of ancestral land by the father of a joint family possessing 200 acres to his daughter at her marriage.[4]

1025. **Separate Property.**—The law of self-acquisition is based upon two conflicting texts, the rigour of one of which has been attempted to be relaxed by the Legislature. According to Manu and Yadnyavalkya such property must have been acquired "without detriment to the patrimony"—words which the Mitakshara explains as controlling all modes of acquisitions whether obtained as a gift from a friend or at the time of marriage and the like. As such, "what is earned by science, acquired at the expense of ancestral wealth" is joint and not separate property of the acquirer. But it was overlooked that such acquisition may not have necessarily involved "detriment to the father's estate," if that term implies substantial offtake from it. Then again, the term "science" has occasioned a considerable conflict of opinions though the cases had reduced its limit by holding that term to mean special or technical education as distinct from a mere general education howmuchsoever liberal. The question what is "science" is intrinsically one of fact, though the area of discussion has been steadily narrowed by typical decisions, conclusive of numerous cases. But as the Privy Council remarked, the whole doctrine is not without anomalies and takes no note of the natural talent which more than "science" may have contributed to the acquisition of property.[5] The subject has been further complicated by the existence of two conflicting texts, since side by side with the distinction of learning and science, we have the mere text of Yadnyavalkya limiting self-acquisitions to "whatever is acquired without detriment to the patrimony"—words which the Mitakshara explains as equally applicable to all acquisitions. Consequently, wealth which is the result of a mere general education will not escape partition if it is shown to have been imparted at the detriment of the patrimony. But this refinement was not given effect to by the courts who accepted the simplified doctrine that the "detriment" relates only to the special education, and that in order that the wealth acquired by a joint member should be partible, the acquirer must have not only received special training but received it at the expense

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(1) Manu, IV-206, quoted *supra*; to the same effect, Narad, XIII-6-7; 33 S. B.E. 190; Mit., I-IV-2.

(2) *Beharee* v. *Lallchand*, 25 W. R. 307; *Adhar Chandra* v. *Nobin Chandra*, 12 C.W.N. 103.

(3) *Sheo Gobind* v. *Sham Narain*, 7 N.W.P.H.C.R. 75.

(4) *Anivilla* v. *Cherla*, 35 M. M. 628; *Sundaram* v. *Krishnaswami*, 28 I.C. (M.) 992; *Kilambi* v. *Tirumala*, 5 M.L.T. 40: 4 I.C. 1094.

(5) *Gokulchand* v. *Hukamchand*, 2 L. 40 (45) P.C.

of the patrimony, which must be substantial and not merely nominal. But in the earlier cases, these limitations do not appear to have been uniformly kept in view.

1026. In one case, the large estate of one Bhao, worth over thirty lacs of rupees made by him as Diwan of the Peshwas was held liable to pass by survivorship, although Bhao had received no more than an elementary education at the expenses of the joint family.[1] It was consequently held that gains of a pleader were partible either because a pleader's learning is not science[2] or because they must be deemed to have been acquired at the family expense, even though it was responsible for no more than a general education.[3] Taking the same strict view, the Madras court held the property of a dancing girl who had learnt singing and dancing at the family expense partible.[4] But in later cases the distinction between a general and a special education was more clearly emphasised while the *quantum* of aid received from the joint funds was taken as equally material.[5] As such, the property of an astrologer who had received merely a general education out of the joint funds was held to be self-acquired[6] and so were the earnings of an Army contractor[7] a Karkun[8] or a Subordinate Judge,[9] an overseer in the department of Public Works[10] though in a more recent case, the earnings of a member of the Indian Civil Service who had been sent to England for that purpose and maintained for seven years at the family expense were held to be joint.[11] But in this case, their Lordships pointedly referred to the anomalies which this branch of Hindu Law had created, and they did not see why the gains of learning were partible while those of science impartible, since in each case the gains depend not so much upon the nature of the education imparted as upon the intelligence and industry of the acquirer.[12] This distinction has since been eliminated by the Legislature which has excepted the acquisitions of both learning and science from the catena of joint property.[13] Though the burden of proving that it is such acquisition is still on the acquirer or his representative, yet if he was in separate possession, he would be entitled to rely on the presumption of ownership from the fact of his possession provided in S. 110 of the Indian Evidence Act.

Accretions excepted.

1027. From the fact that all self-acquisitions made by a member's individual skill are no longer partible, it follows that all accretions thereto or made therewith *a fortiori* fall into the same excep-

(1) *Laxman* v. *Malhar Rao*, 2 Knapp. 60 : 5 W.R. 67 P.C.

(2) *Durvasula* v. *Durvasula*, 7 M.H.C. R. 47; *Gangadharudu* v. *Narasammah*, 7 M.H.C.R. 47; *Bhagirathi* v. *Sadashive Rao*, (1880) B.P.J. 126; *Suraj Narain* v. *Ratanlal*, 40 A. 159 (163) P.C.

(3) *Manchha* v. *Narotamdas*, 6 B.H. C.R. (A.C.) 1 (6).

(4) *Chalakonda* v. *Chalakonda*, 2 M.H. C.R. 56 (75).

(5) *Pauliem* v. *Pauliem*, 1 M. 252 P. C.

(6) *Durga* v. *Ganesh*, 32 A. 305 (313).

(7) *Lachman* v. *Debi Prasad*, 20 A. 435.

(8) *Krishnaji* v. *Moro*, 15 B. 32.

(9) *Somasundara* v. *Ganga Bissen*, 28 M. 386 (388).

(10) *Lakshman* v. *Jamnabai*, 6 B. 225 dissenting from *contra* in *Laxman* v. *Malhar*, 2 Knapp 60: 5 W.R. 67 P.C. at pp. 243, 244.

(11) *Gokul Chand* v. *Hukumchand*, 2 L. 40 P.C.

(12) *Ib.*, p. 51.

(13) Act XXX of 1930, which came into force on the 25th July, 1930.

tion.[1] So it was even previously held that where a coparcener had acquired property with money borrowed upon his sole credit,[2] or on the security of his life policy, the primia of which were paid out of his salary.[3] The same view was taken of compensation paid on the death of a coparcener under the provisions of S. 1 of Fatal Accidents Act.[4]

1028. But inspite of the enactment of the Act, cases would still arise where the question whether an acquisition was not outside the Act. For instance, the question whether the grant of a *Jagir* to a coparcener would be treated as joint property of the family or the self-acquisition of the acquirer depends not upon the talent of the acquirer as upon the incidents of the tenure and the circumstances attending its grant. Ordinarily, a *Jagir* is a personal grant not of the soil, but only of the revenue and, as such, it is personal and neither partible nor heritable.[5] But a maintenance grant is not necessarily restricted to the grantor personally. It depends upon its terms.[6] So, again, since the manager is presumably expected to exert his talents for the benefit of the family, the fact that an acquisition was the result of personal skill would not take the case out of the rule.[7] Such are the savings and property purchased therewith by the holder of an impartible estate.[8] Ordinarily, they are the self-acquisitions of the holder,[9] though they may become accretions to the parent estate.

1029. Apart from the obvious self-acquisitions, the question what property acquired by the manager or a coparcener with some help, direct or indirect, from the joint property must be classed as his self-acquisition, at one time, depended upon the construction of textual authority, which had given rise to conflicting decisions due to the use of loose expressions defining such property, now sought to be remedied by the enactment of the Hindu Gains of Learning Act, 1930.[10] The texts describe all property acquired by individual effort, "without detriment to the father's estate" the acquirer's self-acquisition, while Narad unqualifiedly excepts all "gains of science", but Mitakshara declares the qualification general and as applicable to all acquisitions, howsoever made, added to which there was the further complication created by the doctrines of nucleus, accretion and the burden of proof. The combined effect of these doctrines had, at one time, made the court doubt whether there was any clear line of demarcation between property joint and separate in such cases, though in a later case decided in 1831[11] the Privy Council had to consider whether an estate acquired by one Bhao a member of a joint family

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(1) *Boomad Lall* v. *Dawkee Nandan*. 19 W.R. 223.

(2) 2 Macn. H.L. 151, followed in *Nursing Das* v. *Eai Narain Das*, 3 N.W. P.H.C.R. 217 (235).

(3) *Mahadeva* v. *Rama*, 13 M. L. J. 75; *Rajamma* v. *Ramakrishnayya*, 29 M. 121.

(4) *Sri Gopal* v. *Amba Debi*, (1914) P.R. 52 : 22 I.C. 846.

(5) *Raghoji Rao* v. *Lakshman Rao*, 35 B. 639 P.C.

(6) *Muthukumara* v. *Udayan*, 38 M. 387; *Secretary of State* v. *Rashidull Huq*, 18 C. L. J. 31: 21 I.C. (C.) 93.

(7) *Sheo Dayal* v. *Judoonath*, 9 W.R. 61, (64).

(8) *Parbati* v. *Jagadish Chunder*, 29 C. 433 (453) P.C.

(9) *Tagore* v. *Tagore*, 18 W.R. 359 (364); *Tarkeswari* v. *Sashishekareswar*, 9 C. 952 P.C.; *Karistoromoney* v. *Narendra Krishna*, 16 C. 383 P.C.; *Parnashashi* v. *Kalidhan*, 38 C. 603 P.C.; *Kunhamed* v. *Kunhanbi*, 32 M. 315; *Parbati* v. *Jugdish Chunder*, 29 C. 433 (453) P.C.

(10) Act XXX of 1930.

(11) (1831) *Luxman Row* v. *Mulhar Row*, 2 Knapp. 60 (64): 5 W.R. 67 P.C.

consisting of himself and his brother, who owned some ancestral fields, became part of the joint estate, which it decided in the affirmative on the ground that Bhao retained his connection with the family fields, though he had acquired his estate worth over 30 lakhs by his service in the Maratha Court as Prime Minister of the Peishwa, where his brother had procured him an appointment. The courts in India had held that jointness being the rule, and separate acquisition an exception to it, the burden lay on Bhao to prove the exception which he was held to have failed to prove. Lord Brougham, L.C., while upholding this finding of the Indian courts, did not fail to confess that he did not feel any great confidence in his judgment.[1] But in a case decided in 1921, their Lordships felt constrained to follow this case holding that the salary of a member of a joint family who had been given special educational training in England, enabling him to enter the Indian Civil Service, was equally liable to pay the family debt along with the rest of his ancestral joint property.[2] These two were no doubt extreme cases, but they sufficed to attract the attention of the Legislature to the unsatisfactory state of the archaic law resulting in the enactment of the declaratory Act known as the Hindu Gains of Learning Act, 1930,[3] which saves all acquisitions whether made before or since the commencement of that Act[4] to be the separate property of the acquirer,[5] irrespective of the aid received by him from the joint property or a member of the joint family.

1030. This Act has, therefore, the effect of overruling a large number of cases in which, following the scriptural texts, the courts had to consider the meaning of "Science" or special education, as distinct from a general education, or partly one and partly the other, which had resulted in numerous conflict of cases[6] and the quantum of aid received from the joint property, and its "detriment" in consequence of such aid.

But the Act does not affect the law where such aid is given from funds borrowed on the security of the family property or any of its members. If, therefore, suppose a joint family pledge their small estate to raise funds to give one of its members a special training, enabling him to enter a lucrative service or calling or start a lucrative business, the old rule would still remain. Then, again, the Act leaves untouched the law relating to nucleus and accretion though it has necessarily the effect of shifting the burden of proof from the acquirer and his heirs to the joint family. Consequently, if the two Privy Council cases, last referred to, had to be redecided they would have resulted in a contrary decision to that given.

1031. The question of burden of proof is a more general question, arising out of the fact of jointness and the presumption arising therefrom which has been the subject of a previous discussion. So far as the gains of learning are concerned, the question of support and use of

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(1) (1831) *Laxman Row* v. *Malhar* Rao, 2 Knapp. 60 (64): 5 W.R. 67 P. C., followed in *Gokal Chand* v. *Hukamchand*, 2 L. 40 (49) P.C.

(2) *Gokul Chand* v. *Hukam Chand*, 2 L. 40 (49) P.C.

(3) Act XXX of 1930.

(4) The Act came into force on the 25th day of July, 1930.

(5) *Ib.*, S. 3.

(6) For which *see* Hindu Code (3rd Ed.), §§ 1231-1240, pp. 616-620.

joint family funds applied for imparting learning is statutorily rendered irrelevant, and the sole question is whether the property claimed as self-acquired was the result of or flowed from the acquirer's learning. That fact must be proved by the acquirer, and if any such other property is found in his possession, the court will presume to be his separate property, and the contrary must be proved by him who alleges it.[1]

Clause (2).

1032. **Blended Property.**—*See* §§ 1007-1008.

116. **"Legal Necessity" and "Benefit" are of two kinds: spiritual and secular.**[2]

1033. **Analogous Law.**—The following text bears on the subject of necessity:—

Vyas.—"Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes."[3]

1034. The terms "legal necessity" and "benefit," observed Lord Atkinson, are "general and elastic terms,"[4] and as to the latter, "it is impossible to give a precise definition of it applicable to all cases."[5] The terms necessity and benefit are ordinarily coupled together, but though allied, they are not identical, for an act may be necessary without being advantageous and *vice versa*. It is, however, quite usual that an act may be both. For example, the payment of Government revenue charged upon an estate is necessary and its mortgage for that purpose advantageous to the estate, since it prevents its extinction by sequestration. Other examples could be multiplied to illustrate the dual result. Such for example, would be a charge incurred to protect an estate from submersion by flood or the altered water-course. On the other hand, an act may be beneficial without being necessary. Such would be the case where an estate is sold solely for the purpose of investing the price in a business bringing in an income larger than that derived from the safer and more stable estate. It is clear that this act, though probably beneficial to the family, is not such as is within the scope of the manager's authority.[6] In other words, it is not "reasonable and proper" within the meaning of the next section. Both the terms "necessity" and "benefit" have thus become terms of art and bear a special significance in Hindu Law.

Consequently, an act may be both necessary and beneficial in the ideal sense of Hindu Law, though in reality it is neither. Such is the performance of a pilgrimage or of a religious ceremony. Apart from such acts, the manager's necessary acts are such as are necessary for the material existence of the undivided family, or for the preservation of the family property.[7]

(1) S. 110, Ev. Act; *Rai Shadi Lal Lal* v. *Lal Bahadur*, (1933) P. C. 85; *Nutbehari* v. *Nanilal*, (1937) P. C. 61 (66); *Narainswami* v. *Ratnasabapathi*, (1937) 2 M.L.J. 906.

(2) *Collector of Masulipatam* v. *Cavaly*, 8 M. I. A. 500 (501).

(3) Mit., I-I-28, 29.

(4) *Palaniappa* v. *Sreenath*, 40 M. 709 (719) P.C.

(5) *Ib.*, p. 718.

(6) *Palaniappa* v. *Sreenath*, 40 M. 709 (719) P.C.

(7) *Ramlal* v. *Lakhmichand*, 1 B. H. C.R. (App.) 51.

1035. Legal necessity in the abstract must, however, be distinguished from legal necessity in a given case which implies not only that the object upon which money has been spent was proper, but also that it was expended under pressure. As was observed in a leading case: "The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded."[1] For instance, a debt may be incurred for the most approved purpose, but it will not support alienation of family property, if there were other funds available, and even if it would support a loan, it might still be a question whether it would support a loan, the terms of which are onerous.[2] There is no text to cite in support of this section since the classical writers make no distinction between necessity and benefit or attempt to classify them into spiritual and secular. But this classification has received the support of cases which regard the two distinct and as having a direct bearing on the law of alienation of joint property. Legal necessity must then be distinguished from benefit, and the two are again of two kinds: spiritual or secular. It has been said that these terms cannot be precisely defined.[3] It is so and for that reason they cannot be precisely understood. But the difficulty arises not so much from the lack of definition as from the difficulty created in its application to concrete facts. Regarding necessity there is perhaps less scope for vagueness than there is in the case of benefit. But as their instances become multiplied their connotations become more fixed and certain, till a point is reached when all their common attributes become known, and those that still remain unknown play but an insignificant part in relation to the whole.

Necessity implies pressure and whether it is spiritual or secular there must be the presence of pressure, though in the case of spiritual necessity, the pressure is religious. It may be even said to be metaphorical, while in the case of secular necessity the pressure must be real.

1036. The concept "*benefit*" belongs to a different class from necessity. The pressure, if any, is merely moral, but the obligation in some case would be real especially in case of large estates where the benefit verges on necessity.

117. "Spiritual legal necessoty" defined.

(*a*) **Spiritual legal necessity implies the performance of such spiritual acts which the religion of a person enjoins as obligatory**[4]

"Spiritual legal benefit" defined.

(*b*) **It is distinguished from spiritual legal benefit in that while the one is regarded as obligatory the other is merely beneficial without being obligatory.**[5]

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(1) *Hanooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (423, 424).

(2) *Nazir Begam* v. *Raghunath*, 41 A. 571 P.C.; *Ram Khalawan* v. *Ram Naresh*, 41 A. 609; *Ram Bhujawan* v. *Nathu Ram*, 2 Pat. 285 (292) P. C.; *Radha Kishan* v. *Jagsapu*, 4 Pat. 19 P.C.

(3) *Palaniappa* v. *Sreenath*, 40 M. 709 (719) P.C.

(4) *See* § 1040.

(5) *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (511) P.C.

1037. **Analogous Law.**—The following texts bear on the subject:—

Katyayan.—"Whatever is given for a religious purpose or through affection and whatever debt the son has been directed to pay, the same shall be divided when known. There can be no gift from patrimony."

Mayukh.—"The prohibition of sale or other disposition of immoveable property by a widow, without the consent of takers of the heritage is given on (the authority of) Madhav. As for the text of Katyayan: "After the death of the husband, the widow preserving (the honour of the family) should obtain the share of her husband so long as she lives, but she has no ownership therein in respect of (its), gift, mortgage, or sale" that is a prohibition of gift of money to the *bandi* (bards) *charan* (triffers) and the like. Gifts for religious or spiritual objects and mortgage, and the like for that purpose, are of course permitted; (as is plain) from the aforementioned text (of Prajapati) commencing with *Sthavaram, Jangamam,* etc., and from the text of Katyayan: 'A widow always engaged in meritorious observances and fasts constant in the duties of celibacy intent upon restraining (her passioos) and making holy gifts, shall reach the heavenly abodes even if she has no son.'"[1]

Vyvastha Chandrika.—"Without the consent of her husband's reversioners a widow is, however, competent to sell so much, and no more, of his property as may be required for the performance of the indispensable duties (*Nitya Karma*). If such acts cannot be performed without selling the whole property, the whole may be sold by her for that purpose, because such duties *must* be performed. But for the performance of an optional religious act (*Kamya Karma*) she may, without their consent, dispose of only a small portion of the estate.[2]

1038. The classification of "necessity" into spiritual and secular, and its distinction from "benefit" is now well recognised in the cases, and it has a material bearing upon the law of alienation. The distinction between spritual and secular necessity was stated by the Privy Council in a case decided in 1861. Speaking of the disposing power of the widow, their Lordships observed: "For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of the husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity."[3] So again, the same high tribunal acknowledged the distinction between such "necessity" and "benefit" in the following words: "There can be no doubt upon a review of the Hindu Law, taken in conjunction with the decided cases, that the Hindu system recognizes two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the soul. In the later cases, this distinction runs clearly through the views of the learned Judges. The confusion which has arisen in this case arises from mixing up the indispensable or obligatory duty with a pious purpose which, although optional, is spiritually beneficial to the deceased.

"With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious, and, if performed, are meritorious so far as they

(1) Mayukh (Mandlik, 77, 78 cited and explained in *Panachand* v. *Manohar Lal*, 42 B. 136 (143, 144, 152).

(2) Cited and followed in *Sardar Singh* v. *Kunj Behari Lal*, 44 A. 503 (509, 510) P.C.

(3) *Collector of Masulipatam* v. *Cavaly*, 8 M.I.A. 500 (551); to the same effect, *Raj Lukhee Debea* v. *Gokool Chunder*, 13 M.I.A. 209; *Sham Sunder Lal* v. *Acchan Kanwar*, 21 A. 71 (83) P.C.; *Bijoy Gopal* v. *Girindra Nath*, 41 C. 793 P.C.

conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case, she can alienate a small portion of the property for the pious or charitable purpose she may have in view."[1]

1039. It will thus be seen that spiritual necessity ranks higher than secular necessity as regards the power of alienation of the widow, daughter or other female heir of her inheritance. To justify an alienation for secular necessity she has to prove pressure, but it is not necessary when spiritual necessity is concerned. It is true that all necessity implies pressure, and even in the case of spiritual necessity there is a pressure, but it is the pressure of religion, and one which is more metaphorical than real. Consequently, if the necessity was spiritual, the question to inquire is not whether there was a pressure upon the estate or whether the alienor had not funds of his own, since such acts are held to be indispensably necessary for the spiritual beatitude of the deceased and it is a charge upon the estate which descends to the heir. Such acts are equally obligatory upon the manager of the joint estate, as on the manager of a religious endowment.

1040. Spiritual Necessity.—The next question is: What acts constitute "spiritual necessity"? It is impossible to enumerate them, since beyond a few observances which are generally regarded as indispensable, there remain others whose necessity must be judged in the light of usage. To the former class belong all the initiatory and funeral ceremonies of all the members of the joint family,[2] including its female members, *e.g.*, the mother and widow of a deceased male-holder[3] the performance of the exequial rites and Shradh,[4] the pilgrimage to Gaya,[5] but not to Benares, since one is the necessary part of the exequial rites, which the other is not. But though a pilgrimage to Gaya to offer *pindas* for the spiritual benefit of the deceased is an acknowledged necessity, a feast given upon return is not so.[6] So referring to the widow it was said: "Pilgrimages are generally made by a widow with a view to present her husband's funeral obligations at the sacred place visited, and to ensure for his soul the special merit a rising from such presentation.[7] In every case, the question must be whether the pilgrimage was for the spiritual benefit of her husband, in the performance of her duty to his soul, and whether the expenses incurred are reasonable and were made honestly, having regard to the estate, the *status* of the family and other considerations, which it is customary for Hindus to take into account in accordance with the religious beliefs and usages,"[8] So a pilgrimage to Pandharpur or any

(1) *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (511) P.C.; affirming O.A. 41 A. 130.

(2) *Chuman Lall* v. *Gunput Lall*, 16 W.R. 52; *Mahomed* v. *Shoma*, 14 B. 562 (564).

(3) *Nand Rani* v. *Krishna Sahai*, (1935) A. 698 F.B.

(4) *Chuman Lall* v. *Gunput Lall*, 16 W. R. 52; *Mahomed Ashraf* v. *Brojessure*, 19 W.R. 426; *Mutteram* v. *Gopal*, 20 W. R. 187.

(5) *Junmojoy v. Russomoye*, 10 W. R. 209; *Mohamed Ashrif* v. *Brojessure*, 19 W.R. 426; *Mutteram* v. *Gopal*, 20 W. R. 187; *Ganpat* v. *Tulsiram*, 36 B. 88 (90); *Srimohan* v. *Brij Behary*, 36 C. 753; *contra* in *Raj Chandra* v. *Sheshoo*, 7 W.R. 146.

(6) *Hurromohan* v. *Auluck Monee*, 1 W.R. 252.

(7) *Makhan Lal* v. *Gayan Singh*, 8 A. L.J. 13.

(8) *Ganput* v. *Tulsiram*, 36 B. 88 (90).

other local Gaya might be considered necessary, and it was so treated in a case.[1]

1041. Spiritual Benefit.—The dividing line between "spiritual necessity" and "spiritual benefit" is narrow but it exists. The test in the two cases is this: Was the act considered by the bulk of the community obligatory or merely optional?[2] Even as regards optional acts, there are some which border on the obligatory and others in which the consensus of opinion would favour larger expenditure than on others. In an old case, the court questioned the Pandits on what they considered to be an allowable alienation and the Pandits reported that they would allow the widow to alien from one to three-sixteenth of her husband's property "for the benefit of his soul," but this opinion does not appear to have been acted on; but on the other hand, it has been disapproved.[3] The general rules which the courts observe on the subject are: (*a*) that the alienation must comprise only a moderate portion of the estate; (*b*) that if made by the female heir, it must be conducive to the spiritual benefit of the last male owner, that is to say, if the estate be inherited from the husband[4] or the father[5] it must be conducive to their benefit. She cannot make an alienation which would be conducive to her own spiritual benefit[6] or the benefit of any other relation, *e.g.*, her mother-in law;[7] or is, indeed, to no particular person's benefit, but is otherwise a pious meritorious and a charitable act.[8] A personal gift to one who has assisted the widow[9] or to her own brother[10] is, thus out of question. Regarding the value of the gift, the decided cases show that at least four considerations influence the courts in upholding it: (*a*) the relationship of the donee, (*b*) the nature of the gift, (*c*) its occasion and purpose, and (*d*) its value.

(a) The Donee.

1042. Of these, the dowry to the daughter takes the highest place. Even as far back as 1820 the Pandits who were asked to report on the character of religious purposes which justified an alienation by the widow reported it to "include dowry to a daughter, building temples for religious worship, digging tank and the like."[11] Of these only the dowry has withstood the test of time. In one case the mother had at the time of her daughter's *gowna* ceremony gifted to her one house worth Rs. 1,200, out of the

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(1) *Ganput* v. *Tulsiram*, 36 B. 88 at p. 90.

(2) *Vupuluri* v. *Garimilla*, 34 M. 288; cited with approval in *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (512) P.C.

(3) *Ramchander* v. *Gangagobind* (1826) 4 B.S.R. 147 (154): 7 I.D. (O.S.) 110 (115); dissented from in *Munshi Lal* v. *Shiv Devi*, 4 L. 336 (338).

(4) *Rama* v. *Ranga*, 8 M. 522; *Lakshminarayan* v. *Dasu*, 11 M. 288; *Vupuluri* v. *Garimilla*, 34 M. 288.

(5) *Gudimetla* v. *Bollozu*, 23 M.L.J. 233 : 16 I.C. 139.

(6) *Puran Dei* v. *Jai Narain*, 4 A. 482, followed in *Lakshminarayana* v. *Dasu*, 11 M. 288; *Rama* v. *Ranga*, 8 M. 552; *Ram Kewal Singh* v. *Ram Kishore Das*, 22 C. 506.

(7) *Ram Kewal Singh* v. *Ram Kishore*, 22 C. 506.

(8) *Runjeet* v. *Mhd. Waris*, 21 W.R. 49; *Kartick Chunder* v. *Gour Mohun*, 1 W.R. 48; *Harmange* v. *Ram Gopal*, 17 C.W.N. 782 ; 19 I.C. 417.

(9) *Lachmi Prasad* v. *Jagmohan*, 18 C.L.J. 633 ; 22 I.C. 594.

(10) *Ram Chunder* v. *Ganga Gobind*, (1826) 4 B.S.R. 147 (154) ; 7 I.D. (O.S.) 110 (115).

(11) *Cossinath* v. *Hurrosondry*, 3 I.D. (O.S.) 907, affirmed O.A. *Bysack* v. *Cossinath*, 1 I.D. (O.S.) 292 P.C.

three inherited by her from her husband valued at Rs. 3,800. The court upheld the gift as not unreasonable in view of the fact that the donee was her only child,[1] though such a gift, if made to a stranger, would be considered as excessive. It was so held where the widow had made a gift of a fourth portion of her husband's estate to a charitable institution.[2]

(b) The Nature of the Gift.

The second question is the nature of the gift. Hindu Law regards the gift of land as most meritorious. On this ground, the court upheld the gift of a small portion of a Zemindari to a Brahmin for the performance of the funeral and annual *shradh* of the deceased husband.[3]

(c) Its Occasion and Purpose.

Closely connected with this is its occasion and purpose. It has already been seen that the occasions of initiation, marriage and death are customarily regarded as appropriate to the display of piety. So again, while pilgrimages to certain places are obligatory, pilgrimages and sacrifices by the widow are generally regarded as indirectly beneficial to the husband justifying an alienation of only a small portion of the estate.[4]

(d) Its Value.

As regards value no categorial rule can be formulated since it must depend upon circumstances. The cases, however, emphasise the necessity of moderation. And in this respect the power of the father is larger than that possessed by the manager[5] or the female heir.[6] The question will have to be considered in the sequel.

1043. Father's and Manager's Alienations.—The question of spiritual necessity and spiritual benefit usually arises in connection with the alienations of the female heir because it is the limit of their power. In the case of the father and the manager, this question does not assume the same importance because they wield larger powers of alienations, and in the case of abuse of power, the coparceners aggrieved have their remedy in partition; but this is by no means their only remedy, since they are equally entitled to set aside an improper alienation even though supported by spiritual necessity or benefit. The subject really relates to the power of the manager where the subject will be found discussed in detail.[7]

1044. In considering the question of benefit, a distinction must be made between what might appear immediately beneficial and what might be to the ultimate benefit of the minor or of the estate. The question in such cases would be whether the guardian is justified in disposing of the minor's property in a rising market which might have been left for disposal by the minor himself after attaining majority.[8] Moreover, the term benefit can hardly be held to include cases of speculative development

(1) *Churaman* v. *Gopi Sahu*, 37 C. 1 (12); followed in *Khub Singh* v. *Kunj Behari*, 44 A. 503 P.C.

(2) *Munshi Lal* v. *Shiv Devi*, 4 L. 336.

(3) *Lakshminarayan* v. *Dasu*, 11 M. 288; *Vuppuluri* v. *Garimilla*, 34 M. 288.

(4) *Rama* v. *Ranga*, 8 M. 552.

(5) S. 136.

(6) *See* "Widows' Estate".

(7) S. 136.

(8) *Krishna Chandra* v. *Ratan Ram*, 20 C.W.N. 645 (647), following *Radha*

of the minor's estate[1] or the obtaining of the benefit out of proportion to its cost. The question in this case to ask is: What would have been the probable result if the guardian had not acted in the way he did.[2]

"Secular legal necessity" defined.

118. (1) "Secular legal necessity" implies such pressing requirement of the family or of the estate which the law regards as sufficient justification for contracting a debt, or for the transfer of the joint estate.[3]

(2) In particular and without prejudice to the generality of the foregoing provision, the following objects constitute such necessity:—

(*a*) The debt of the father, not illegal or immoral[4] or of the husband;[5]

(*b*) Payment of rent or revenue assessed on the joint property and all charges of a public nature, accruing due therefrom, in default of payment of which it may be summarily sold;[6]

(*c*) Payment of a reasonable premium on renewal of a lease and the rent due thereon;

(*d*) Other charges necessary for the preservation of the property from destruction, deterioration, forfeiture or sale;

(*e*) The expenses reasonably requisite for the assertion or protection of the title to the property;[7]

(*f*) Its due management, and the collection of the rents and profits thereof;[8]

(*g*) The protection and maintenance of coparceners, and of their wives and issues;[9]

(*h*) The marriage expenses of coparceners[10] and of their daughters;[11]

(*i*) The performance of indispensable religious or customary duties;[12]

(*j*) Litigation for the recovery, protection or preservation of the estate;[13]

(*k*) The cost of defending a member of the joint family in a criminal prosecution.[14]

Persad v. *Raj Kooer*, 20 W.R. 38; *Kalhar Singh* v. *Roop Singh*, 3 N.W. P.H.C.R. 4; *Ganap* v. *Subni*, 32 B. 577; *Hemraj* v. *Nathu*, 59 B. 525 contra *Jagat Narain* v. *Mathura Das*, 50 A. 569 F.B.; *Amrejsingh* v. *Shambu Singh*, 55 A. 1 F.B.

(1) *Krishna Chandra* v. *Ratan Ram*, 20 C.W.N. 645 (647).

(2) *Ishani* v. *Ganesh*, 23 C.W.N. 858 (860).

(3) *Hanooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393 (421).

(4) Narad, 1-6; *Natesayyan* v. *Ponnusami*, 16 M. 99 (104); *Ram Ratan* v. *Basant Bai*, 2 L. 263 (269).

(5) *Ashutosh* v. *Chidam*, 34 C.W.N. 153, (1930) C. 351; *Bhawat* v. *Nivrathi*, 39 B. 113.

(6) *Garibullah* v. *Khalak Singh*, 25 A. 407 (415) P.C.; *Ganeshi Lal* v. *Khetra Mohan*, 5 Pat. 585 (594) P.C.

(7) *Miller* v. *Ranganath*, 12 C. 389. *Cf.*, S. 13, Trusts Act (II of 1882).

(8) *See* § 1052.

(9) *See* Ch. VII.

(10) *Ganpat* v. *Tulsi Ram*, 13 Bom.L.R. 860; *Durga Prasad* v. *Jewdhari*, 62 C. 733.

(11) *Bhagirathi* v. *Jokhu Ram*, 32 A. 575 and cases cited *post.* (§ 1054).

(12) § 1056.

(13) *Karimuddin* v. *Gobind*, 31 A. 497 (506) P.C.; *Indar Kuar* v. *Lalta Prasad*, 4 A. 532 (542).

(14) *Beni Ram* v. *Man Singh*, 34 A. 4; *Indar Kuar* v. *Lalta Prasad*, 4 A. 532 (543); *Dhanukdhari* v. *Rambirich*, 1 Pat. 171; *Nobinchunder* v. *Khedar Nath*, 6 C.W.N. 648 and cases cited *post.*

1045. What is "Legal Necessity?"—"Legal necessity" is a term of art and means such objects of necessity as the law considers sufficient to justify the pledging of the family credit. For "necessity" must have reference either to the family members, whether coparceners or not, or to the estate. In either case, it must be judged in the circumstances of each case.[1]

As West, J., said: "Family necessity is an expression that must receive a reasonable construction, and the head of the family and those dealing with him, must in the interest of the family itself, be supported in transactions which, though in themselves diminishing the estate, yet prevent and tend to prevent still greater losses. A reasonable latitude, too, must be allowed for the exercise of the manager's judgment, especially in the case of the father, though this must not be extended so as to free the person dealing with him from the need of all precaution, where a minor son has an interest in the property."[2]

"Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical offerings to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the relatives,—these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are, in the strict sense of the word, lawful necessities."[3]

But all expenses considered necessary by the manager do not constitute "legal necessaries" a term which must be confined only to such objects which law recognizes as proper objects for the raising of money on the credit of the joint estate. Naturally, this must depend upon the value and income of the estate, the status and position of the family, the claims upon it and the precedents by which it might be supported. But the leading heads of necessity are now well settled and they will now be examined.

(a) Father's Debts.

1046. According to the Hindu idea the son, grandson and great-grandson are in reality the same person in different bodies. Consequently, the liability of the son is equally a liability of the grandson and of the great-grandson. This is in accordance with Asahaya's interpretation of the following text of **Narad:**

Narad.—"If a debt has been legitimately inherited by the sons, and left unpaid by them, such debts of the grandfather must be discharged by his grandsons. The liability for it does not include the fourth in descent."

1047. As to this Asahaya says that the term "grandsons" must be taken to relate to the grandsons of the debtor's sons, *i.e.*, to the great-grandsons of the debtor, and that the term "fouth descendant" signifies the fourth in descent from the debtor's sons, *i.e.*, the fifth in descent from the debtor himself. This assumption, he says is necessary in order to reconcile the present rule with the statements of all other legislators, and

(1) K. M. Bhattacharya's Law of the Joint Hindu Family, p. 488.
(2) *Babaji* v. *Krishnaji*, 2 B. 666; *Ratnam* v. *Govindarajulu*, 2 M. 339.
(3) K. M. Bhattacharaya's Law of the Joint Hindu Family, p. 488.

with Narad's own rule.[1] It is now so settled by the Privy Council who have held the son, the grandson and the great-grandson all equally liable to pay the father's debt.[2] And the rule now accepted as settled, is what is apparent from Narad's words, namely, the father's debt is payable not only by the son and the grandson, but also by his great-grandson. This they are bound to do whether the estate inherited by them be the ancestral or the self-acquired estate of the father[3] but their liability is, in any case, limited to the assets inherited by them; and they are only liable if they were joint with their ancestor, or when the debt for which they are made liable was incurred,[4] and the suit is otherwise in time, that is to say, if the claim could have been enforced against the father if he were alive when the suit was brought, since the cause of action against both is identical.[5] The son is moreover not liable for the father's debt if it can show that it was incurred for illegal or immoral purposes.[6]

1048. The legal debt of the father constitutes a recognized head of necessity. "The sons are under a pious obligation to discharge the just debts of their father, because otherwise he would be liable to be punished in a future state for non-discharge of their debts. Upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money, which he was bound to pay to another, would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do, were it possible, namely, to restore to those lawfully entitled, money he has unlawfully retained."[7]

All debts of the father are then due from and payable by the son.

Debts recoverble from the estate.

1049. The family is bound to pay all debts recoverable from the estate, that is, such debts as were incurred by the manager, and are chargeable to the joint family which constitute a sufficient necessity, justifying the mortgage or sale of the family estate.[8]

(b) Government Revenue.

(c), Premium or Rent.

1050. The second head of such necessity is the Government revenue due on the joint estate. By the common law, as under the several Land Revenue Acts, the payment of Government revenue is a prime charge on the land[9] and the penalty prescribed for non-payment is either forfeiture or sale. Its payment is, consequently, a recognized head of legal necessity.[10] A

(1) Refers to Narad, 1-6; Vishnu, VI-27, 28; Yadnyavalkya, II, 50; 33 S.B.E. 42.

(2) *Masitullah* v. *Damodar Das*, 48 A. 518 (525) P.C.

(3) *Hanuman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (421); *Girdhari Lal* v. *Kantool Lall*, 14 B.L.R. 187 (197) P.C.

(4) *Fakirchand* v. *Daya Ram*, 25 A. 67.

(5) *Fakirchand* v. *Daya Ram*, 25 A. 67 (70).

(6) *Subramania* v. *Gopala*, 33 M. 308; *Naro* v. *Paragowda*, 41 B. 347.

(7) *Natesayyan* v. *Ponnusami*, 16 M. 99 (104) followed in *Peari Lal* v. *Chandi*, 5 C.L.J. 80 (88); *Ram Ratan* v. *Basant Bai*, 2 L. 263 (269).

(8) *Soorjoo Pershad* v. *Krishnan*, 1 N.W.P.H.C.R. 46; *Lalla Gunput* v. *Toorun*, 16 W.R. 52.

(9) *Chatraput* v. *Grindra*, 6 C. 389.

(10) *Gharibullah* v. *Khalak Singh*, 25 A. 407 (415) P.C.; *Ganeshi Lal* v. *Khetra Mohan*, 5 Pat. 585 (594) P.C.

suit by the co-sharers for contribution stands on the same footing.[1] For the same reason where the property held by the family is a renewable lease, the payment of any premium payable on its renewal and the rent are necessarily a charge on the joint family, since their non-payment equally entails deprivation of the property which even a trustee would be expected to avert.

(d) & (e) Defence Title

1051. Even, a trustee is bound to maintain all such suits and to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.[2] A *fortiori* the necessity of asserting and protecting the title to joint property is obvious. But of course, the question is one of degree. A costly suit to enforce a forlorn hope or a highly speculative claim would scarcely be classed as a legal necessity. On the other hand, a suit would not be classed as unnecessary merely because it is unsuccessful. The question in such case is: Was the act one justified by ordinary prudence?

(f) Management.

1052. The cost of management of the property and that necessary for the collection of its rents and profits are other cases of obvious necessity, being of the same nature as the cost incurred for the preservation of the property from destruction, deterioration, forfeiture, on sale. It is possible to uphold a permanent lease by a widow in consideration of the lessee marrying her grand-daughter and looking after her in her old age.[3]

(g) Maintenance of co-parceners and their family.

1053. The maintenance of the coparceners follows as a matter of course from the fact that he is joint owner of the estate, and so long as he remains joint, he is entitled to be maintained out of the joint funds. His wife and children have equally the same right. As regards other relations, their right of maintenance depends upon their legal or moral claim upon the family. The subject has already been set out in a preceding chapter,[4] and all persons there mentioned as entitled to maintenance out of the joint family are persons for the maintenance of whom the assets of the family, are liable, and might be validly charged.

The manager is not bound to allow the co-parceners separate maintenance, though he may do so at his discretion. And where he decides to allow them separate maintenance he may equally charge the joint funds with the cost thereof.

(h) Marriage expenses of members.

1054. Betrothal[5] and marriage of the male[6] and female members of the family is another head of legal necessity. As already stated, marriage is a *Samskar* and religious necessity[7] (§ 389), though not

(1) *Ganeshi Lal* v. *Khettra Mohan*, 5 Pat. 585 (594) P.C.

(2) S. 13, Trusts Act (II of 1882).

(3) *Rajendra Nath* v. *Peyari*, (1926) C. 854 : 94 I.C. 321.

(4) Ch. VII.

(5) *Sundrabai* v. *Shivnarayan*, 32 B. 81 (87), where texts and cases are cited, dissenting from *contra* in *Sundari* v. *Subramania*, 26 M. 505 and *Govindarazulu* v. *Devarabhotla*, 27 M. 206, overruled in *Gopala* v. *Venkatanarasa*, 37 M. 273 F.B.

(6) *Ganpat* v. *Tulsi Ram*, 13 Bom.L.R. 860.

(7) *Sundarabai* v. *Shivnarayana*, 32 B. 81; *Bhagirathi* v. *Jokhu Ram*, 32 A. 575; *Debi Lal* v. *Nand Kishore*, (1922)

when it is contracted in defiance of the law, *e.g.*, the child Marriage Restraint Act.[1] It is the only obligatory ceremony in the case of a Shudra.[2] Consequently, the manager is entitled to burden the estate with the reasonable expenses of the marriage of the co-parceners.[3]

The question is immaterial whether the relation to be married is a female,[4] provided she is a member of the joint family. This is now, settled.

But the Allahabad Court would draw a line after the first marriage, holding the second and subsequent marriages as outside the pale of legal necessity.[5] In strict view of the law this view is right; but it may be doubted whether it is in consonance with modern thought.

1055. The expenses of marriage would include the price paid for the bride, though it may convert the marriage to the *Asur* form disapproved by the sages. But as already seen, such marriages now obey the economic law of supply and demand and are quite common in places where girls are in deficiency.[6]

(i) Performance of Ceremonies.

1056. The performance of indispensable religious or customary duties is a recognized head of legal necessity. Such are the performance of initiatory,[7] and funeral ceremonies[8] and the performance of the father's exequial rites and Shradh[9] and the pilgrimage to Gaya[10] though not to Benares[11] since one is the necessary part of the exequial rites which the other is not. But though a pilgrimage to Gaya to offer *pindas* for the spiritual benefit of the deceased is an acknowledged necessity a feast given upon return is not so.[12] So referring to the widow it was said: "Pilgrimages are generally made by a widow with a view to present her husband's funeral obligations at the sacred place visited, and to ensure for his soul the special merit rising from such presentation. In every case the question must be whether the pilgrimage was for the spiri-

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1 Pat. 266; *Gopala* v. *Venkatanarasa*, 37 M. 273 (274) F.B.; overruling *contra* in *Govindarazulu* v. *Devarabhotla*, 27 M. 206; *Jai Indra* v. *Dilraj Kuar*, 8 O.L.J. 94 : 61 I.C. 278.

(1) *Ramjan* v. *Chand Mondal*, 41 C.W. N. 1176.

(2) *Sundarabai* v. *Shivnarayana*, 32 B. 81 (90); *Saravana* v. *Muttayi*, 6 M.H. C.R. 371; *Mahadeva* v. *Rama*, 13 M.L. J. 75; *Kameswari* v. *Veeracharlu*, 34 M. 422; *Gopala* v. *Venkatanarasa*, 37 M. 273 F.B.; *Narayana* v. *Ramalinga*, 39 M. 587; *Garibullah* v. *Khalaksingh*, 25 A. 407 P.C.

(3) *Juggessur* v. *Nilambur*, 3 W.R. 217; *Durga Prasad* v. *Jewdhari*, 62 C. 733.

(4) *Prayag Narain* v. *Ajudhia*, (1848) 7 B.S.R. 602 : 8 I.D. (O.S.) 456; *Chuman Lall* v. *Gunput Lall*, 16 W.R. 52; *Bhagirathi* v. *Jokhu Ram*, 32 A. 575; *Makhan Lal* v. *Gayan*, 8 A.L.J. 13.

(5) *Bhagirathi* v. *Jokhu Ram*, 32 A. 575.

(6) *Ib.*

(7) 2 W. Cac., Ch. XI, case 6, pp. 259, 260; *Puran Dai* v. *Jai Narain*, 4 A. 482 (484).

(8) *Chumun Lall* v. *Gunput Lall*, 16 W.R. 52; *Mahomed Ashruf* v. *Brojes-* 562 (564).

(9) *Chuman Lall* v. *Gunput Lall*, 16 W.R. 52; *Mahomed Ashraf* v. *Brojessure*, 19 W.R. 426; *Mutteram* v. *Gopal*, 20 W.R. 187.

(10) *Junmojoy* v. *Russomoye*, 10 W.R. 209; *Mohamed Ashruf* v. *Brojessure*, 19 W.R. 426; *Mutteram* v. *Gopal*, 20 W. R. 187; *Ganpat* v. *Tulsiram*, 36 B. 88 (90); *Srimohan* v. *Brij Behary*, 36 C. 753; *contra* in *Raj Chandra* v. *Sheshoo*, 7 W.R. 146.

(11) *Hurromohun* v. *Auluck Monee*, 1 W.R. 252.

(12) *Makhan Lal* v. *Gayan Singh*, 8 A. L.J. 13.

tual benefit of her husband, in the performance of her duty to his soul, and whether the expenses incurred are reasonable and were made honestly, having regard to the estate, the *status* of the family, and other considerations which it is customary for Hindus to take into account in accordance with the religious beliefs and usages."[1] So a pilgrimage to Pandharpur or any other local Gaya might be considered necessary, and it was so considered in a case.[2]

1057. The gift of property to the priest of a temple may be a pious act but is not of legal necessity.[3] If the gift be of a small value it may pass muster as a pious gift,[4] but a considerable portion of the estate cannot be alienated for a pious purpose.[5]

(j) Cost of litigation.

1058. Litigation is an evil, but it is a necessary evil, and one which constitutes legal necessity if it is necessary for the recovery, protection or preservation of the estate or of any of its assets,[6] and it may be added, for the defence of its head,[7] or of any of its members.[8] The question was examined by Mahmud, J., who said: "A distinction should be drawn between litigation undertaken to *protect* the property and litigation the object of which is to obtain a possible *benefit* for the estate. The former relates to the security of that which has already been acquired. As a general rule, the former class of litigation would no doubt amount to legal necessity; and in regard to the latter classes of litigation, it may be laid down that, if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner, on the analogy of the maxim: 'He who enjoys the benefit ought to bear the burden also.' It may be further laid down that in cases where the litigation undertaken by the widow is not undertaken for the benefit of the estate, any alienations made by her for the purpose of prosecuting the litigation are necessarily invalid and do not bind the property. It may even be a question of nicety to determine the exact nature of a litigation when it actually ends in failure. The widow may have been acting with a view to benefit the estate; the creditor may have advanced money to her without any fraudulent intention. But these circumstances alone do not in my judgment warrant the conclusion that the charge created by the widow should bind the property against the reversioners."[9]

1059. In this case the widow had embarked upon a very costly but uncertain claim to recover property to which her husband had an alleged right of succession, but which he had not himself sought to enforce. The

(1) *Ganpat* v. *Tulsi Ram*, 36 B. 88 (90).
(2) *Ib.*, p. 90.
(3) *Ram Kewal* v. *Ram Kishore*, 22 C. 506.
(4) *Cossinath* v. *Hurrosoondry*, 3 I. D. (O. S.) 907, affirming O.A. 1 I. D. (O.S.) 292 P.C.; *Mahoda* v. *Kuleani*, 6 I.D. (O.S.) 62 : 1 Mac. S.R. 82; *Ram Chunder* v. *Gangagovind*, 7 I.D. (O.S.) 110 : 4 Mac. S.R. 147; *Kartick Chunder* v. *Gour Mohun*, 1 W.R. 48; *Runjeet* v. *Mhd. Waris*, 21 W.R. 49; *Ram Kewal Singh* v. *Ramkishore*, 22 C. 506.
(5) *Puran Dai* v. *Jai Narain*, 4 A. 482; *Ram Kewal* v. *Ram Kishore*, 22 C. 506.
(6) *Karimuddin* v. *Gobind*, 31 A. 497 (506) P.C.; *Indar Kuar* v. *Lalta Prasad*, 4 A. 532 (542); *Grose* v. *Amirtamoyi*, 12 W.R. 13.
(7) *Beni Ram* v. *Man Singh*, 34 A. 4 (8).
(8) *Ib.*, p. 7; *Hanumat* v. *Sonadhari*, 4 P.L.J. 653 : 52 I.C. (Pat.) 734 (735); *Ramalinga* v. *Muthayyan*, 26 M.L.J. 528 : 24 I.C. (M.) 356.
(9) *Indar Kuar* v. *Lalta Prasad*, 4 A. 532 (543).

court held that the litigation was not for the benefit of the estate, and did not support the mortgage.[1] Even where a suit is necessary, it may not be necessary to mortgage the estate and carry the case to the Privy Council. In this view the court disallowed a mortgage given by the widow as security for costs, even though the husband had deposited it before it was accepted.[2]

As between suits instituted to protect and those instituted to recover an estate the courts hold the first to be necessary while the second unnecessary though they may be for the benefit of the estate.[3]

(k) Cost of defending Members.

1060. The cost of defending the head or any other member[4] of the family, whether the father or any other relation, is held to be a necessity justifying the mortgage or sale of the joint estate[5] being regarded as a pious and necessary act in order to remove the stigma of disgrace upon the whole family consequent upon the conviction of one of its members,[6] though not so (it is said) an expense incurred in bringing the murderer of a coparcener to justice.[7] But it is apparent that every coparcener is entitled to protection and an action whether preventive or punitive may be as much a necessity as any other so recognised.

"Secular benefit" defined.

119. "Secular benefit" includes such protection or preservation or improvement of family estate, or the maintenance, education, or advancement of its members, as may, due regard being had to all circumstances, be considered reasonable and proper.[8]

1061. Analogous Law.—"Legal necessity" and "benefit" are two key words justifying an alienation of coparcenary property. These words are the outcome of the text of Vyas, already cited (§ **1033**), from which it will be seen that Vyas justifies an alienation of property (*a*) in the season of distress; (*b*) for the sake of the family; and (*c*) especially for pious purposes. Pious purposes may be obligatory or commendatory, the one constitutes "spiritual necessity", the other "spiritual benefit." These terms will be defined and explained in the next paragraph. Secular legal necessity would fall under Vyas's clause (*a*) and is defined in section 113, while secular benefit would fall under this clause (*b*) and is defined in and explained under this section.

1062. As observed by Lord Atkinson, the terms "Legal necessity" and "benefit" were general and elastic terms, and that as regards "bene-

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(1) *Indar Kuar* v. *Lalta Prasad*, 4 A. 532 (534, 545).

(2) *Phool Koer* v. *Debi Pershad*, 12 W.R. 187.

(3) *Roy Mukhun Lall* v. *Stewart*, 18 W.R. 121.

(4) *Beni Ram* v. *Man Singh*, 34 A. 4; *Hanumat* v. *Sonadhari*, 52 I.C. (Pat.) 734; *Premsukh* v. *Ram Bhujawan*, 52 I. C. (Pat.) 964; *Dhanukdhari* v. *Rambirich*, 1 Pat. 171, dissenting from *Nathu Rai* v. *Din Dayal*, (1917) 2 Pat. L.J. 166.

(5) *Beni Ram* v. *Man Singh*, 34 A. 4; *contra* in *Nathu Rai* v. *Din Dayal*, 2 Pat.L.J. 166: 39 I.C. 665, in which, however, there is no discussion; *Nobin Chandra* v. *Khedar Nath*, 6 C.W.N. 648.

(6) *Dhanukdhari* v. *Rambirich*, 1 Pat. 171 (173, 174); *Krishna* v. *Muthulakshmi*, (1934) M. 169, distinguished in *Maruthappan* v. *Nirai Kumathan*, (1937) M. 943 (946, 947).

(7) *Maruthappan* v. *Nirai Kumathan*, (1937) M. 943.

(8) *Palaniappa* v. *Sreenath*, 40 M. 709 (714) P.C.; § 1062.

fit" it was impossible to give a precise definition so as to be applicable to all cases.[1] "The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration, by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection to be taken as benefits and what not."[2] That necessity and benefit are two concepts distinct and distinguishable from each other is recognized both in the texts as well as in the decided cases. The recovery of an estate from another which the family claimed by succession is a clear case of "benefit" as distinct from necessity.[3] Such is also the case of starting a trade for improving the family fortunes.[4] The older cases, however, do not observe any distinction between legal necessity and benefit, holding the latter as a species of family necessity. So in a leading case[5] the Privy Council said that the alienation would be valid if it was made by the managing member of the family "for legitimate family purposes" and in another case, where the father had contracted a debt to purchase a stock of buffaloes to enable him to start the business of milkman, West, J., held that the debt was contracted to put the father in the way of earning a maintenance, and, therefore, under the pressure of family necessity.[6] On the other hand, in a Calcutta case where the widow had executed a bond for raising funds to prosecute a suit for recovery of certain property, the Lower Court upheld her debt as supported by necessity, but Couch, C.J., said: "That is not a necessity at all, because there was no necessity to institute the suits though it may have been a proper thing for her to do, as being beneficial to her as well as to those who would succeed her in the property.[7]

1063. What is a Benefit.—The distinction between necessity and benefit is now well recognized, though cases must occur in which an act might be justified from the dual stand-point, since an act is sometimes defended as necessary because it is conducive to the spiritual benefit. Even apart from such figurative expression the two terms are sometimes apt to be confused, though they do not exert the same degree of pressure upon the estate.

The distinction between the two was pointed out by Mahmud, J., in a passage already cited.[8]

1064. The question whether anything is a benefit must depend upon the circumstances. A well and a tank are both useful for irrigating land, but whether the manager was justified in charging the estate for the purpose of excavating them is a question which must depend upon circumstances. If the income of the estate was sufficient, he would in no case be entitled to raise funds on the security of the estate to dig them.

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(1) *Palaniappa* v. *Sreenath*, 40 M. 709 (714) P.C.

(2) *Ib.*, p. 718.

(3) *Roy Mukhun Lal* v. *Stewart*, 18 W.R. 121.

(4) *Babaji* v. *Krishnaji*, 2 B. 666; *Achhe* v. *Jawala*, (1873) P.R. 67; *Ganga* v. *Khushal*, (1876) P.R. 77; *Raghunath* v. *Ruheem*, (1869) P.R. 53; *Janki Das* v. *Sanchi Ram*, (1871) P.R. 11; *Achru* v. *Merchand*, (1879) P.R. 98; *Thakusi* v. *Ganda Mall*, (1879) P.R. 78; *Hazura* v. *Chand*, (1887) P.R. 87; *N. Jamna* v. *Sardar*, (1888) P.R. 93; *Charanjit* v. *Telu Mal*, (1888) P.R. 152.

(5) *Suraj Bunsi Koer* v. *Sheo Pershad*, 5 C. 148 P.C.

(6) *Babaji* v. *Krishnaji*, 2 B. 666.

(7) *Ray Mukhun Lall* v. *Stewart*, 18 W.R. 121 (122), followed in *Indar Kuar* v. *Lalta Prasad*, 4 A. 532 (543).

(8) *Indar Kuar* v. *Lalta Prasad*, 4 A. 532 (543); *Bhagwan Das* v. *Mahadeo*, 45 A. 390.

If, on the other hand, it was the only means of averting drought and there were no funds, it might be both a benefit and a necessity.[1] In either case, the act would be justified if it is reasonable and proper. If the litigation has ended in recovery of the estate then the end necessarily justifies the means and he who has the benefit, cannot complain of the burden.[2] The construction of a house is not such benefit as to justify the mortgage of the estate,[3] but the purchase of agricultural land the produce of which went to support the family, is not an act of imprudence which the junior or minor members can repudiate as not conducive to their benefit.[4] But in one case the mortgage of family land for the purpose of purchasing new land found unprofitable, was held to be a speculative and improvident transaction not binding on the minor members of the family.[5] In another case, the father was held not entitled to mortgage ancestral estate to pre-empt some property.[6] But the question is one of degree, for the manager's discretion cannot be fettered by a rigid rule that he shall never pledge the family estate to acquire new estate, and that he should have foreseen the result any more than any man of ordinary prudence could have foreseen.[7] So the court decreed a mortgage alleged to be made to acquire a zemindari, though as a matter of fact, it had already been otherwise paid for. The court held the purchase of property as a benefit to the family, and it is so, provided it is not too speculative and improvident.[8]

1065. In one case the widow had mortgaged the property to recover it from the purchaser to whom it had been sold for arrears of road cess. The court disallowed the mortgage holding that as the money was not used to stop the execution, it was not spent to meet a legal necessity.[9] But the question of benefit was not considered. It was perhaps a case where the estate was lost to the family by the widow's negligence. In that case she conferred no benefit on the reversion by her re-purchase of the property which she should never have lost. Where the manager purchases new property out of funds raised by selling or mortgaging the old, the question whether the transaction is beneficial to the family, and as such, binding upon its members, depends upon its reasonableness and propriety, which must be decided with due advertence to all the surrounding circumstances, as to which no hard and fast rule is possible, but *inter alia* it must be shown (*i*) that the new lands are at least not inferior in quality and value of the lands; (*ii*) that though the new lands are not superior in value to the old lands, the family would otherwise gain by the change; and (*iii*) that the family would not lose by

(1) *Makhanlal* v. *Gayan Singh*, 8 A. L.J. 13; *Ranjeet Ram* v. *Mhd. Waris*, 21 W.R. 49.

(2) *Karimuddin* v. *Gobind*, 31 A. 497 P.C.

(3) *Bhogaraju* v. *Adapalli*, 10 M.L.T. 179.

(4) *Manna Lal* v. *Karu Singh*, 56 I. C. (C.) 766 P.C., explained in *Sadhu* v. *Brahmadeo*, 61 I.C. (Pat.) 20 (22, 23); *Kalika* v. *Shiv Nandan*, 63 I.C. (Pat.) 265 (630).

(5) *Subramania* v. *Chidambara*, 41 M. L.J. 459; *Radha Pershad* v. *Talook Raj Kuar*, 20 W.R. 38.

(6) *Shankar* v. *Bechu*, 47 A. 381.

(7) *Sheotahal* v. *Arjun*, (1920) Pat. 155; 56 I.C. 879; *Tularam* v. *Tulshi Ram*, 42 A. 559; *Manulal* v. *Karu Singh*, 56 I. C. (C.) 766 P.C.; *Jagmohun* v. *Prag Aher*, 47 A. 452; *Jagat Narain* v. *Mathura Das*, 50 A. 969 (F.B.) followed in *Sellappa* v. *Suppan*, (1937) M. 906 (912); *Auraj Singh* v. *Shambhu Singh*, 55 A. 1 F.B.

(8) *Tularam* v. *Tulshi Ram*, 42 A. 559; *Bhagwan Das* v. *Mahadeo*, 45 A. 390; *Shankar* v. *Bechu*, 47 A. 381.

(9) *Sri Mohan* v. *Brij Behary*, 36 C. 753 (757); *Kaihur Singh* v. *Roop Singh*, 3 N.W.P.H.C.R. 40.

parting with ancestral lands and purchasing new lands.[1] But it is not a question for the infusion of sentiment into consideration of the question. The question is one of material advantage. It is not often that the managers in this country are willing to barter new lamps for old. Their chronic conservatism is a sufficient safeguard against making any cataclysmic changes in their ancestral domain. But when they are made their conduct must be examined in the cold light of facts.

It will be thus noticed that the term benefit is rather a term of art, implying, as it does, such benefit to the estate or person of the minor as warrants in law the alienation of his property. Instances of such alienations have been given before, such as the sale of a small portion of the estate which was inconvenient and expensive to manage.[2]

1066. No Benefit.—These general considgrations migh be illustrated by reference to a few cases. In one case, the mother took a lease of land and mortgaged the minor's property as security for the due payment of its rent. Rents having fallen into arrears, the landlord sued to enforce the mortgage, but the court held that the transaction was not beneficial to the minor in that the mother had accepted the hazards of a lease by hypothecating the minor's land.[3]

In another case, the Privy Council held the grant of a perpetual lease of land at fixed rent, however adequate that rent may be, at the time of granting them, could not be upheld as a benefit, *first* because by this means the estate is deprived of the benefit of enhanced rents for all time, and *secondly* because the leases were made solely to raise capital to embark in the money lending business, calculated to bring in an income larger than that derived from the probably safer and certainly more stable property, namely, the land itself.[4] On the same ground the court could not uphold the sale of land in order to repurchase other land which formerly belonged to the family, but which was not shown to yield more than a mere sentimental satisfaction.[5] Then again, while it would be right to construct a dwelling house it would be wrong to raise its cost by mortgaging the estate.[6]

Proof of Legal Necessity:—*See* S. 150.

Incidents of a Joint Family.

120. A Hindu family is constituted of the following members,[7] namely:—

Constitution of a Hindu family.

(1) Persons descended from a common ancestor and related to one another as sapindas;[7]

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(1) *Krishnasami* (In re), (1912) M. W.N. 167: 13 I.C. 648; *Bohru* v. *Dhuram Singh*, 14 I.C. 745.

(2) *Krishna Chandra* v. *Ratan Ram*, 20 C.W.N. 645 (647).

(3) *Radha Pershad* v. *Talook Raj Kuar*, 20 W.R. 38; *Subramania* v. *Chidambara*, 41 M.L.J. 459; *Besdeo* v. *Mhd. Yusaf*, 51 A. 285.

(4) *Palaniappa* v. *Sreenath*, 40 M. 709 (719) P.C., following *Shibessoree* v. *Mothooranath*, 13 M.I.A. 270 (275); *Mayandi* v. *Chokalingam*, 27 M. 292 (299); *Abhiram* v. *Shyama*, 36 C. 1003 (1013).

(5) *Kaihur Singh* v. *Roop Singh*, 3 N.W.P.H.C.R. 4 (7).

(6) *Bhogaraju* v. *Adapali*, 10 M.L.J. 170.

(7) *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (154).

(2) Collateral relations descended from a common ancestor in the male lines;

(3) Persons adopted into the family;

(4) The mother, the wives and widows of the male members, and unmarried daughters.

1067. **Analogous Law.**—The unit of a Hindu society is not the individual, but the family, and in their mutual relations it is not the individuals but the families that count. Whenever the individuals count, they do only as representing the family. Each individual in a family has to fill his appointed office recognized by immemorial usage.

But what is a family and who are its members? In its primary conception, a family consisted of all the descendants in the male line from a common ancestor, their wives, sons and unmarried daughters. The existence of such a family is still recognized. But in practice, they are split up into smaller aggregates as soon as their number becomes unweildy, and it may then be that the family comprises only a man, his wife or wives, his sons, their wives and children, and their unmarried or widowed daughters.[1] But such a family, though complete in itself, is only a component part of a larger family consisting of all such who are related to one another as *sapindas*.[2] These, though living apart and possessing separate property, are yet members of the same family in that they are all related through a common ancestor. But a family in this larger sense has no legal attributes. The family to be considered is that which comprises the relations enumerated in the section.[3]

Clause (4).

Since the relations mentioned in clause 4 are entitled to maintenance, a joint family may consist of a single male member with those females who have no right to a share of the corpus, but still are entitled to maintenance therefrom.[4] But this does not imply that every Hindu with wife and unmarried daughters necessarily becomes a member of the joint family, since the question depends upon whether his estate is that of the sole surviving coparcener; otherwise he is its sole owner even though his wife and daughters may be entitled to be maintained by him.

Coparcenary and coparcener defined.

121. (1) A coparcenary is a joint family comprising a common male ancestor with his lineal descendants in the male line not more than three degrees remote from him, or of the last holder of a share of his property.

(2) A coparcener is a male related not more than three degrees remote from a direct ancestor who owned an estate or was entitled to a share therein.

Explanation.—**A coparcenary under the Dayabhag law is subject to the variations stated in S. 171.**

1068. **Analogous Law.**—The term "family" as used in connection with Hindu Law is an elastic term and its significance is more often

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(1) *Sudasanam* v. *Narasimhulu*, 25 M. 149 (154).

(2) *Karsandass* v. *Gangabai*, 32 B. 479 (493).

(3) *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (154); *Pakiriswami* v. *Doraswami*, 9 R. 266.

(4) *Vedathanni* v. *Commissioner of Income-tax*, 49 M. 1; followed in *Commissioner of Income-tax* v. *Gomedalli*, (1935) B. 412.

assumed than defined. Taken as a large concept it would include all persons related to a common ancestor, and as such, the whole world. The term had, therefore, to be limited, and has been limited to the extent stated in the section.

1069. But is clear that even in this family all persons do not possess equal rights. The property which it owns is called "joint family property," but it is a misnomer if it implies possession of any common rights other than the right to maintenance. In the property of such family women possess no share. And even as regards males no relation beyond the son, the grandson and the great-grandson possesses any present right. But this does not mean that other relations have no shares at all. All it means is that given the father alive with his son, grandson and great-grandson, any remoter relation such as the great-grandson has no present right to call for a partition which is the test of his present interest.

1070. Under Hindu Law, the law relating to partition is so intimately connected with the law of inheritance, that they may almost be said to be blended together.[1] The question then arises what relations are entitled to partition? Now, the Mitakshara declares it a settled point that "property in the paternal or grand-paternal estate is by birth."[2] The Mitakshara does not mention the great-grandfather but he is included in the Viramitroday,[3] and is supported by judicial decisions.[4] The principle of coparcenary is co-ordinate with the gift of funeral cakes[5] and as no relation beyond the third (or counting one's self, the fourth) degree can offer them[6] it lies in near collaterals, up to the third degree.[7]

1071. The relations included in this description were graphically described by Nanabhai Haridas, J., in a case[8] in which the plaintiffs and defendants both descendants of one Udhav, a common ancestor, the acquirer of the property, claimed partition. The plaintiffs were beyond and the defendants within the fourth degree from Udhav. The defendants disputed the plaintiff's right to partition on the ground that they were more than three (counting themselves four) degrees remote from Udhav, which the court allowed, supporting its view by examples, from which the following tables are drawn:—

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(1) *Yenumala* v. *Yenumala*, 6 M.H.C.R. 93 (107).

(2) Mit. I-I-27. Colebrooke's error in translating *Paitamah* पैतामह as "ancestral" is wrong, as the word *Paitamah* means "grand-paternal"—*Jamna Prasad* v. *Ram Partap*, 29 A. 667 (669). The close connection between Partition and Inheritance would be obvious to any one who notices that both the Mitakshara and the Dayabhag which deal with partition and inheritance call it "dayabhag" (or "the partition of heritage"). Katyayan said: "His son includes the great-grandson of the person whose estate is divided because the case of the grandson is considered . . . The meaning is that the partition of heritage extends inclusively to the further degree counting from the proprietor."

(3) Ch. II, Pt. 1, 16; Golap Shastri's Tr. p. 72.

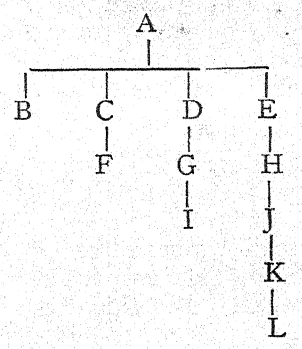
(4) *Moro* v. *Ganesh*, 10 B.H.C.R. 444; *Yenumala* v. *Yenumala*, 6 M.H.C.R. 93 (107) : Str. H.L. 124.

(5) Devala, cited in 3 Dig. 1 : Str. H.L. 204.

(6) Manu, IX-186.

(7) They are called Sakulyas, *i.e.*, those belonging to the family.

(8) *Moro* v. *Ganesh*, 10 B.H.C.R. 444.

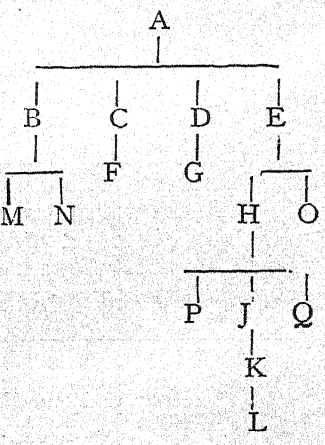


A, the father, acquires an estate. It is his self-acquired property and, therefore, his sons B, C, D and E have no interest by birth, that is, they are not his co-parceners. But suppose they have issues as given in the tree. On the death of A—B, C, D and E become coparceners in A's estate, and so do F, G, and H and so on up to K who is in the fourth degree, from E: but since K's son is beyond that degree he has no right to force a partition, and therefore, he is not a coparcener, but as soon as E dies he will become one. This case illustrates the two rules stated in the section, *viz.*, first, that any coparcener may be beyond the fourth degree removed from the acquirer or the original owner of the property sought to be divided, provided he is not more than four degrees removed from the last owner, however, remote he may be from the original owner thereof. This rule is capable of unlimited expansion.

Secondly, a coparcenary may consist entirely of collateral relations. Such would be the case on the death of A, if the sons of A do not separate.

Coparcenary of several Families.

1072. Again, coparcenary may consist of several families. Take for instance, the last diagram enlarged by further births of male children in the family.



Here, then, there are the following families: (1) A with his four sons, B, C, D and E and their sons and grandsons M, N, F, G, H, O, P, J, Q constitute the main family. (2) Then B with his two sons M and N, C and D with their sons F, G, E with his sons, H, O, grandsons P, J, Q and great-grandson K, and H and J, likewise with their sons and grandson each constitutes a "branch" family. All the families have one common ancestor A and each branch family has its own head being, B, C, D, E, H and J, respectively. On A's death the coparcenary will consist of the four brothers B, C, D and E and their male issue. On the death of B, C and D, the coparcenary will consist of E, his nephews, M, N, F, G and all his own issue, but L will be out of it, but will enter the coparcenary on the death of E.

1073. It is thus apparent that the *personell* of the coparcenary ever varies by births, adoptions and deaths. Those who are not coparceners to-day may become so to-morrow. Those who are of the coparcenary to-day may go out of it to-morrow by adoption, partition, renunciation, acquiescence[1] disqualification,[2] or death, natural or civil.

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(1) Manu, IX 207; Mit. II-II, 12; (156). *Sudarsanam* v. *Narasimhulu*, 25 M. 145

(2) *Ram Sahye* v. *Laljee*, 8 C. 149.

1074. Hitherto the entire family depicted in the diagram has been considered joint. But suppose some branches of it separate from the rest. In that case, the main family does no longer count. If E separtes from his three brothers by taking one-fourth of his patrimony, then his estate becomes his "ancestral property" in which his issue become coparceners by birth. The branch coparcenary then becomes the main coparcenary and independent of its other branches. But so long as there is no division, the branch families have no legal existence as a separate independent unit; but if they comprise all the members of the branch, or of a sub-branch they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such. Such property may be the self-acquisition or obstructed heritage of a paternal ancestor of that branch, as distinguished from the other branches, which property has come to that branch and that branch alone, or it may be the self-acquisition of one or more individual members of that branch, which, by the act of the parties, has been impressed with the character of joint property owned by that branch and that branch alone to the exclusion of the other branches.[1] So if in the last illustration, should E obtain property from his uncle, or any maternal relation and E and his sons H and O should augment it by their joint labour, the estate so constituted would exclusively belong to that branch, and descend to their issue as an unobstructed heritage.[2]

Cl. (2) Illegitimate son.

1075. The coparceners are, ordinarily, males related to one another and all possessing vested rights. But an illegitimate son of a Shudra has been assigned textually rights which are within limits coparcenary and subject to survivorship. These rights depend upon the texts quoted elsewhere. (§ 302.) Upon their strength it has been held that there may be coparcenary between a legitimate and an illegitimate son with survivorship *inter se*.[3]

Females excluded.

1076. It has already been stated that women are debarred from the right of enforcing a partition,[4] which is the test of coparcenership,[5] and the fact that certain females are now statutorily empowered to enforce a partition would not otherwise alter their position.[6] Mothers, however, receive a share at partition.[7] But this is the ordinary rule; though its analogy has been extended to the family of dancing girls amongst whom there may be a coparcenary with the right of survivorship,[8] though since the members thereof are all women that analogy cannot be extended to holding that by birth they acquire an interest in the ancestral property[9]

(1) *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (155).
(2) *Ib.*, pp. 155, 156.
(3) *Sadu* v. *Baiza*, 4 B. 37; approved in *Jogendra* v. *Nityanand*, 18 C. 151 P.C.; followed in *Vellaiappa* v. *Natarajan*, 55 M. 1 (15) P.C.; *Shamu* v. *Babu Aba*, 52 B. 300; *Shome Shankar* v. *Rajesar*, 21 A. 99; *Packirisamy* v. *Doraswamy*, 9 B. 266 (271).
(4) *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (165) P.C.
(5) *Punna* v. *Radha Kissen*, 31 C. 476 (478).
(6) The Hindu Women's Right of Property Act, 1937.
(7) Mit., I-II-9.
(8) *Chalakonda* v. *Chalakonda*, 2 M. H.C.R. 56 (58); *Kamakshi* v. *Nagarathnam*, 5 M.H.C.R. 161 (166); *Official Assignee* v. *Swornam*, 4 M. 330; *Venku* v. *Mahalinga*, 11 M. 393; *Muthu Kannu* v. *Paramasami*, 12 M. 214.
(9) *Kokilambal* v. *Sundarammal*, 8 I. C. 632.

The fact that the dancing girls live by prostitution may place them outside the pale of Hindu society, but it cannot deprive them of the protection of Hindu Law. Moreover, prostitution as a trade is recognized and regulated by Hindu Law.[1]

1077. **No Coparcener.**—The question whether the son is a coparcener in his father's self-acquired property and what constitutes the latter's self-acquired property are questions upon which there had been some disvergence of opinion. (§§ **1015, 1022.**) It has been laid down that property acquired by the father by devise from his paternal relation became ancestral property in his hands, and his sons acquired a right thereto at the moment of their birth.[2] This view has been combated in other cases,[3] in which it has been held that such property would be the self-acquired property and not coparcenary property in the hands of the son, a gift by will being indistinguishable from a gift *inter vivos*. As to the question whether the son is a coparcener in his father's self-acquisition, there appears also to be some divergence of authorities based upon the text of the Mitakshara, the question being answered in tht affirmative in a case of the Madras High Court[4] though the contrary has been held elsewhere.[5] The question is now set at rest by the Legislature. (§ **1015.**) The question becomes material in a case of re-union or where two brothers acquire property by their jont labour and the question of succession to them is raised by the son of one against the widow of the other. The Mitakshara contains some expressions which would seem to favour the persistence of coparcenary even in the joint acquisition of two brothers, but it does not concede to their sons the right of partition and the testamentary power of a person over his self-acquisitions since evolved would be inconsistent with the existence of a coparcenary right in the son. It is then safe to assume that the conception of such right is inconsistent with the son's coparcenership. (§§ **1015,1022.**)

No coparcenery by contract.

122. The relation of coparcenership arises by law. It cannot be created by contract.[6]

1078. **Analogous Law.**—Both a joint family, and its child a coparcenary, are the outcome of the Hindu social evolution, and have as such become definite concepts with their two essential attributes, namely, an undivided family as a corporate body and the possession by it of joint property which is usual, but by no means its primary attribute,[7] since joint family may have had property all of which is lost by fire or flood; but it does not destroy its jointness. "Such corporate body with its heritage, is purely a creature of law and cannot be created by act of

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(1) *Venku* v. *Mahalinga*, 11 M. 393 (396, 397); *Vishvanath* v. *Doraisami*, 48 M. 944.

(2) *Tara Chand* v. *Reeb Ram*, 3 M. H.C.R. 50; *Muddon Gopal* v. *Ram Buksh*, 6 W.R. 71.

(3) *Jag Mohandas* v. *Mangaldas Nathubhoy*, 10 B. 528 (546 547, 550, 551, 552 *et seq*); O. A. *per* Sargent, C. J., pp. 576 *et seq.*, in which the Mitakshara texts are explained; followed in *Parsotam* v. *Janki Bai*, 29 A. 354 (363).

(4) *Sudarsanam* v. *Narasimhulu*, 25 M. 149.

(5) *Jamna Prasad* v. *Ram Pratap*, 29 A. 667 (671), following *Chatturbhooj* v. *Dharamsi*, 9 B. 438, dissenting from *Sudarsanam* v. *Narasimhulu*, 25 M. 149.

(6) *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (154).

(7) *Janaki Ram* v. *Nagamoni*, 49 M. 98.

parties, save in so far that by adoption, a stranger may be affiliated as a member of that corporate body. Persons who by birth or adoption are not members of a Hindu family cannot in the absence of custom having the force of law, by mere agreement, become or be made members of a joint family.''[1] Consequently, a father and his illegitimate sons living with him cannot form a joint family;[2] nor can two females living together be so regarded.[3] So where the father and his five sons constituted an undivided family and two of his youngest sons, the plaintiff and the defendant commenced to live together, and one of them, the defendant, commenced business as a railway contractor in which the plaintiff claimed a coparcenary interest on the ground of their relationship and joint interest, from which he wished the court to infer an agreement in favour of their becoming joint coparceners, but the court threw out his suit on the ground that the sub-coparcenership set up by him was unknown to the law, and coult not be created by contract.[4] In another case two brothers being members of a joint Mitakshara family went down to Calcutta and began to work there as coolies. Out of their joint savings they purchased a house. One of them having died the other sued his widow for possession of the house on the ground that he had inherited it by survivorship. But the court threw out his case on the ground that there was no intention to create a coparcenary between themselves by agreement,[5] to which it might have been added that, even if there was, it could not be recognized by law.[6] Such persons could not be regarded as re-united after a division.[7] But where a Shudra executed a writing, stating that he had two illegitimate sons who were like his legitimate sons, with right of heirship, and on his death the sons took his estate and continued to live jointly, it was held that they inherited as joint tenants, so that neither could devise his interest.[8] As women cannot be coparceners, it follows that property acquired by a woman and her husband would belong to both, and on the wife's death, her share would descend according to the rules of inheritance prescribed for stridhan.

Disqualified coparceners.

123. (1) **A person who is and has been congenitally a lunatic or idiot is disqualified from coparcenership.**

(2) Save as above; no person is so disqualified by reason only of any disease, deformity or physical or mental defect:[9]

(3) Provided that such disqualification is personal only to the coparcener and does not affect his natural issue, though it affects equally his adopted son and the wife.[10]

Exception.—**Nothing herein applies to a Dayabhag family in which the textual disabilities still prevail.**[11]

(1) *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (154).

(2) *Shamu* v. *Babu Aba*, 52 B. 300.

(3) *Khush Waqt* v. *Jagannath*, (1930) O. 184.

(4) *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (157).

(5) *Mitil Bouli* v. *Bhagwan*, 35 I.C. (C.) 635.

(6) *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (157), commenting on *contra* in *Sham Narain* v. *Court of Wards*, 90 W. R. 197.

(7) *Muthu Ram Krishna* v. *Mari Mathu*, 26 M.L.J. 532 : 24 I.C. 363.

(8) *Shamu* v. *Babu*, 52 B. 295 (307) explaining *Jogendra* v. *Nityanand*, 18 C. 151 (155) P.C.

(9) S. 2 of *Hindu Inheritance Removal of Disabilities* Act, XII of (1928).

(10) Yad., II-142; Mit., II-X-9, *see* S. 307.

(11) *See* § 330.

1079. **Analogous Law.**—This section is drawn from section 2 of the Hindu Inheritance (Removal of Disabilities) Act, 1928,[1] printed in the Appendix, which overrules the texual rule of Hindu Law which excluded a person from coparcenership or his inheritance by reason of his congenital idiocy, blindness, deafness, and dumbness, and the following defects, though not congenital, if present, when the succession opened, namely, madness, sanious or ulcerous leprosy, permanent lameness, impotency, and other incurable diseases. These disabilities no longer exclude a person from coparcenership or inheritance, the only defects disqualifying him being his congenital lunacy or idiocy.

The reason given in the texts for the exclusion is that these evils are the outcome of his past life and that the sufferer must undo the past by his piety and penance in this life for which the life of the householder is ill-fitted. But this appears to be the priestly rendering of a more practical consideration, which justified their exclusion, namely, that those who could not fight had no reason to share in its booty.

1080. Whatever may be the genesis of the rule, it is now limited by the Legislature to only two cases of congenital lunacy and idiocy. The reason why these disqualifications were sanctioned by the Legislature is that a person bereft of reason can enjoy no right of property and it is society that he should be removed from the incentive to marry and good for society that he should be removed from the incentive to marry and procreate issue. But if he does marry, his son is not deframed of his right of inheritance, the person excluded from inheritance must, however, be maintained since that right has not been abrogated by the Legislature. (§ 97.)

Loss of Coparcenary Rights.

124. (1) A coparcener loses his interest in the coparcenership in the following cases, namely:—

(*a*) on his adoption (other than in the *Dwamushayana* form) into another family;[2]

(*b*) on his withdrawal from the coparcenary, or relinquishing his share therein;[3]

(*c*) on his alienating his interest for consideration subject to the provisions of section 126;

(*d*) on the attachment and sale of his interest in execution of a decree passed against him personally;[4]

(*e*) on the extinction of his interest by adverse possession;[5]

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(1) Act XII of 1928.

(2) Manu, IX-142; S.B.E. 3355; *Yadao* v. *Namdeo*, 49 C. 1 P.C.; *Dattatraya* v. *Govind*, 40 B. 429 (433); *Sri Raja Venkata* v. *Sri Raja Rangayya*, 29 M. 437 (447) and cases cited in comm. *See also* S. 60, *supra*.

(3) Manu, IX-207; Yad., II-117; *Shivajirao* v. *Vasantrao*, 33 B. 267 (271); *Chandra* v. *Dampat*, 16 A. 369 *Sundersanam* v. *Narasimhulu*, 25 M. 149 (156); *Anand Rao* v. *Wasant Rao*, 9 Bom.L.R. 595 P.C.

(4) *See* S. 126.

(5) *Suryanarayana* v. *Tammanna*, 25 M. 504; *Atma Ram* v. *Godhu Ram*, 14 Lah. 306 (310).

(*f*) on his voluntary retirement from the world;[1]

(2) A coparcener may otherwise forfeit his right of coparcenary by doing an act or suffering an omission that is incompatible with its continuance.

(3) In cases specified in clauses (a), (b), (c), (d), (e) and clause (2) not only the coparcener but his natural issue and all claiming through him forfeit their right, whereas in cases specified in the remaining clauses the forfeiture is personal and does not affect those who claim after, through or under him.

Illustrations.

(*a*) *To cl.* (1) (*a*).—*A*, *B*, and *C* are members of a joint family. *B* being the son *A*, the latter gives him in adoption to *D*. *B* ceases to be a joint member of the family of *A* and *C*. (*See* § 60.)

(*b*) *To cl.* (1) (*d*)— *A* and *B* are coparceners. In execution of a decree obtained against *B*, *A's* interest is erroneously seized and sold. *A* failed to object. On sale of his interest he ceases to be a member of the coparcenary.

(*c*) *To cl.* (2).—Of two coparceners *A* and *B*, *A* kills *B* in sudden fit of temper. He cannot take *B's* interest by survivorship. (§ 303).

1081. Analogous Law.—While the last section dealt with the forfeiture of coparcenary right, this section deals with the loss of that right in consequence of the act of the coparcener.

1082. Adoption: Alienation and Relinquishment.—The adoption of a coparcener into another family amounts to civil death in his natural family. It has, therefore, the same effect in that it extinguishes his coparcenary interest which enlarges the share of the remaining members.[2] Its voluntary alienation for value is allowed in certain Provinces, its involuntary alienation is possible everywhere, since in a decree obtained against a coparcener his interest in the joint property is liable to sequestration and sale, whereupon the coparcener naturally ceases to possess any interest in the joint family property. Regarding him as a coparcener he is as good as dead. The same result ensues from the relinquishment of his interest. Such relinquishment may again be voluntary or involuntary. It is voluntary if the coparcener leaves the family for good by abandoning the status of a householder. But, of

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Cl. (*b*).—S. 122.

Cl. (*c*).—*Syed Taffazzool* v. *Raghoonath*, 14 M.I.A. 40 (50, 51); *Suraj Bunsi Koer* v. *Sheo Prasad*, 5 C. 148 (174) P.C.; *Hardi Narain* v. *Rudra Prakash*, 10 A. 626 (636, 637) P.C.; *Ramkishore* v. *Jainarayan*, 40 C. 966 (981) P.C.

Cl. (*d*).—*Gangadhar* v. *Parashram*, 29 B. 300 (304, 305); *Jogendra* v. *Baladeo*, 35 C. 961 (968, 969); *Kumarappa* v. *Saminatha*, 42 M. 431 (439).

Cl. (*e*).—Vashisth, XVII-27; Yad. II-137; Mitak., II-10-3; Dayabhag, V, V-11; Mayukh, IV-115; 2 Dig. 525; v. Darp. 10; 1 Str. H.L. 185, 96; Ss. 107 108, Ev. Act.

Cl. (*f*).—*Peddayya* v. *Ramalingam*, 11 M. 406; *Shivji Rao* v. *Vasant Rao*, 33 267 (271).

(1) Mit. II-X-3; Vashisth cited in Vivad Chintamani, ch. "Of Partition," §§ 126, 127, 129.

(2) Manu, IX-142, 25 S.B.E. 355; *Yadao* v. *Namdeo*, 49 C. 1 P. C.; *Dattatraya* v. *Gobind*, 40 B. 429 (433); *Sri Rajah Venkata* v. *Sri Rajah Rangayya*, 29 M. 437 (447); *Behari Lal* v. *Kailas Chandra*, 1 C.W.N. 121; *Maroti* v. *Luxman*, 5 N.L.J. 58.

course, the relinquishment by a coparcener, even the father, of his interest does not affect the interest of his sons.[1]

Clause (1) (a) Adoption.

1083. That a coparcener, upon his adoption into another family, loses all rights in his natural family is clear from what has been stated in S. 54. The only exception to this rule is where the adoption is in the *dvamushyayan* form, which as a form of adoption is exceptional if not wholly obsolete.

It is only his undivided coparcenary interest of which he is divested; because the enjoyment of it depends upon his jointness. Adoption severs his relationship with the joint family, and therefore, upon his ceasing to be its coparcener, he ceases to retain any interest in the coparcenary property.

Of course, a person does not, upon his adoption, forfeit his share which he has already obtained on partition.[2]

Clause (1) (b) Withdrawal.

1084. Though a coparcenary cannot be created by contract, its continuance depends upon the consensus of the members to remain joint. It is consequently open to any member to withdraw by giving notice of his intention to withdraw therefrom. He may do so by demanding a partition but this is not necessary, since a member may not desire complete severance, being content to determine his status. In that case he may continue joint, but his jointness will thenceforward be that of a co-owner and not that of a coparcener. As such, he would be entitled to call for accounts and receive his share of the profits which, as a coparcener, he could not have done. A mere declaration of a coparcener's intention withdrawing from the coparcenary is enough, but the declaration must be unequivocal. Such a declaration may be express or implied by conduct.[3] (§§ **1320-1322.**)

Right of Surrender.

1085. No coparcener can surrender his right to any coparcener he chooses, since such surrender would then be indistinguishable from an alienation or a gift which he is not by the very nature of his tenure entitled to make. All that law permits him to do is to waive or renounce his right in favour of the general body of coparceners.[4] A renunciation in favour of any one of them will be so treated.[5]

Clause 1 (c) (d) Alienation, Voluntary and Involuntary.

1086. That the alienation of a coparcenary interest whether by an act voluntary or involuntary must result in its loss to the coparcener is merely a truism, but the question in this connection arises how far are such alienations permissible. (§ **126.**)

(1) *Karam Singh* v. *Surendar Singh*, (1931) L. 289.

(2) *Mahableshwar* v. *Subramanya*, 47 B. 542; *Sri Rajah Venkata* v. *Sri Rajah Rangayya*, 29 M. 437 (447).

(3) *See* Ch. on "Partition."

(4) Manu, IX-207; Yad., II-117; *Shivajirao* v. *Vasantrao*, 33 B. 267 (271); *Chandra* v. *Dampat*, 16 A. 369; *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (156); *contra* in *Peddayya* v. *Ramalingam*, 11 M. 406 (407) (submitted—reasoning unsound, since release in favour of one coparcener amounts to an alienation and prejudices the right of others).

(5) *Anad Rao* v. *Wasant Rao*, 9 Bom.L.R. 595 P.C., affirming O.A. *Wasant Rao* v. *Anand Rao*, 6 Bom.L.R. 925 (947); but see *Sivagnana* v. *Kesalarama*, 1 M. 312 (332) P.C.

Clause (1) (e) Adverse Possession.

1087. Adverse possession operates upon all property whether individual or coparcenary. Such possession may be on the part of the manager[1] or other coparceners or a stranger who may exclude the coparceners collectively, directly or through the manager. But where the coparceners are joint, the possession of one is the possession of all and it will require a very strong overt act to render his possession adverse. But nevertheless, such possession is possible; while as regards a stranger who is under no obligation to the coparcenary his possession will be deemed to be *prima facie* exclusive and adverse.

Clause (1) (f). Asceticism.

1088. The cases on this point are, however, jealous of his right. The Mitakshara merely categorizes "one who has entered into an order of devotion" with "an enemy to his father, a sinner in an inferior degree and a person deaf, dumb, or wanting any organ."[2] The subject will have to be considered in the sequel. (§ 304.)

Clause (2). Cessor on doing an inconsistent act.

1089. **Coparceners' Rights.**—So long as the family remains joint, every coparcener must necessarily possess certain rights both against the manager as well against his coparceners with reference to the enjoyment of joint property. These rights, however, must be necessarily subject to other laws and to the nature of the estate. Where, for instance, the property is impartible, members of the joint family have no right beyond the customary right of maintenance. So under the Dayabhag law, the sons have no right of partition against their father. The existence and the continuance of a coparcenary depend upon the consensus of the coparceners and upon their fulfilling certain conditions upon which its existence depends. If these conditions are not fulfilled the coparcenership comes to an end so far as regards the member not fulfilling the conditions. What these conditions are is illustrated in the next clause. But the instances there given are necessarily not exhaustive. For example, it is stated in the text with some degree of particularity that a son who is hostile to his father is not entitled to the rights of a coparcenary or to inherit to him. These texts will be the subject of discussion in the sequel. They have been held to imply that before a coparcener or an heir can be excluded from participation, it must be shown that he was in a state of malignant hostility towards the father or other coparceners. (§ 303).

1090. **Principle.**—Withdrawal from the joint family may result from an act both voluntary and involuntary. Instances of the one are afforded by the withdrawal consequent upon partition, alienation, or relinquishment of the coparcenary interest. Instances of the others are found in the acts which destroy the incident of survivorship of which coparcenary right is a counterpart. Any act entailing permanent deprivation of caste would ordinarily dissolve the coparcenership. It may be

(1) *Suryanarayana* v. *Tammanna*, 25 M. 504; *Atma Ram* v. *Godhu Ram*, 14 L. 306 (310).

(2) Mit., II-X-3; Dayabhag, V-V-II; Mayukh, IV-XI-5 (Mandlik), p. 109.

that the act of the delinquent is in fact condoned, but if it is an act which is unexpiable in law, the result it leads to cannot be averted. If, suppose, a member, is converted to Christianity or Mahomedanism, the fact that he recants his act and is readmitted into the family would not stay the operation of law, for reconversion to Hinduism is not permissible. Where, however, a member abandons family life and becomes an ascetic, there is nothing to prevent his readmission into the bosom of his family, for in this case the door was always open and the re-entry of the ascetic would not constitute a reunion but the continuance of his joint status which his temporary abandonment of family life had merely interrupted but not destroyed. Such is also the effect of a disqualification due to physical infirmity upon the removal of which the member rejoins his family and becomes entitled to participate in all its benefits. This branch of the law has not been yet fully developed, as cases of desertion from coparcenership are not many, and the few cases in which the question was considered, will be found noticed in the sequel under the law of inheritance. (§ 304.)

Outcast.

1091. The effect of outcasting a member upon a joint family requires examination, since the textual rigour has been in part mitigated by the Statute, which renders any forfeiture thereby incurred as unenforceable in law. But this provision merely safeguards his rivht of property. It does not safeguard his status as a coparcener which, according to the texts, ceases upon his becoming an outcast. Such member can demand his share,[1] and that too because of the Statute, but he cannot persist in remaining within the coparcenary, the incidents of which include joint food and joint worship from which he is necessarily excluded. It has already been seen that on his conversion the convert is put upon election. It is open to him to follow the old law, or to renounce it in favour of the new law associated with his new religion. (§§ 245-253.)

Severance upon Statutory Marriage.

1092. It is provided by the Special Marriage (Amendment) Act[2] that the marriage under that Act "of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jain religion shall be deemed to effect his severance from such family." Buddhists have no joint family system; but in the case of Hindus, Sikhs and Jains a marriage under the Act results in the severance of the interest of the person so married from the coparcenary. This is necessary, since succession to the property of such person is regulated by the Succession Act,[3] which is inconsistent with collectivism which is the essence of coparcenary. The property such person takes upon partition becomes his own, though it may have been ancestral: he is then free to dispose of it at his discretion. His own relations can no longer claim it by their right of survivorship, though his own right of succession to them remains unimpaired. All that is destroyed is his dependent posi-

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(1) If the property is partible, but if it is impartible, *e.g.*, a *tarwad*, his conversion does not clothe him with a new right to obtain partition (*tarwad*) of impartible property; *Pathumma* v. *Raman*, 44 M. 891 F.B.

(2) S. 22, Act III of 1872, as amended by Act XXX of 1923.

(3) S. 24, Act III of 1872 as amended by Act XXX of 1923.

tion as a coparcener. All that he gains is his individualism which, as a Hindu, he could not have otherwise achieved.

The question whether a person who has contracted a civil marriage outside his own caste or religion, otherwise than under the provisions of the Special Marriage (Amendment) Act, equally ceases to be a member of the coparcenary has not yet been judicially determined, but there can be no doubt that it will also entail the same result, since such a person loses his caste upon such marriage.

1093. It has already been stated that the conversion of a Hindu to another faith such as Brahmoism (§ **205**) or Sikhism (§ **202**) has not the effect of casting him outside the pale of Hinduism. Nor does the conversion of a Hindu to an alien creed deprive him of any right which he possessed before his conversion. (§ **218.**) The question still remains whether by reason of such conversion he ceases to be a member of the coparcenary.[1]

Incidents of coparcenary right.

125 **Subject to any law for the time being in force, and the nature of the estate, the interest of every coparcener is subject to the following incidents, namely:—**

(1) Every coparcener, with his wife and children, is entitled to joint mess, residence, and worship in the family dwelling house;[2]

(2) He is entitled to joint possession and joint enjoyment of all property comprised in the coparcenership;[3]

(3) Both he and his wife and children are entitled to maintenance and protection out of the coparcenary funds;[4]

(4) He may restrain any illegal or improper acts of the other coparceners in respect of the coparcenary;[5]

(5) Subject to the provisions of the next section and to the extent therein provided, he may alienate his share;[6]

(6) His interest is liable to variation with the members of the coparcenary,[7] but in Bengal it is fixed;

(7) He is, subject to the provisions hereinafter contained, entitled to call for the partition of his share;[8]

(8) Except in a suit for partition, he cannot recover the profits of his share or separate possession of any portion of the joint property otherwise than by way of restitution;[9]

(9) His power over his separate and self-acquired property is in no way affected by his interest in the coparcenary.[10]

1094. **Analogous Law.**—The opening words "subject to any law for the time being in force," save, for instance, the Malabar Law, under which members of a *tarwad* have no right of partition, as also the Dayabhag law, under which the son has no right of partition, or indeed, any

(1) *Abraham* v. *Abraham*, 9 M.I.A. 195 (237, 238); *Jogi Reddi* v. *Chinnabbi*, 52 M. 83 (87) P.C.
(2) § 1095.
(3) *Ib.*
(4) Ch. VII.
(5) § 1702.
(6) *See* S. 126.
(7) § 1104.
(8) *See* Chapter on "Partition", S. 179.
(9) *Pitchai Pal* v. *Jarahia*, 14 C. 493
(10) § 1106.

other coparcenary right against the father. It would save impartible estates and other property, in respect of which there is no room for the existence of coparcenary rights. For the rest, the section sums up the rights of the coparceners *inter se*. These rights are equally possessed by the manager *qua* coparcener.

All the clauses are supported by the authorities undernoted.[1]

These are merely the broad principles which will have to be more closely examined in the chapter on partition.

Clause (1), (2) Joint Possession.

1095. The coparcener is *prima facie* entitled to joint possession of all and every portion of the joint property. This right flows from the very fact of this jointness. No coparcener is as of right entitled to specific possession of any portion of the joint property. His right is to obtain and maintain joint possession, not necessarily joint enjoyment, for this may not be possible. In the case of coparcenary property joint possession does not imply the assertion of any right beyond those incident to his coparcenership. As against the manager, he with his wife and children are entitled to be maintained and educated and married, and as against the other coparceners, he is entitled to retain joint possession.

1096. Where, however, any of them is allowed separate possession of the property he cannot disturb the *status quo* if such possession is not in denial of his right but in the enjoyment of his property.[2] He must not usurp separate possession, but must take it consistently with the rights of other coparceners if they acquiesce in it. If, when he takes it, any other coparcener objects, he is entitled to sue for restoration of the *status quo ante* by obtaining an injunction or joint possession.[3] But if he has acquiesced in it, his only remedy is by a suit for partition.[4] A coparcener cannot sue another for the profits of his separate possession.[5] The separate possession of one coparcener is not adverse to another unless his possession was in assertion of a hostile title or where his possession is from its nature, inconsistent with joint ownership. The fact that one erects a building on joint land does not necessarily constitute an ouster of the other coparceners entitling them to a decree for joint possession. Ouster means dispossession of another in the assertion of a hostile title.[6]

Building on Common Land.

1097. But this implies that the building was acquiesced in, or at least, there was a standing by. Where one coparcener commences to build and the other objects, he is entitled to have the building

(1) *Secretary of State* v. *Kamachee*, 7 M.I.A. 476 (537); *Suraj Bansi* v. *Sheo Prasad*, 5 C. 148 (165) P.C.; *Sankar* v. *Hardeo*, 16 C. 397 (405) P.C.; *Homadari* v. *Ramani*, 24 C. 575 F.B.; approved in *Bhagwat* v. *Bipin Behari*, 37 C. 918 (927) P.C.; *Jagmohan Das* v. *Mangaldas*, 10 B. 528.

(2) *Watson & Co.* v. *Ramchand*, 15 C. 10 (21, 22) P.C.; *Lachimeshwar Singh* v. *Manwar*, 19 C. 253 (263) P.C.

(3) *Rohin Singh* v. *Hodding*, 21 C. 340; *Surendra* v. *Hari Mohon*, 33 C. 1201; *Bhairon* v. *Saran Rai*, (1904) A.W.N. 106 F.B.; *Ramcharan* v. *Kauleshar*, 27 A. 153; *Phani Singh* v. *Nawab Singh*, 28 A. 161 (166), following *Rahmat* v. *Salamat*, (1901) A.W.N. 48, in which the court merely passed a declaratory decree, but it is submitted, it was not sufficient.

(4) *Madan Mohun* v. *Rajah Ali*, 27 C. 223 (227).

(5) *Ittappan* v. *Manavikrama*, 21 M. 153 (165, 166).

(6) *Basanta* v. *Mohesh*, 18 C.W.N. 328 (331); *Durjendra* v. *Purendra*, 11 C.L.J. 889; *Israel* v. *Shamsher*, 41 C. 436 (441, 442), in which there is a discussion as to when the Court should grant temporary injunction.

pulled down and the land restored to the *status quo ante*.[1] In some cases the courts go into the question whether the defendant had appropriated more of the common land than would have come to him on partition[2] but it is submitted, that this is immaterial, since no coparcener can be permitted to appropriate any specific part of the joint property without a partition in which all the coparceners will get their full *quantum* of the common land, having regard to possession, quality and the amount of their shares.[3] "The law provides a legitimate means by which any co-sharer may obtain partition. The law does not favour one co-sharer, adversely to the other co-sharers, making a partition in his own favour, and selecting the portion of the land he likes by erecting a building upon it."[4] But even where the coparceners have objected at the very start it does not necessarily follow that the court would decree demolition as a matter of course. Before it will do so it must be satisfied not only that there has been an encroachment on the common right, but that the coparcenary rights have been injured and that they cannot be otherwise compensated for.[5]

1098. So where a co-harer had excavated a tank on the joint land which the other co-sharer sued for filling up in order to restore the *status quo ante*, the court held that, before ordering it, it must be satisfied that the plaintiff had suffered some injury from the encroachment. The term "injury" in this connexion means "something substantial, something that materially affects the position of the parties."[6] The land in this case was described as "fit for cultivation," but the court held it no ground for ordering the refilling of the tank. But the result would probably have been different if the land had been actually under cultivation. In granting or withholding an injunction, the courts exercise a judicial discretion and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant.[7] Such was held to be the case where the defendant had converted a common staircase room to his own use and barred the plaintiff's right of access thereto, through his own part of the house,[8] though in a similar case while decreeing the removal of obstruction, the court remarked that it would not have interfered, if there had been acquiescence, abandonment or non-user of the common way.[9] The same view was taken in another case in which the court ordered restoration of the common verandah, which the defendant had pulled down, and which interfered with the plaintiff's enjoyment of the family dwelling house.[10]

1099. So the court will prevent building on joint lands,[11] but it will not interfere after the building is completed.[12] In suits for an injunction relating to joint property the courts in this country follow the practice

(1) *Shadi* v. *Anup Singh*, 12 A. 436 F.B., overruling *Paras Ram* v. *Sherjit*, 9 A. 661.
(2) *Paras Ram* v. *Sherjit*, 9 A. 661.
(3) *Shadi* v. *Anup Singh*, 12 A. 436 (437) F.B.
(4) *Hajiokhan* v. *Initea Juddin*, 10 A. 115 (116).
(5) *Mocury* v. *Brindabun*, 8 C. 708; *Biswambhar* v. *Rajaram*, 16 W.R. 14.
(6) *Joy Chunder* v. *Bippro Churn*, 14 C. 236 (238).
(7) *Shamnugger Jute Factory* v. *Ram Narain*, 14 C. 189 (198); *Soshi* v. *Ganesh*, 29 C. 500 (502).
(8) *Soshi* v. *Ganesh*, 29 C. 500 (502); *Chunder Kant* v. *Nund Lal*, 16 W.R. 277.
(9) *Chunder Kant* v. *Nund Lal*, 16 W.R. 277 (278).
(10) *Gopee Kishen* v. *Hemchunder*, 13 W.R. 312.
(11) *Gooroodass* v. *Bejoy*, 10 W.R. 171.
(12) *Dwarkanath* v. *Gopee Nath*, 18 W. R. 14.

of a court of equity in England, limiting the exercise of their jurisdiction to acts of waste, illegitimate use of the family property, or acts amounting to ouster.[1]

1100. The manager may, of course, permit an alienation of joint property which he considers necessary or proper; so, where he had consented to an alienation by a coparcener's widow, it was held to bind his after-born son who was precluded from challenging his authority.[2] He may permit any member to occupy any portion of the joint property. And it is usual and consistent with joint possession that some of the joint owners should be permitted exclusive possession of the joint property for their mutual convenience. Such possession is necessarily permissive and cannot be disturbed during the continuance of joint property by any other member, but may of course be disturbed by all of them or on their behalf by the manager.[3]

1101. The right of the coparcener to his own maintenance as well as the maintenance of his wife and children has already been the subject of discussion in a previous chapter (Ch. VII). The joint family is bound to maintain not only the coparcener and his family but also those who would have legal or moral claim upon him for maintenance. Such are his parents and widowed daughters and unmarried sisters. Even coparceners who are disqualified from inheritance are entitled to assert this right. Coparceners' concubines, if exclusively and continuously kept, become entitled to maintenance out of the joint estate on the death of their paramour.[4]

Clause (3) Maintenance.

The illegitimate sons are also entitled to maintenance[5] which might be secured by a charge on the father's property.[6] While the coparceners is entitled to maintenance for himself and his dependants, he cannot sue for if he is entitled to a share.[7] Consequently, a suit for maintenance would be maintainable only by a minor or disqualified coparceners or in respect of property which is impartible.[8]

But in Madras, a member of a *tarwad* is held entitled to claim separate maintenance where there is substantial inconvenience in living in the family house either on account of want of room there, or because there are quarrels which make it uncomfortable to a member to live there, where there are several houses belonging to the *tarwad* and a member lives in one of them, and where the *karnavan's* conduct has afforded, a valid excuse for a member living away from the *tarwad* house.[9] The same principle governs a member of a *tavazhi*.[10]

(1) *Anant* v. *Gopal*, 19 B. 269 (270); *Bapuji* v. *Mansukharam*, (1893) B.P.J. 552; *Sheo Pershad* v. *Dedab Singh*, 20 W.R. 160.

(2) *Bhagwan* v. *Ujagar*, (1928) P.C. 20 (so held; *semble*, could the afterborn son have ever questioned his father's alienation, *a fortiori* his father's consent thereto?).

(3) *Sheo Pershad* v. *Leelab Singh*, 20 W.R. 160.

(4) Mit., II-I-28; *Khemkar* v. *Umia*, 10 B.H.C.R. 381; *Vranjiabandas* v. *Yamuna*, 12 B.H.C.R. 229.

(5) Mit., I-XII-3; *Muttusamy* v. *Venkata*, 2 M. H. C. R. 293, affirmed O.A. 12 M.I.A. 223; *Coomara* v. *Venkateswara*, 5 M. H. C. R. 405.

(6) *Ananthaya* v. *Vishnu*, 17 M. 160.

(7) *Per* Westropp, C.J., in *Himmat Singh* v. *Ganpat Singh*, 12 B.H.C.R. 94 note (*a*).

(8) *Himat Singh* v. *Ganpat Singh*, 12 B.H.C.R. 94.

(9) *Peru* v. *Ayyapan*, 2 M. 282; *Nalle Kandiyail* v. *Chatu*, 4 M. 161; *Raman* v. *Iti Mayamina*, 9 M.L.J. 153; *Mahadevi* v. *Pammakka*, 36 M. 203 (212); *Kunchi* v. *Ammu*, 36 M. 591; *Muthu* v. *Gopalan*, 26 M. 593.

(10) *Naku* v. *Raghava*, 38 M. 79.

1102. Every coparcener possesses the right of restraining other coparceners including the manager, from doing any act which is illegal or improper and prejudicial to their joint interests. So where the manager had contracted to sell the right to cut wood in a forest for Rs. 4,000, secretly stipulating for payment of a like sum to himself, the court cancelled the whole contract, holding that it was the right of a person defrauded by a contract between a manager and a third party to have the contract altogether rescinded. Even as between the parties who have entered into the contract to defraud a third party, the court will not enforce performance.[1] But apart from covin or fraud, the court will not interfere with the discretion of the manager, or an act of a coparcener unless it is done on purpose to create a hostile title against the plaintiff.[2]

Clause (4) He may restrain improper acts.

As regards the right of coparceners to impeach alienations of the joint property, the courts are now bound by the rules which they have laid down for their own guidance. They will be set out under the sections where the subject of improper alienations will also be considered. (§§ 134-135.)

Right to impeach Alienation.

1103. As to right of alienation. *see* S. 126.

1104. The coparcener's interest is either variable or invariable according to the law to which he is subject. In Bengal, where coparceners hold in *quasi*-severalty as tenants-in-common with no right of survivorship, the interest of each member is determined on the death of the father and remains fixed up to partition. Under the Mitakshara, however, since coparcenary interest is the birth-right of every male member of the family, that interest is necessarily subject to increase or decrease according to the births, deaths and other circumstances elsewhere set out.

Clause (6) Interest Variable.

So long as the family is joint, a coparcener is necessarily precluded from appropriating any specific portion of the joint property or of its profits, for he has no definite share until partition.[3] But a coparcener may obtain possession in common with a purchaser who has obtained separate possession without partition of specific undivided and unascertained share.[4] Where a coparcener sells his share to a stranger, the latter cannot assume possession of his co-parcener's interest without the consent of the other co-parceners. If he does so, any coparcener may eject him, and he cannot resist his ejectment, since the only right he possesses is to work out his equity in a

Clause (8) Can receive no share of profits.

(1) *Ravji* v. *Gangadhar*, 4 B. 29 (33), following *The Panana Telegraph Co.* v. *The Indian Rubber Co.*, L.R. 10 Ch. 515.

(2) *Gopee Kishen* v. *Hemchunder*, 13 W.R. 312.

(3) *Pithi Pal* v. *Jorahia*, 14 C. 493 P. C.

(4) *Nhiku* v. *Pattu*, 8 Bom. L.R. 99 (105), following *Pandurang* v. *Bhaskar*, 11 B.H.C.R. 72; *Udaram* v. *Ranu*, 11 B.H.C.R. 76; *Mahahalaya* v. *Timmaya*, 12 B.H.C.R. 138; *Bataji* v. *Vasudeb*, 1 B. 95; *Kelappa* v. *Venkatesa*, 2 B. 676; *Dugappa* v. *Venkataramaya*, 5 B. 493; *Rama Chandra* v. *Damodhara*, 20 B. 467; *Paresram* v. *Murari*, 20 B. 569; *Nana* v. *Appa*, 20 B. 627; *Narainbhai* v. *Banchod*, 26 B. 141; *Wahid* v. *Sajed*, 12 A. 556.

suit for general partition.[1] This equity entitled him to his alienor's share existing on the date of his purchase subject only to such equity in favour of the member of the transferor's family as might have been enforceable against his alienor.[2]

Clause (9) Self-acquired Property.

1106. All schools now recognize the right of separate ownership. A coparcener is not disqualified by reason merely of his possession of an interest in joint property from obtaining or acquiring any property of his own.

Alienation of Coparcener's share.

126. (1) A coparcener, other than the manager, or the father; may alienate his coparcenary interest as follows:—

(2) He may alienate[3] or devise[4] his interest, if he was at the moment the sole surviving coparcener; but while his alienation so made cannot be set aside by a son subsequently born[5] or adopted[6] or by his posthumous son[7] his devise would be inoperative even though made with his consent[8] since survivorship being a prior right takes precedence over devise.[9]

(3) A coparcener may alienate his share *inter vivos*[10] though not by will[11] with the consent express or implied[12] of the other coparceners, including minors, whose consent may be validly given by their fathers[13] or other guardian entitled to alienate their interest.[14]

(4) Save as above a coparcener cannot even surrender his interest to any one or more of his coparceners as distinct from the whole coparcenary.[15]

(5) A male coparcener subject to the Dayabhag law is entitled to alienate his share *inter vivos* or by will.[16]

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(1) *Venkatarama* v. *Meeralabi*, 18 M. 275; *Palani* v. *Mansakonam*, 20 M. 243; *Subbe Goundan* v. *Krishnamachari*, 45 M. 449.

(2) *Chinnu* v. *Kalimuthu*, 35 M. 47 F.B.; followed in *Subbe Goundan* v. *Krishnamachari*, 45 M. 449; *Subba Rao* v. *Ananthanarayana*, 23 M. L. J. 64.

(3) Vyas, Dig. 455; Brihaspati cited in Mit. I-I §§ 28, 29; *Venkatanarayana* v. *Subammal*, 29 M. 107 (112) P.C.; *Bharat Singh* v. *Jeobodh Lal*, (1934) A. 891.

(4) *Nagalu and Chmee* v. *Gopo Nadaraja*, 6 M.I.A. 309; *Narottam* v. *Narsandas*, 3 B.H.C.R. (A.C.) 6.

(5) *Lalita Devi* v. *Ishar Das*, 14 L. 178.

(6) *Venkatanarayana* v. *Subhamal*, 39 M. 107.

(7) *Hanmant* v. *Bhimacharya*, 12 B. 105; *Minakshi* v. *Virappa*, 8 M. 89.

(8) *Bhikubhai* v. *Purshottam*, 50 B. 558.

(9) *Lakshmichand* v. *Anandi*, 48 A. 313 P.C.; *Subharani* v. *Ramamma*, 43 M. 824.

(10) *Lakhmichand* v. *Anandi*, 58 A. 313 (323) P. C., approving *Sadabart* v. *Foolbash Koer*, 3 B.L.R. 31 F.B.; *Madho Parshad* v. *Mehrban Singh*, 18 C. 157 (160, 161) P.C. *Seetla Sahai* v. *Thakur Din*, 20 I.C. (A.) 247; *Budhu Singh* v. *Kawalnuin*, 19 I.C. (A.) 430.

(11) *Bhikabhai* v. *Purshottam*, 50 B. 558; *Gur Narain* v. *Gulzarilal*, 25 I. C. (O.) 917.

(12) *Thakurji* v. *Nanda Ahir*, 55 I.C. (A.) 217; *Madho Ram* v. *Jaya Singh*, 52 I.C. (A.) 18; *Thakur Din* v. *Seetla Sahai*, 23 I.C. (A.) 530; *Mahabir* v. *Mathura*, (1924) O. 138.

(13) *Subhrami* v. *Ramamma*, 43 M. 824, approved in *Lakmichand* v. *Anandi*, 48 A. 313 (323) P.C.; *Baijnath* v. *Tejbali Singh*, 43 A. 228 P.C.

(14) *Srinivasa* v. *Tiruvengada*, 55 I. C. (M.) 588; *Nagindas* v. *Mhd. Ysuf*, 64 I. C. (A.) 923; *Sanka Krishnamurthi* v. *Bank of Burma*, 35 M. 692 (698).

(15) *Kaveramma* v. *Vishnu*, 49 I. C. (M.) 263; *Ayavier* v. *Subramania*, 40 I. C. (M.) 205.

(16) *Anund Chand* v. *Bunoja*, 1 B.S. R. 153: 6 I. D. (O.S.) 113 (115 *f-n.*); *Kounla Kant* v. *R. H. N. Graimee*, 4 B.S.R. 247: 7 I.D. (O.S.) 184.

(6) A coparcener elsewhere is entitled to alienate his share *inter vivos*, though not by will[1] in the following cases namely:—

(a) In the provinces of Bombay[2] Madras[3] the Central Provinces and Berar[4] he may alienate it for valuable consideration.[5]

(b) That in Bengal, subject to the Mitakshara law; the United Provinces,[6] Behar, Orissa[7] and the Punjab[8] he may alienate it for legal necessity or pious purposes.

(7) A Coparcener may in a case of emergency alienate joint property, or any part thereof,[9] provided that by so doing he does not encroach on the powers of the manager.[10]

Explanation.—The power of transfer herein permitted does not extend to a mere contract to transfer, of which the obligee cannot obtain specific performance or damages.[11]

Exception.—Nothing herein applies to an involuntary alienation of a coparcener's share by attachment and sale in execution of a decree obtained against him[12] which entitles the purchaser to demand partition of his transferor's share for his benefit, at on a partition claim that the property purchased by him be; as far as possible, allotted to his transferor for his benefit.[13]

Illustrations.

(*a*) *A* coparcener bequeaths his share to *B* with the consent of all his coparceners. The bequest is void.[14]

(1) *Gur Narain* v. *Guzzarilal*, 25 I C. (O.) 917 (movables subject to the same rule).

(2) *Lakshman* v. *Ramchandra*, 5 B. 48 P.C.; *Balgovind* v. *Narain Lal*, 15 A. 339 P.C.; *Pandu* v. *Goma*, 43 B. 471; *Dularam* v. *Badaldas*, 35 I.C. (S.) 478.

(3) *Doraiswami* v. *Nandisami*, 36 M. 118; *Ramaswami* v. *Venkata*, 46 M. 815; *Davud Seevi* v. *Ramakrishna*, (1923) M. 467; *Kota Balbhadra* v. *Khetra Doss*, 36 I.C. (M.) 301.

(4) *Syed Kasim* v. *Jorawar Singh*, 49 I.A. 358: (1922) P.C. 353; *Dhadabai* v. *Narayan*, (1922) N. 28; *Kishanlal* v. *Nathu*, 16 N. 131; *Behari Lal* v. *Hukamchand*, 46 I.C. (N.) 754; *Hira Ram* v. *Udhi Ram*, 9 N. 74.

(5) *Madho Pershad* v. *Mehrban Singh*, 18 C. 157 P.C.; *Janki Nath* v. *Jamini Kant*, 22 I.C. (C.) 612 (614).

(6) *Lachman Prasad* v. *Sarnam Singh*, 39 A. 500 P.C.; *Madho Parshad* v. *Mehrban Singh*, 18 C. 157 (168) P. C.; *Lala Ram* v. *Raghubir Lal*, 45 A. 311; *Prag Lal* v. *Rameshwar*, 20 I. C. (A.) 921; *Malak Chand* v. *Hiralal*, (1937) O. 510.

(7) *Debi Lal* v. *Nankishore*, 1 P. 266; *Jwala Prasad* v. *Udit Nath*, 37 I. C. (P.) 184.

(8) *Munshi Lal* v. *Sohan Lal*, 66 I.C. (L.) 881; *Piare Lal* v. *Ramchand*, 11 I. C. (L.) 443.

(9) *Thakurji* v. *Nanda Ahir*, 43 A. 560; *Nanjuda* v. *Kishnagaraju*, 42 M. 154; *Prem Sukh* v. *Ram Bhujhawan*, 52 I.C. (S.) 964.

(10) *Ghasitey* v. *Harprasad*, (1937) A. 99; *Sarju Prasad* v. *Ramsaran*, (1931) A. 541 (544).

(11) S. 27 (*c*) *Ill.* (2), Specific Relief Act; S. 273, Cont. Act (IX of 1872); *Bhagwan* v. *Krishnaji*, 44 B. 967 (971); *Subha* v. *Venkatrami*, 38 M. 1187; *Narayana* v. *Muthiah*, 47 M. 692 (Liability of minors in a trading firm); but *see Adikesavan* v. *Gurunatha*, 40 M. 338 F.B. (Notice of the defect of title (immaterial).

(12) *Suraj Bansi Koer* v. *Sheo Pershad Singh*, 5 C. 148 P.C.; *Madho Pershad* v. *Mehrban Singh*, 18 C. 157 (162) P.C.; *Faquir Chand* v. *Sant Lal*, 48 A. 4; *Luchmi Narain* v. *Kunjilal*, 16 A. 449; *Jagannathan* v. *Venkata*, 53 I. C. (A.) 334; *Murugaya* v. *Ayyadorai*. 9 I.C. (M.) 286; *Jagannath* v. *Sham Pandey*, 18 I.C. (C.) 819.

(13) *Deen Dayal* v. *Jugodeep Narain*, 3 C. 198 (208) P.C.; *Suraj Bansi* v. *Sheo Persad*, 5 C. 148 (167) P.C.; *Hardi Narain* v. *Rudet Perkash*, 10 C. 626 (636) P.C.; *Rakhal Das* v. *Indubala*, (1936) C. 126; *Gurlingappa* v. *Sahu Ramappa*, (1931) B. 218; *Ganpatrao* v. *Kanhayalal*, 30 N. 149; *Jinwarsa* v. *Gunwant*, 31 N. (supp.) 124. (*See* comm. on the next section.)

(14) *Bhikabhai* v. *Purshotam*, 50 B. 558; *Gur Narain* v. *Gulzari Lal*, 25 I.C. (O.) 917.

(*b*) A sells a specific property to *B*; and his undivided share to *C*. The sale to *B* is invalid but that to *C* is valid.[1]

(*c*) *A* makes a gift of his share to his wife. The gift is invalid as contravening the limits stated in clauses (3) and (4).[2]

(*d*) *A* is falsely charged of theft. He raises funds for defending himself by mortgaging the family estate, the manager consenting. The mortgage is valid.[3]

(*e*) *A* borrows money from *B* who sues him and obtains a decree, in execution of which he attaches *A's* share. *A* dies. *B* is entitled to bring *A's* share to sale.[4]

(*f*) If in the last case if A had mortgaged his share in a village in Behar and then died. Since the mortgage creates a charge even more than an attachment, the mortgagee would be entitled to realize his mortgage money even though the mortgage be not given for legal necessity.[5]

1107. Analogous Law.—The following texts bear the subject of this section:—

Brihaspati (cited in the Mitakshara).—"Even a single individual may conclude a donation, mortgage or sale of family immoveable property during a season of distress for the sake of the family and especially for pious purposes."

Mitakshara (citing the last text).—"The meaning of that text is this: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers, are so and continue unseparated, even one person, who is capable may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family requires it; or the support of the family renders it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable."[6]

Following this text, it has been held that where the manager was in jail, a mortgage of the family property by four junior co-parceners, for the purpose of defending themselves in a criminal case, was upheld on the ground that it was a case of distress when the junior members could act for the *karta*.[7]

Vyas.—"A single coparcener ought not, without the consent of his coparcener, to sell or give away immovable property of any sort which the family hold in coparcenary."[8]

"Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family and especially for pious purposes.[9]

Dayabhag.—"It should not be alleged that by the texts of Vyas[10] .....one person has not power to make a sale or other transfer of such property. For here also (in the very instance of land held in common) as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure.[11]

Neither the Mitakshara nor the Mayukh contains any reference to the subject under reference. They both, of course, allow,[12] and so does Vyas,[13] the disposal of the family estate in case of necessity; but such dispoal is quite apart, and is not a disposal of a corparcenary interest at the coparcener's pleasure for his own private benefit, which has grown out of the cases.[14]

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(1) *Duvur Subha* v. *Kakuturn*, 38 M. 1187; *Maharaja of Bobbili* v. *Venkataramanujulu*, 39 M. 265.

(2) *Suraj Bani* v. *Sheo Prasad*, 5 C. 148 (166) P.C.

(3) *Ib.*, p. 167.

(4) *Rash Behary* v. *Jaipercash*, (1934) Pat. 21

(5) *Ibid.*

(6) Mit., I-I, §§ 28, 29.

(7) *Dhanukdhari* v. *Rambirich*, 1 *Pat.* 171.

(8) Vyas Dig. 455, cited in Dayabhag Ch. II-27. Mitakshara attributes this text to Brihaspati.

(9) Mit. I-I-28, 29.

(10) Here the text cited is omitted.

(11) Dayabhag, Ch. II, § 27.

(12) Mit., I-I-27, 32; Mayukh, IV-1; §§ 3, 6.

(13) 2 Dig. 189.

(14) *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 (166, 177) P.C.

1108. Since a coparcenary right is indeterminate until it is defined by partition, it follows that a coparcener is not, is strict logic, entitled to alienate his right until it is so defined. But in this case, the purchaser's equity has got the better of the coparcenary logic and the courts have permitted alienation of a coparcenary right as provided in clause (6); but not otherwise by gift or devise, without the consent of the other coparceners (§ **1120**) since a gift *inter vivos* or a devise affects their right of survivorship.[1]

A historical retrospect of the law of alienation of a coparcenary interest was given in the last edition of this work.[2] It is now omitted as being of no practical importance in view of the law stated in the section.

1108-A. The right of a coparcener, as distinct from the manager, to alienate joint family property, as distinct from his own share, depends upon a text of Vyas, which the courts have held to comprise three distinct cases of destress, family necessity and piety;[3] *a fortiori* a coparcener may alienate his own share for legal necessity[4] in the provinces other than those mentioned in clause 6 (*a*) where an alienation only for valuable consideration is now well recognized. A coparcener may transfer joint family property to save himself from a prosecution, for having no separate funds of his own, he can have recourse to joint funds in a season of distress[5] which with the second head of family purpose is now described as "legal necessity".

Clause (1).

1108-B. Transfer with Consent of Coparceners.—Both according to the text as well as precedents, it is open to any coparcener subject to the Mitakshara restriction, to alien, though not to devise, his share with the consent of the other coparceners.[6] The restriction only applies to a devise[7] of a transfer without consent[8] and without legal necessity or benefit to the family[9] But even with consent, it is not open to one coparcener to will away his share, the reason being that "at the moment of death, the right of survivorship (of other coparcener) is at conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise."[10] Of course, no body of coparceners can, at any time, barter away the right of their successors.

Clause (1).

Since a member of a joint family cannot validly mortgage his undivided share in ancestral property held in coparcenary on his own private account

(1) *Lukshman* v. *Ramchandra*, 5 B. 48 P.C.; *Bhikabhai* v. *Purshottam*, 50 B. 558; *Subbarani* v. *Ramamma*, 43 M. 824; *Radha Ram* v. *Ganga Ram*, (1935) L. 661.

(2) *See* Hindu Code (3rd Ed.), §§ 1346-1360.

(3) *Sri Thakurji* v. *Nanda Ahir*, 43 A. 560 (562), following *Gopal Chand* v. *Kunwar Singh*, 5 B.S.R. 29: 7 I. D. (O.C.) 355; *Raghunath* v. *Govind Prasad*, 8 A. 76 (78) (all three cases of pious gift by the father). Contra *Balgovind* v. *Narain Lal*, 15 A. 320; *Nabindra* v. *Sitaram*, (1935) Pat. 348, transfer without legal necessity, *Puttoolal* v. *Raghubir*, 9 Luck. 237.

(4) *Prag Lal* v. *Rameshwar*, 20 I.C. (A.) 921; *Mhd. Mizamilullah* v. *Mithu Lal*, 33 A. 783; *Munshilal* v. *Sohan Lal*, 66 I.C. (L.) 881; *Ramnath* v. *Ram Harakh*, (1924) O. 49.

(5) *Prem Sukh Das* v. *Ram Bhujawan*, 52 I.C. (Pat.) 964 (966); *Ram Raghubir* v. *Dip Narain Singh*, 46 A. 311.

(6) *Madho Pershad* v. *Mehrban Singh*, 18 C. 157 P.C.; *Bhikhabhai* v. *Purshottam*, 50 B. 558 (566).

(7) *Lakhmichand* v. *Anadi*, 42 M. 581 P.C.; *Babu Singh* v. *Lal Kuer*, (1933) A. 830.

(8) *Natesa* v. *Rathai*, 19 M.L.J. 62: 4 I.C. 1104.

(9) *Sundarlal* v. *Brijlal*, 35 A. 543; *Thakur Din* v. *Seetla Sahai*, 12 A.L.J. 52.

(10) *Vitla Butten* v. *Yan-Sinamma*, 8 M.H.C.R. 6.

without the consent of his coparceners, it follows that a mortgage by a father of joint family property not made to satisfy an antecedent debt or one for legal necessity or benefit of the family, is not binding even as to his share in the ancestral property comprised in it, and no decree can be passed for the sale of his share under the mortgage.[1] The only course open to the mortgagee is, of course, to sue for the mortgage money and then to attach the property in execution.

Clause (7).

1108-C. According to the state of law in vogue in the provinces mentioned in clause 6 (*b*) where a coparcener has no power to alienate his own share, except for valuable consideration coupled with legal necessity, the text of Vyas is explained to support his alienation of the family property generally in the three cases of distress, family and pious purposes,[2] though this power is not reconciled with the power of the manager with which it might come into conflict. The text of Vyas upon which this view is supported was, however, written when the powers of the manager had not become clarified, nor has any case been yet reported in which such power has come into conflict with those of the manager. The clause has, however, been added because it is supported by judicial authority which may have to be further considered *vis a vis* the acknowledged powers of the manager.[3]

1109. Valuable Consideration.—The question what constitutes valuable consideration must be decided with reference to the general law. Past and furture services may amount to sufficient consideration.[4]

1110. Coparcener's Contract.—There can be no doubt that in the parts where a coparcener is permitted to alien his interest, he is necessarily competent to enter into a contract for its alienation which is capable of specific enforcement[5] Even in the provinces which disallow an alienation altogether, it is possible for a coparcenary interest to pass, as where, acting as manager, he professes to contract for the family with a *bona fide* alienee without notice, and it afterwards appears that his contract *qua* manager is not enforceable, in which case the court would order conveyance of the transferor's interest, even though it could not have been separately transferred.[6] But in such cases, the coparcenary interest is transferred, not under the contract, though because of it, but as a matter of equity, that he who makes a representation must make it good to the extent he can. As regards the contracts of other coparceners, it is clear that those who are not disqualified to alien their interest, are equally not disqualified to contract for its alienation; but others may profess to transfer or agree to transfer their interest, in which case, the question would be whether they are liable for their breach of contract. A decree for damages, in the first instance, followed up by sale of their interest in execution, is then one relief possible to the alienee. The circumstances giving the obligee the right to recover damages belong to the domain of contracts, and cannot be discussed here.

(1) *Juggunnath* v. *Doobo*, 14 W.R. 80.
(2) *Sri Thakurji* v. *Nanda Ahir*, 43 A. 560 (562).
(3) Cf. *Sarju Prasad* v. *Ramsaran*, (1931) A. 541 (545); *Ghasitey* v. *Har Prasad*, 1937 A. 99.
(4) *Kali Shankar* v. *Nawab Singh*, 31 A. 507.
(5) S. 27 (*c*), Ill. (2), Specific Relief Act; *Bhagwan* v. *Krishnaji*, 44 B. 967 (971); *Subha* v. *Venkatrani*, 38 M. 1187; *Narayana* v. *Muthiah*, 47 M. 692 (Liability of minors in a trading firm).
(6) *Shama Charan* v. *Kumed Dasi*, 42 I.C. (C.) 378; *Kasuri* v. *Ivamiry*, 26 M. 74; *contra* in *Bappu* v. *Anna Malai*, (1923) M. 313.

1111. Involuntary transfer.—These variations only refer to voluntary alienations. They have no application to an involuntary transfer since a corparcenary interest like any other property, may be attached and sell in execution of a decree against a coparcener and the purchaser thereupon acquires the same right to enforce a partition as his vendor had in the joint property.[1] But this he can only do during the lifetime of the judgment-debtor,[2] unless he died after the attachment[3] or was the father, in which case, the pious obligation of the sons to pay their father's debt will entitle the purchaser to work out the rights which he has acquired by means of a partition.[4] But in any other case, the purchaser will, on the death of his vendor, lose the property and his money too.[5]

Explanation.

1112. The question whether such purchaser takes subject to any prior incumbrance created by the debtor depends upon the personal law of the debtor. In Bengal, Bombay, Madras and the Central Provinces where a coparcenary interest may be mortgaged, the purchaser would be naturally bound whether he had or had no notice of the incumbrance, which being valid, creates a right *in rem* enforceable against all subsequent transferees. But in the other Mitakshara country since such mortgages are invalid, it follows that they create no charge which can have priority over purchases at execution sales made *bona fide* and without notice of it.[6]

1113. In such a case the mortgagee's remedy is to obtain a decree upon his mortgage and to attach the interest in execution of his decree. Of course, in such cases the mortgagee will only rank as an attaching creditor but that is a contingency which he should have been prepared for when he took the mortgage.[7] Again, in a voluntary sale, the purchaser can insist upon the separation of his vendor's share so as to give him the property he had purchased, and if this is not effected, he may seize his other property on the principle of substituted security now embodied in S. 43 of the Transfer of Property Act or obtain compensation;[8] but in an involuntary sale, though he can insist upon the first, it is his only remedy; and if it is not possible to allot to him the property he had purchased, then he has no remedy against the judgment-debtor for either substituted property or compensation; because in a court sale there is no warranty of title, and the condition of sale applicable to such purchases is *caveat emptor*.[9]

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(1) *Deen Dyal* v. *Jug Deep*, 3 C. 198 (209) P.C.

(2) *Deen Dyal* v. *Jug Deep*, 3 C. 195 (209) P.C.; explained in *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (167) P.C.

(3) *Subrao* v. *Mahadevi*, 15 Bom. L. R. 848 : 21 I.C. 330; *Murugappa* v. *Ayyadoray*, 9 M.L.T. 96 : 9 I.C. 286; *Thadi* v. *Moola*, 16 M. L. T. 123: 24 I. C. 667. In *Banwari Lal* v. *Sheo Sankar*, 13 C.W.N. 815 : 1 I.C. 670, the death of the coparcener during the pendency of the suit was held to preserve the purchaser's equity.

(4) *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 P.C.

(5) *Madho Pershad* v. *Mehrban Singh*, 18 C. 157 (163, 164) P.C.

(6) *Balagobind* v. *Narainlal*, 15 A. 339 P.C.

(7) *Balgobind* v. *Narainlal*, 15 A. 339 (351, 352) P.C.; *Bhagammal* v. *Chandi Singh*, 14 C. 295: 13 I. C. 46, but see *Rash Behary* v. *Jaiperesh*, (1934) Pat. 21 (no attachment necessary).

(8) *Sabapathi* v. *Thandavaroya*, 43 M. 309 (311); *Rangayya* v. *Subramania*, 40 M. 365 F.B.; *Manjaya* v. *Shanmuga*, 38 M. 684; *Ayyagari* v. *Ayyagari*, 25 M. 690 F.B.

(9) *Subapathi* v. *Thandavaroya*, 43 M. 309 (311).

1114. Cancellation of Alienation.— As a coparcener's alienation is not void, but only voidable by his other coparceners, no outsider can sue to set it aside or question it.[1] Even of the other coparceners, those who have expressly, or impliedly, consented to the alienation are estopped from disputing it.[2] A coparcener born at the time of the alienation as well as one born subsequently to it, are both equally entitled to sue to set it aside. But the court will grant relief subject to the equities of the purchaser. Where, therefore, the alienation is set aside, the court should order that the property should be possessed in defined shares and the shares of the transferor should be subject to the lien of the transferee for the return of the purchase money, on the ground that the coparcener must make his share available for payment of his just dues and fulfilment of his obligations.[3] But being worked out in his suit[4] he is merely entitled to a declaration of his right for the severance of which he must institute a suit for general partition.[5] But by his purchase, he acquires merely an equity and no interest in that property.[6] He cannot, therefore, obtain even joint possession.[7] A coparcener mortgagor who afterwards becomes the sole coparcener cannot avail himself of the right of other coparceners to challenge his mortgage on the ground of want of legal necessity.[8] An alienation not in conformity with the provisions of this section is wholly void and can be set aside even by the alienor.[9] Where a member of a joint Mitakshara family executes a deed of sale in respect of a joint property, his coparceners who were not parties to the deed, would be entitled to maintain a suit for recovery of possession within 12 years from the time when the alienee took possession of the property.[10]

Limitation.

A sale in excess of his share by the father or manager is not void, but merely voidable at the instance of other coparceners. (§ **1114.**) They are consequently entitled to mesne profits only from the date of the repudiation or of their suit for avoiding the transfer.[11]

1115. The head of a joint Mitakshara family mortgaged in 1886 property belonging to the joint family, but neither for legal necessity nor to pay an antecedent debt. In 1888 the mortgagor sold the same property to a third person. The purchaser remained in possession for

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(1) *Madan Lal* v. *Chiddu*, 53 A. 1; *Kharag Narain* v. *Janki*, 16 Pat. 230 (alienor cannot challenge it.)

(2) *Mania (Mt.)* v. *Bhagwatti*, (1936) A. 557.

(3) *Banwar* v. *Sheo Shankar*, 13 C. W. N. 815: 1 I. C. 670; *Ram Sundar* v. *Barham Deo*, 14 C.W.N. 552: 2 I. C. 986.

(4) *Subramania* v. *Padmanabha*, 19 M. 267; *Iburamsa* v. *Thiruvenkatasami*, 34 M. 369; *Subba Goundan* v. *Krishnamachari*, 45 M. 449 (460).

(5) *Deen Dayal* v. *Jugdeep*, 3 C. 198 P.C.; *Suraj Bansi* v. *Sheoprasad*, 5 C. 148 P.C.; *Hardi Narain* v. *Urdeb Perkash*, 10 C. 626 (P.C.) explained in *Subba Goundan* v. *Krishnamachari*, 45 M. 449 (460, 461); *Kandasamy* v. *Velayutha*, 50 M. 320; explaining *Ramasami* v. *Venkatarama*, 46 M. 815; *contra* in *Sourimuthu* v. *Pavadai*, 49 M. L. J. 679 dissented from.

(6) *Manjaya* v. *Shanmuga*, 38 M. 684.

(7) *Pandu* v. *Goma*, 43 B. 472.

(8) *Bharat Singh* v. *Jeobodh Lal*, (1934) A. 891; *Kharag Narain* v. *Janki*, 16 Pat. 230.

(9) *Lachman Prasad* v. *Sarnam Singh*, 39 A. 500 (505) P.C., following *Madho Pershad* v. *Mehrban Singh*, 18 C. 157 (163) P.C.; *Balwant Singh* v. *Clancy*, 34 A. 296 (306) P.C.; *Puttoo Lal* v. *Raghubir*, (1933) O. 535 (539).

(10) *Banwari* v. *Sheo Shanker*, 13 C. W.N. 815 : 1 I.C. 670.

(11) *Bhirgu Nath* v. *Narasingh*, 39 A. 61; followed in *Subhe Goundan* v. *Krishnamachari*, 45 M. 449.

more than twelve years, when the mortgagees instituted a suit for sale on their mortgage. It was held that in view of the fact that the purchaser had acquired a title to the property by adverse possession as against all the members of the family, it was open to him, notwithstanding that his title was originally acquired from the mortgagor alone, to set up as a defence the invalidly of the mortgage.[1]

It is said that the fact that one son has unsuccessfully impeached his fathers's alienation does not deprive the other sons of their right to question it.[2] There can be no *res judicata*, because the sons do not claim under one and the same title but under an independent title of their own. But if the principle that such suits must be regarded as representative suits, as held by the Privy Council in the case of reversioners, be held to apply equally to coparceners[3] then it is difficult to see why a son's suit should be viewed in any other light.

Right of coparcener's alienee.

127. (1) On an alienation of a coparcener's interest, voluntary or involuntary, made in conformity with the provisions of the last section, the alienee becomes entitled to the right, title and interest of his alienor, accommodated to the nature of the alienation made and the alienor's interest, then; and thereafter subject to the rights of other coparceners.

(2) Without prejudice to the generality of the above provisions, the general rights acquired by the alienee are as follows:—

(*i*) He may call for a general partition requiring that the share alienated to him be allotted, if possible, to his alienor and the same transferred to him;[4]

(*ii*) He may obtain a declaration of his right and may enforce it by way of specific performance of a contract to transfer against his alienor and also damages against him, but the right being personal can only be enforced against the alienor personally, and lapses on his death.[5]

(*iii*) The alienee's interest is unaffected by any variation in his alienor's share by the subsequent birth or death of another coparcener;[6]

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(1) *Muhammed* v. *Mithu Lal*, 33 A. 783 F.B.

(2) *Bhup Kunwar* v. *Balbir*, 44 A. 190 (197).

(3) *Venkatnarayana* v. *Subbamal*, 38 M. 406 P.C.; followed in *Kesho Prosad* v. *Sheo Pergash*, 44 A. 19.

(4) *Byjnath* v. *Ramoodeen*, 21 W. R. 233 P.C.; *Mukund* v. *Balkrishna*, 52 B. 8 P.C.; *Mhd. Afzallchan* v. *Abdul Rahman*, 13 L. 702 P.C.; *Udaram* v. *Ranu*, 11 B.H.C.R. 76; *Mararrao* v. *Sitaram*, 23 B. 184; *Shivmurtappa* v. *Virappa*, 24 B. 128; *Ishrappa* v. *Krishna*, 46 B. 925; *Venkatarama* v. *Meera*, 13 M. 275; *Palani* v. *Masalcoman*, 20 M. 243; *Manjaya* v. *Shanmuga*, 38 M. 684; *Shyam Sunder* v. *Jaganath*, 2 Pat. 925.

(5) *Mahabalya* v. *Timaya*, 12 B.H.C.R. 138; *Babaji* v. *Vasudev*, 1 B. 96; *Kallapa* v. *Venkatesh*, 2 B. 676; *Dugappa* v. *Venkatramanaya*, 5 B. 495; *Balaji* v. *Ganesh*, 5 B. 499 (503); *Bhau* v. *Budha*, 50 B. 204; *Bhagwan* v. *Krishnaji*, 44 B. 907 (Contract specifically enforced even on the death of the contracting coparcener).

(6) *Chinna Pillai* v. *Kalimutiu*, 35 M. 47 F.B.; *Naro Gopal* v. *Paragauda*, 41 B. 347 (354); *contra* in *Gurlingapa* v. *Nandapa*, 21 B. 797 (805) dissented from.

(*iv*) **The alienee may attach his alienor's interest in execution of his decree obtained against him, and the right is enforceable against the survivors in case of his alienor's death, but should the latter die before the attachment no cause of action survives to the alienee against the alienor's surviving coparceners;**[1]

(*v*) **The alienee's equity is not enforceable against a *bona fide* transferee without notice of it.**[2]

Illustrations.

(*a*) *A* sells 2 26 acres of his land to *B*, out of 4 52 belonging to him and *C*. *A* died. *B* can sue *C* for partition of the 4.52 acres and claim the allotment to *A's* share, in the specific land that he had purchased.[3]

(*b*) A coparcener mortgages his undivided share to *B*, after which there is a general partition. Since *B* was not then entitled to possession of *A's* share, he has no present equity to come into the partition, but must wait till he has foreclosed *A*, after which he can claim what property *A* has obtained on the principle of substituted security.[4]

(*c*) *A* borrows Rs. 1,000 from *B*, for which *B* obtains a decree. In execution, *B* attaches half of *A's* undivided share in a coparcenary. *A* dies. *B* can bring the attached share to sale, though his unattached half will devolve on his surviving coparceners.[5]

(*d*) But in the last case if *A* dies before the attachment, *B* cannot follow up his share, in the hands of *A's* survivors.[6]

1116. Analogous Law.—This section is drawn from the cases. It rests on no text of Hindu Law, but on the equitable doctrine that a coparcener's undivided interest is specific, existing and definite,[7] and its purchaser for value should be allowed to stand in his vendor's shoes and work out his rights by a partition.[8] Strictly speaking, such alienation is inconsistent with the strict theory of coparcenership, though the obvious equity in favour of the transferee for value has relaxed the rule and established an exceptional doctrine, in favour of the alienee, which following the general law of transfer, divests the coparcener of his interest in the coparcenary and vests it in his alienee. The transferor's

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(1) *Deen Dyal* v. *Jugdeep*, 3 C. 198 P.C.; *Suraj Bunsi Koer* v. *Sheo Pershad*, 5 C. 148 P.C.; *Madho Pershad* v. *Meherban Singh*, 18 C. 157 (162, 163) P.C.; *Udaram* v. *Bannu*, 11 B.H.C.R. 76; *Vithal Das* v. *Nand Kishore*, 23 A. 106; *Tagirchand* v. *Sant Lal*, 48 A. 1 (Attachment before judgment suffices); *Sankaralinga* v. *Official Receiver*, 49 M.L.J. 616: (1926) M. 72; contra *Subrao* v. *Mahadevi*, 38 B. 105; *Laxman* v. *Vinayak*, 40 B. 329; *Sundarlal* v. *Roghunandan*, 3 *Pat.* 250 (unless the debtor was the father, grandfather or the great-grandfather).

(2) S. 40, Transfer of Property Act.

(3) *Aiyyagari* v. *Aiyyagari*, 25 M. 690 F.B.

(4) *Byijnath* v. *Ramoodeen*, 21 W. R. 233 P.C. *Md. Afzal Khan* v. *Abdul Rahman*, 13 L. 702 P.C.; *Jiswarsa* v. *Gunwant Rao*, 31 N. (Supp.) 124: (1936) N. 34 (37).

(5) *Suraj Bunsi Koer* v. *Sheo Persad*, 5 C. 148 P.C.

(6) *Ib.*

(7) *Taffuzzool Hoosein* v. *Raghoonath*, 14 M.I.A. 40 (50).

(8) *Deedyal* v. *Jugdeep Narain*, 3 C. 198 P.C., followed in *Hardi Narain* v. *Ruder Perkash*, 10 C. 626 (636) P.C.; *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265 (268).

subsequent death cannot divest what has already vested.[1] But the question arises whether the enlargement of the coparcener's share by the death of a coparcener would accrue to the alienee as an accretion to his interest.[2] If so, it would logically follow that the coparcener's mimunition of his interest by the subsequent birth of a coparcener should equally diminish the alienee's interest. That the alienee's interest is fixed and immutable from the date of the alienation, and is not fluctuating has been held by the Privy Council,[3] but the mode of its acquisition must necessarily vary according to the nature of his transfer, and procedure he has to adopt to enforce it. If the transfer to him is an out and out sale, he can enforce it by partition that his alienor had the right to do. If it is a mortgage, he has no present right for partition, but may acquire after foreclosure or sale.[4]

1117. "The law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition."[5] This right is however determined by the death of the alienor before partition,[6] and the quantum of interest transferred is taken as that of the alienor at the date of the assignment[7] but, nevertheless, the right the alienee possesses is not a specific right but is in the nature of an equity which can only be enforced on a general partition which the alienee is entitled to sue for,[8] but it is said that if he is negligent and in the meantime his coparcener's interest diminishes by the birth of another, or other coparceners, he must content to take what his alienor had the right to receive on the date of partition.[9] So far as the alienor is concerned, he does not, before partition, cease to be a member of the coparcenership[10] but continues to retain all the rights which attach to his membership including the right to the variation of his share by the birth or death of another member. It has been so held in Bombay, but in Madras, his share is held

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(1) *Rangasami* v. *Krishnayya*, 14 M. 408 (419) F.B.; followed in *Aiyyagari* v. *Aiyyagari*, 25 M. 690 (700) F.B.; *Chinna Pillai* v. *Kalimuthu*, 35 M. 47 (53) F.B.; *Narayan* v. *Sankar Sah*, 53 M. (16) F. B.; *Sivaram Murti* v. *Venkayya*, 57 M. 667; *Naro* v. *Paragauda*, 41 B. 347 (354, 355).

(2) *Suraj Bunsi Koer* v. *Sheo Pershad*, 5 C. 148 P.C.

(3) *Ib.*

(4) *Byijnath* v. *Ramoodeen*, 1 I. A. 106: 21 W.R. 233 P.C.; *Mhd. Afzal Khan* v. *Abdul Rahman*, 13 L. 702 P.C.; *Jinwarasa* v. *Gunwant Rao*, 31 N. (Supp.) 124: (1936) N. 34 (37).

(5) *Suraj Bunsi Koer* v. *Sheo Pershad Singh*, 5 Cal. 148 (166, 167) P. C.; *Deen Dyal* v. *Jug Deep Narain*, 3 C. 198 (208) P.C.

(6) *Ib.*, pp. 167, 168; *Madho Parshad* v. *Mehrban Singh*, 18 C. 157.

(7) *Pandurang* v. *Bhaskar*, 11 B. H. C.R. 72; *Naro* v. *Paragauda*, 41 B. 347 (254); *Gurlingappa* v. *Ramappa*, (1931) B. 218; *Rakhal Das* v. *Indubala*, (1936) C. 126; *Aiyyagari* v. *Aiyyagiri*, 25 M. 690 F.B.; *Yelumalai* v. *Srinivasa*, 29 M. 294; *Chinnu* v. *Kalimuthu*, 35 M. 47 F. B.; contra *Sathapathier* v. *Sivanarayana*, 56 M. 534 (545); *Ganpatrao* v. *Kanhayalal*, 30 N. 149; *Jinwarsa* v. *Gunwant*, 31 N. (Supp.) 124; *Ram Kisan* v. *Damodhar*, (1934) N. 108.

(8) *Gurlingapa* v. *Nandapa*, 21 B. 797; *Naro* v. *Paragowda*, 41 B. 347; *Hanmandas* v. *Valabhdas*, 43 B. 17; *Gonjakarta* v. *Nobinchandra*, 20 C.W.N. 675: 36 I.C. 294.

(9) *Naro Gopal* v. *Paragauda*, 41 B. 347 (354).

(10) *Manjaya* v. *Shanmuga*, 38 M. 684 (692); followed in *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265 (268); *Venkatarao* v. *Tulija Ram Rao*, (1917) 3 M.W.N. 30: 34 I.C. 794.

to be fixed and is not liable to such variation.[1] But it is even there conceded that the purchaser has a mere equity and does not acquire any right *in rem* thereby becoming a tenant-in-common with the other members and so acquires a right to joint possession[2] or to any mesne profits in respect of his share for the period between the date of his purchase and the date of his suit for partition.[3] If the alienee has been put in possession of any specific property, it is open to the other members to eject him,[4] if necessary, though in Bombay, the court is not bound to turn him out if, while decreeing joint possession or otherwise, the right of the other coparceners can be safeguarded.[5] So it may order that the property should be possessed in defined shares, and the share of the transferor should be subject to the lien of the transferee for the return of the purchase-money, on the ground that the coparcener must make his share available for payment of his just dues and in fulfilment of his obligation.

The question whether a purchaser can, pending his suit for partition, claim joint possession with the other coparceners has been the subject of decisions both by the Bombay and the Madras High courts. That if the purchaser is not a relation but a stranger, the question of joint possession is out of the question, but if he was in possession of the whole, and a coparcener sued to eject him therefrom, the court would maintain *status quo* declaring the purchaser in possession as a tenant-in-common, pending a partition by the other coparcener.[6] But the question is one of procedure and judicial discretion and the court in Madras would, in such a case, require the alienee to sue for partition and combine the two suits and grant appropriate relief.[7]

It has been stated that the alienee takes subject to the other equities to which he might be found liable. As such, the alienee of one of the sons was held liable to pay out of the property the alienor's debt *qua* son of his father, which takes precedence of the son's right of partition.[8] The purchaser's claim, being equitable, it will only be decreed subject to the other equities that may claim priority, but the nature and measure of which must depend upon the circumstances of each case. As a rule, the purchaser is not entitled to mesne profits between the date of his purchase and the date of his suit for partition.[9]

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(1) *Iburamsa* v. *Theruvenkatasami*, 34 M. 274; *Chinna Pillai* v. *Kalimuthu*, 35 M. 47 F.B., (*contra* in *Rangasami* v. *Krishnayyan*, 14 M. 408 F.B.); followed in *Sathapathiar* v. *Sivanarayana*, 56 M. 534 (545); *Manjaya* v. *Shanmuga*, 38 M. 684 (692); *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265 (268); dissenting from *Aiyyagari* v. *Aiyyagari*, 25 M. 690 (698); *Subba Rao* v. *Anantha-narayana*, 23 M.L.J. 64, as *obiter dicta*; *Jinwarsa* v. *Gunwanrao*, 31 N. (Supp.) 124: (1936) N. 34.

(2) *Pandu* v. *Goma*, 43 B. 472; *Kota Balabhadra* v. *Phetra Doss*, 31 M.L.J. 275: 37 I.C. 168; *Audimula* v. *Alamelammal*, (1936) 2 M. W. N. 115: 36 I.C. 365; *Gurlingappa* v. *Nandapa*, 21 B. 797 (802); *Naro* v. *Paragauda*, 41 B. 347

(3) *Maharaja of Bobbili* v. *Venkata* (354).

ramanjulu, 39 M. 265; following *Manjaya* v. *Shanmuga*, 38 M. 648 (692).

(4) *Rajaram* v. *Luchmun*, 8 W.R. 15; *Ramkishore* v. *Jainarayan*, 40 C. 966 (980) P.C., explained in *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 266 (269); *Banwari Lal* v. *Sheo Shankar*, 13 C. W.N. 815: 1 I.C. 670; *Bhau* v. *Budha*, 50 B. 204 (210).

(5) *Bhau* v. *Budha*, 50 B. 204 (209, 210).

(6) *Bhau* v. *Budha*, 50 B. 204 (211).

(7) *Kandasamy* v. *Velayutha*, 50 M. 320.

(8) *Venkureddi* v. *Venkureddi*, 50 M. 535 (540) F.B.; *Narayan* v. *Nathaji*, 28 B. 201 (208).

(9) *Maharaja of Bobbili* v. *Venkata*, 39 M. 265; *Trimbak* v. *Pandurang*, 44 B. 621.

1118. It should not make an unconditional decree for the purchaser's ejectment.[1] But if the alienor dies before the alienee's suit on his equity, he loses his remedy since his share passes by survivorship to the other co-sharers;[2] and no suit for specific performance of a contract entered into by one deceased member can be enforced against the surviving members.[3] Since the purchaser is only entitled to an equity, it has been held that no suit will lie against the vendor for specific performance of his contract of sale of his undivided co-parcenary interest;[4] but that the court would decree specific performance if his interest is severed and it is the only means of making him fulfil his contract.[5] If this is not possible the purchaser would nevertheless be entitled to recover damage for the breach of contract,[6] which is his only relief if, for any reason, he fails to obtain the specific item of property sold to him and which the court is unable to allot to his alienor.[7] In order to preserve his right the alienee is entitled to sue for a declaratory decree.[8] But if it is possible to work out the alienee's equity in the coparcener's suit to set aside his alienation, the court will not drive the alienee to another suit. So where the plaintiff, the sole surviving coparcener, sued for setting aside an alienation made by another and it appeared that the quantum of alienation was less than the alienor's share in the family property at the time of the alienation, the court dismissed the suit, holding the alienee entitled to retain the property sold to him.[9]

In the alienee's suit for partition, the court is not bound, nor is it indeed entitled to force a general partition. All it has to do is to carve out the share of the alienee,[10] unless a general partition is desired and asked for by all concerned;[11] but so far as the alienee is concerned, he is bound to apply for the separation of his share, if necessary by a general partition.[12] Where, however, the coparcener was divided in status and was enjoying the profits of his share, his alienee would be entitled to claim the same profits from his alienor's other coparceners as from the date of his alienation to him.[13]

1119. Effect of Attachment.—As to the effect of an attachment before and after a decree, it has been held that, if the attachment was made before judgment,

Clause (2) (ii).

(1) *Banwari Lal* v. *Sheo Shankar*, 13 C.W.N. 815: 1 I.C. 670 (674); *Iswardhari* v. *Narsingh*, 1 I.C. (C.) 899.

(2) *Madho Prasad* v. *Mehrban Singh*, 18 C. 157 P.C.; *Jaganatha* v. *Shama Pandey*, 18 I.C. (C.) 819; *Banwari Lal* v. *Sheo Shankar*, 13 C.W.N. 815: 1 I.C. 670 (676) (where coparcener dies after the purchaser's suit, the purchaser's equity stands good); *Jwala Prasad* v. *Udai Nath*, (1917) Pat. 27: 37 I.C. 184.

(3) In *Nochat* v. *Kallor Ali*, 3 M.L.W. 435: 33 I.C. 696, it was conceded that specific relief would only be given if the contract was found necessary or beneficial.

(4) *Janki Nath* v. *Jamini Kanta*, 22 I.C. (C.) 612.

(5) *Shama Charan* v. *Kumad Dasi*, 27 C.L.J. 611: 42 I.C. 378; *Surja Prasad* v. *Raj Mohun*, 13 C.W.N. 281: 4 I.C. 92; *Mohunt Ram* v. *Barban Deo*, 14 C.W.N. 562: 2 I.C. 986.

(6) *Abdul Rahman* v. *Gadunandan*, 18 C.L.J. 344: 21 I.C. 528; *Gadhu Nandan Singh* v. *Abdul Rahman*, 16 C.W.N. 93: 11 I.C. 892.

(7) *Dhada Sahib* v. *Mahamed Sultan*, 44 M. 167.

(8) *Kota Balabadra* v. *Khetra Doss*, 16 M.L.T. 229: 25 I.C. 401 O.A.

(9) *Ramaswami* v. *Venkatarama*, 46 M. 815.

(10) *Murarrao* v. *Sitaram*, 23 B. 184 (187).

(11) *Shivmurteppa* v. *Virappa*, 24 B. 128 (130).

(12) *Udaram* v. *Ranu*, 11 B.H.C.R. 76; *Shivmurteppa* v. *Virappa*, 24 B. 128 (135).

(13) *Sivaramamurthi* v. *Venkayya*, 57 M. 667.

followed up by a decree in the coparcener's lifetime, it is a question whether, on the subsequent death of the judgment-debtor, his interest would pass to the survivors. According to the Bombay and Patna Courts it does,[1] but in a later case of the Patna High Court relating to a mortgage, it was held to be a charge and as such continued even after the coparcener's death,[2] and according to the Madras Court the death of the coparcener makes no difference, and attachment before judgment serves the purpose of an attachment in execution of the decree, since no fresh attachment is then necessary.[3] It is submitted that the latter view is sound, since all that the law requires is that the share should have been attached, which gives the decree-holder a right to prosecute his remedy against the property attached.

1120. **Right to Partition.**—The coparcener has an indefeasible right of partition[4] out of which he may contract himself only to the extent set out elsewhere.[5]

Clause (3).

128. (1) **The normal state of a Hindu family is one of jointness in mess and estate.**[6]

Presumptions re-joint family and joint property.

(2) As such, it may be presumed that—

(a) such family continues to remain joint until the contrary is shown;[7]

(b) where any property is shown to have been once joint family property, it remains joint until the contrary is shown;[8]

(c) where there is a nucleus from which property may be acquired, any property acquired with its aid by a member is joint property;[9]

(3) Provided that no presumption referred to in the last clause shall be made where it is admitted or proved that there has been separation from the joint family.

(4) There is no presumption that a family because it is joint, possesses joint property, and the burden of proving that any property in possession of a coparcener is joint lies upon him who asserts it.[10]

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(1) *Subrao* v. *Mahadevi*, 38 B. 105; *Laxman* v. *Vinayak*, 40 B. 329; *Sundarlal* v. *Raghunandan*, 3 Pat. 250 (256) (case *obiter*, as court found that there was no attachment; still relied on Or. XXXIV, R. 10, Civil Procedure Code).

(2) *Rash Behari* v. *Jaipercash*, (1934) Pat. 21.

(3) Or. XXXIV, R. 1, Civil Procedure Code; *Baiher Krishna* v. *Lakshmana*, 4 M. 302 (307); *Muthusami* v. *Chinnammal*, 26 M.L.J. 517: 24 I.C. (M.) 320; *Thadi Ramamurthi* v. *Moola Kamial*, 24 I.C. (M.) 667; *Sankaralinga* v. *Official Receiver*, 49 M.L.J. 616: 92 I.C. 504: (1924) M. 72; cf. *Raj Chunder* v. *Isser Chunder*, (1865) Bourke (O.C.) 139, followed in *Ganu Singh* v. *Jangi Lal*, 20 C. 531 (535).

(4) *Mukund* v. *Balkrishna*, 52 B. 8 P.C. and cases cited in f.n. under the clause, *supra*.

(5) Gour's Law of Transfer (6th Ed.), §§ 415-417.

(6) *Neelikisto* v. *Beerchunder*, 12 M. I.A. 522 (540).

(7) *Deo Narain Singh* v. *Agya Ram*, 101 I.C. 249 P.C.: (1927) P.C. 52.

(8) *Deo Narain Singh* v. *Agya Ram*, 101 I.C. 249 P.C.: (1927) P.C. 52; *Deo Denonath* v. *Hari Narain*, 12 Bom. L.R. 349.

(9) *Anand Rao* v. *Vasant Rao*, 5 C.L. J. 338 P.C.; *Lall Bahadur* v. *Kanhaiyalal*, 29 A. 244 (254, 255) P.C.

(10) *Shadi Lal* v. *Lal Bahadur*, (1933) P.C. 85 (87).

Explanation.—**The presumption arising under this section may extend to the property standing in the name of the female members of a joint family in the circumstances stated in the next section.**

1121. Analogous Law.—This section states two propositions: (*i*) that the normal state of a Hindu family is one of jointness, and (*ii*) that, consequently, all property possessed by it is presumably joint. Both these propositions are based upon the consensus of authorities.[1] They are both merely rules of evidence, creating merely as they do presumptions of jointness in mess and estate which may be rebutted by any one asserting the contrary. This presumption applies to every Hindu family whether subject to the Mitakshara or the Dayabhag school.

1122. It has already been seen that the unit of a Hindu society is a family, and that term, however elastic and at times misleading though it be, has become a definite concept which enters largely into the discussion of all legal questions relating to property and status. It has already been the subject of a previous discussion. Taking the term "family" in its narrower sense, there can be no doubt that its normal state of existence is one of jointness in mess, worship and estate.[2] The family being thus in every respect joint, all that appertains to it is *prima facie* held in common. This being the rule it gives rise to several presumptions which are, however, all reducible to the two main presumptions set out in Clauses (2) and (4).

1123. The presumption in the fourth clause is a qualified one and does not necessarily flow from the very jointness of the family, since a family may be joint and yet it may possess no property of its own.[3] But if it possesses any joint property the law presumes that all acquisitions made with its aid are also joint property,[4] and the burden of proving that any portion of that property is separate or self-acquired is on the person who alleges it.[5] Clause (1) is taken from a judgment of the Privy Council

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(1) *Riwun Persad* v. *Radha*, 4 M.I.A. 137 (168); *Naragunty* v. *Vengama*, 9 M.I.A. 66 (92); *Cheetha* v. *Miheen Lali*, 11 M.I.A. 369; *Kattama* v. *Rajah of Sivaganga*, 9 M.I.A. 539; *Neelkisto* v. *Beer Chunder*, 12 M.I.A. 523 (540); *Prit Koer* v. *Mahadeo*, 22 C. 85 (89) P.C.; *Bilash Konwar* v. *Bhawanee*, (1864) W.R. 1; *Prawnath* v. *Kashinath*, (1864) W.R. 169; *Beer Narain* v. *Teencowria*, 1 W.R. 316; *Neelmoney* v. *Ganga Narain*, 1 W.R. 334; *Muonye* v. *Lomun*, 2 W.R. 288; *Bissumbhur* v. *Suorodhuny*, 3 W.R. 21; *Bipropershad* v. *Kenadeyee*, 5 W.R. 32; *Bhurmchand* v. *Rajmohishee*, 5 W.R. 145; *Treelochun* v. *Raj Kishen*, 5 W.R. 214; *Lukhun* v. *Modheemoolkhee*, 5 W.R. 278; *Sreenath* v. *Monmohini*, 6 W.R. 35; *Seoratan* v. *Gour Behari*, 7 W.R. 449; *Radham* v. *Phoolkoomaree*, 10 W.R. 28; *Govindnath* v. *Govind Chunder*, 10 W.R. 393; *Dharoo* v. *Court of Wards*, 11 W.R. 336; *Konjbeharee* v. *Gyadeen*, 11 W.R. 361; *Parreelal* v. *Bukhoreelal*, 12 W.R. 124; *Brijnath* v. *Srigopal*, 12 W.R. 468; *Shib Pershad* v. *Gangamonee*, 16 W.R. 291; *Indercomar* v. *Doolal*, 18 W.R. 258; *Drobo* v. *Tarachand*, 18 W.R. 459; *Tarnakchunder* v. *Jodeshur*, 19 W.R. 178; *Babulal* v. *Tuma*, 22 W.R. 116; *Bhugobutty* v. *Domun*, 24 W.R. 365; *Shushee Mohun* v. *Aukilchandei*, 25 W.R. 232; *Gane* v. *Kane*, 4 B.H.C.R. (A.) 169; *Mancha* v. *Narotamdas*, 6 B.H.C.R. (A. C.) 1; *Cassumbhoy* v. *Ahmadbhoy*, 12 B. 280 (309); *Parbutty* v. *Sudabut*, 2 Hay 316; *Nundram* v. *Chotoo*; 1 Agra 255.

(2) *Neel Kisto* v. *Beerchunder*, 12 M.I.A. 523 (540).

(3) *Shadi Lal* v. *Lal Bahadur*, (1933) P.C. 85 (87).

(4) *Denonath* v. *Hurry Narain*, 12 B.L.R. 349; *Gobind Chunder* v. *Doorga Persaud*, 14 B.L.R. 337.

(5) *Dhurm Das* v. *Shama Soondri*, 3 M.I.A. 229; *Gopee Krist* v. *Gunga*

which has since been affirmed in several cases. Delivering the opinion of their Lordships, Lord Chelmsford said: "The normal state of every Hindu family is joint. Presumably, every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things."[1] This rule was first stated by the Pandits to Sir Thomas Strange in 1807, and he re-stated it as follows: "With respect to the proof of disputed partition, though the law favours separation by which religious ceremonies are multiplied, it presumes joint tenancy as the primary state of every Hindu family; and this especially amongst brothers, it being most natural for such to dwell together in unity."[2]

Clause (2) (b) (c).

1124. Presumption of Union.—Assuming however, that a family is normal, and that as such, it is presumably joint, it does not thence follow that it has joint property since there is no presumption that every joint family necessarily possesses joint property.[3] Consequently, unless the nucleus of family property is admitted or proved,[4] the burden of proof of the existence of joint property lies on the claimant. The presumption in favour of the joint family does not obtain in the case of all property, and it is for the claimant to prove the property to be joint (Cl. 4). If, in any case, the plaintiff alleges that any property is joint property, it is for him to prove it, which he may do either by direct evidence proving that fact, or by the indirect evidence of establishing a nucleus and by the application of the rule of Hindu Law that whatever has been acquired with the help of the nucleus becomes impressed with its own character.[5] The question of jointness is not necessarily a question of fact, but may become a question of law if it has to be inferred from the proved facts of the case.[6]

The question arises what must be the value of the nucleus necessary to constitute all acquisitions, made by its aid, joint property. This subject will have to be presently considered.

Persad, 6 M.I.A. 53; *Naragunty* v. *Venkama*, 9 M.I.A. 66; *Prankishen* v. *Moothooramohan*, 10 M.I.A. 53; *Deo Narain* v. *Agya Ram*, 31 C. W. N. 533: 101 I.C. 249: (1927) P.C. 52; *Tara Churn* v. *Jog Narain*, 8 W.R. 226; *Lalla Sreedhur* v. *Lalla Madho Pershad*, 8 W. R. 294; *Prankisto* v. *Bhageerutee*, 20 W. R. 158; *Ram Ghulam* v. *Ram Behari*, 18 A. 90; *Gajender* v. *Sardar Singh*, 18 A. 176. *Johnstone (Mrs.)* v. *Gopal Singh*, 12 L. 546.

(1) *Neelkisto* v. *Beerchunder*, 12 M. I.A. 523 (540). To the same effect, *Naragunty* v. *Vengamma*, 9 M.I.A. 66; *Dhurm Das* v. *Shama Soondri*, 3 M.I. A. 229.

(2) 2 Str. H. L. p. 347; *Dhunookdharee* v. *Shama Sundari*, 3 M.I.A. 229; *Neelkisto* v. *Beer Chunder*, 12 M.I.A. 523 (540); *Radhika* v. *Dharma*, 3 B.L. R. (A. C.) 121; *Koonj Beharee* v. *Khetur Nath*, 8 W.R. 270; *Taruck Chunder* v. *Jodeshur*, 11 B.L.R. 193 overruling contra *Shiv Gulam* v. *Baram Singh*, 1 B.L.R. (A.C.) 164 and dissenting from *Khilut Chunder* v. *Koonj Lall*, 11 B.L.R. 194; *Sasbheddai* v. *Boolaram*, W.R. (S.N.) 57; *Dhunookdharee* v. *Ganpatlal*, 11 B.R. 201.

(3) *Shadilal* v. *Lal Bahadur*, (1933) P.C. 85.

(4) *Venkataramayya* v. *Seshamma*, I.L.R. (1937) M. 1012. *Sankaranarayana* v. *Tangeratna*, (1930) M. 662; *Satchidanandam* v. *Subbarazu*, (1930) M.W.N. 1016.

(5) *Trailokyanath* v. *Chintamoney*, 30 C.W.N. 588: 95 I.C. 426: (1926) C. 813; *Kamla Kant* v. *Madhoji*, 59 B. 573.

(6) *Amrit Rao* v. *Mukund Rao*, 53 I. C. 866 P.C.; followed in *Sahal Singh* v. *Salik Ram*, 44 A. 602.

Clause (1).

1125. The first clause states a rule expressed to apply only to a family living in a normal state, and one which is joint in all the three respects mentioned therein; that is to say, given a Hindu family of which nothing is known, the law will make the presumption stated in this clause. But such families do not give trouble in practice. The families that do are those which are not normal in the sense that they have severed in one or two of the three essentials of a normal union. For instance, they may have separated in mess or both in mess and worship and the question may then arise how far the presumption is then to prevail. It may be that the fortunes of the whole case depend upon the application of the presumption. The evidence on either side may be negligible or evenly balanced—upon what solid foundation is the court then to rest its decision? If it can be sure that, notwithstanding severance in mess and worship, there still exists a presumption, then it will have something to go upon. But there may be other facts equally destructive of that presumption. As pointed out by Sir Thomas Strange in a passage before cited, and followed by Nanabhai Haridas, J., in a considered judgment,[1] the strength of the presumption varies with the relationship of the parties concerned. The presumption that arises in favour of the brothers living in a state of union is very different to the presumption in favour of the union of cousins, and still less in favour of more distant relations. Then, again, it cannot be forgotten that the presumption of union as a whole is getting daily weaker by the very condition of modern society. As Carnduff, J., rightly observed in a passage already cited: "Jointness is, I imagine, becoming almost daily less and less the rule, and the presumption under consideration is, amid the changing conditions, and in response to the natural demands of a progressive society, steadily losing strength, in the sense that it is more and more rebutted as time advances. It may well be that it will disappear altogether some day, perhaps at no distant date."[2] The education of the people, the growth of intellectual pursuits and the opening of new avenues for the employment of individual enterprise are fast altering the old methods of living and the joint employment and enjoyment of property. But so long as the joint Hindu family continues to preponderate, there would be justification for the legal presumption, which should, nevertheless, be cautiously made, and it must be understood as subject to a counter-presumption which may arise from separate residence, separate messing and separate worship.[3]

1126. In considering then the value of such presumption, several facts are material, while on the other hand many facts are regarded as equally immaterial. So, for instance, where one party alleged jointness, and another separation, the fact that one member possesses a larger share of the family property than others, and the fact that such property has not been shown to be self-acquired, would be a material fact in supporting the case of union.[4] So on the other hand, the fact that members have for a considerable time possessed and enjoyed separate portions of the family property in equal shares would support the case of separation. In one

(1) *Moro* v. *Ganesh*, 10 B.H.C.R. 444 (468).

(2) *Ganpat* v. *Balmakund*, 18 C.L.J. 548 (549, 550); *Gannu Singh* v. *Bhagwati Koeri*, 3 I.C. (C.) 234.

(3) *Ram Prasad* v. *Lukhpati*, 30 C. 231 P.C.; *Banoo* v. *Khaseeram*, 3 C. 315 P.C.

(4) *Koyaloji* v. *Shiva*, (1888) B.P. J. 86.

case, where a brother born deaf and dumb had been for long treated as joint, the Privy Council held it to amount to no recognition of his jointness since such conduct could equally be ascribed to kindness.[1] (§ 1007.)

Mutation and Purchase in Separate Names.

1127. Immaterial Facts.—Revenue entries are relevant under S. 35 of the Evidence Act, but their evidentiary value depends upon circumstances.[2] For instance, since it is not uncommon to mutate names benami or in recognition of the right of maintenance or through mere affection or for luck, mutation of names by a person in favour of another does not amount to relinquishment of the property by one in favour of the other, nor can it be used as evidence of disruption of the joint family.[3] Of course, if such mutation is accompanied by any statements supporting the relinquishment, then they would be relevant as admissions from which relinquishment or even severance may be inferred. So again, the fact that the settlement was made with one member of the family would not negative the rights of other members to a participation in the property so settled, unless, of course, their right was then denied;[4] nor is it necessary for such other members, if living in commensality with the former as joint proprietors to prove that they actually contributed money towards the acquisition of the property.[5] Settlement entries, like the Collector's entries in the mutation register, are made for purposes of revenue and not of title, and they do not suffice to rebut the presumption of jointness or separation.[6] Where commensality is admitted, the mere use of one brother's name in documents relating to the property raises no counter-presumption of exclusive ownership in his favour,[7] nor is his separate possession any evidence of separate acquisition unless such separate possession can prove consent of the other sharers to his keeping a separate account.[8] So again where other facts prove jointness, the mere fact that a certain property was recorded separately in the name of a member is insufficiene to rebut that fact, since in such a case, it will be presumed that the purchase was made out of money derived from joint funds.[9]

(2) Separate Residence.

1128. So again, the mere circumstance that one of several brothers occupied a separate dwelling house would not of itself rebut the presumption of jointness.[10] But that it may have that effect was conceded by the Privy Council in a case in which it was said:

(1) *Muddun Gopal* v. *Khikinda*, 18 C. 341 (348).

(2) *Nageshwar* v. *Ganesha*, 42 A. 368 P.C.; *Gangabai* v. *Fakirgowda*, 54 B. 336 (341, 342).

(3) *Cheeta* v. *Miheen Lall*, 11 M.I. A. 369 (380, 381); *Chokhey Singh* v. *Jote Singh*, 31 A. 73 (79) P.C.; *Harnam Singh* v. *Lal Rudra*, 48 A. 529 P.C.; *Bhagwan Kunwar* v. *Mohan Singh*, (1925) P.C. 132: 88 I.C. 385; *Shibosoondery* v. *Rakhal Dass*, 1 W.R. 38; *Mun Mohinee* v. *Soodamonee*, 3 W. R. 31; *Bilash Koonwar* v. *Bhavanee*, (1864) W.R. 1; *Srichand* v. *Surajkuar*, 9 I.C. 146.

(4) *Yellappa* v. *Tippannah*, 53 B. 213 P.C.; *Annamalai* v. *Subramanian*, (1929) P.C. 1; *Srinivas* v. *Evalappa*, 45 M. 565 P.C.

(5) *Hurosoondaree* v. *Doorga Doss*, 16 W.R. 215.

(6) *Bhagwan Kunwar* v. *Mohan Singh*, (1925) P.C. 132 (137, 138).

(7) *Kishen Komulsingh* v. *Janokee*, 23 W.R. (F.B.) 31; *Deela Singh* v. *Troofanee*, 1 W.R. 307; *Gopal* v. *Jawand*, (1919) P.W.R. 30: 49 I.C. 1007.

(8) *Lalla Beharee Lall* v. *Lalla Madho Persaud*, 5 W.R. 69; *Runjeetsingh* v. *Madud Ali*, 3 Agra 222.

(9) *Anund Mohun* v. *Lama*, 1 Hay 374; *Mathab Bose* v. *Soodha*, 2 Hay 333; *Nuronath* v. *Goda Kolita*, 20 W.R. 342.

(10) *Belas Kore* v. *Bhawanee*, Marsh. 641.

"The cesser of commensality is only material to the determination of the issues in the cause, in so far as it removes or qualifies the presumptions which the Hindu Law might otherwise raise, that an acquisition made in the name of an individual son of the family was made by the head of the family and as part of the family estate."[1] Their Lordships then considered that fact along with others and considered their cumulative effect upon the case. Cesser of commensality is then an element which may properly be considered in determining the question whether there has been a partition of joint family property, though it is not conclusive.[2]

(3) Separation in Mess and Residence.

1129. Of course, of all the three facts of jointness, namely jointness, in mess, residence and estate, it often happens that parties usually commence their separation by taking up separate residence. This is necessarily accompanied by separation in mess. The question then arises what is the effect of such separation upon the normal presumption in favour of jointness. Does it neutralize it so far as to leave the party, alleging a jointness thereafter, to prove his case. It has been so held in a case in which the lower court had held the contrary. Adverting to it, the court said: "The Judge is also wrong in saying that no presumption whatever arises of a separation from the fact of an admitted separation in dwelling and food. We would observe that such separation, though not conclusive evidence of a separation in estate, would give rise in Hindu Law to a presumption of separation in estate."[3] And a similar view has been expressed by the Privy Council in the cases already cited.[4] Of course, in such a case it may be that the members have been forced to separate mess and residence owing to discords amongst the female relations which so often force upon the male members not only the course of separation in residence but separation altogether. The question of separate worship is seldom now raised, since the household goods of a family are usually divided upon severance of mess and residence, and even when it is not so, it is an index of least importance in considering the question of separation.

Separate Possession for a long time.

1130. In the foregoing discussion cases have been cited to show how far the court regards single facts such as separate entry in the mutation register, separate possession, and the like as insufficient to rebut the presumption in favour of jointness. These were also cases in which the testimony of those single facts was overborne by other facts which, made for a considerable period, have been held of themselves to destroy the presumption of jointness. So where the members lived apart for several years and during that time or for more than 12

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(1) *Anundee Koonwar* v. *Khedoo Lal*, 14 M.I.A. 412 (422) cited and followed in *Ganesh Dutt* v. *Jewach Thakurain*, 31 C. 262 (269) P.C.

(2) *Anundee Koonwar* v. *Kedoo Lal*, 14 M.I.A. 412, cited and followed in *Ganesh Dutt* v. *Jewach Takurain*, 31 C. 262 (269) P.C.

(3) *Jagun Kooer* v. *Raghoonundun*, 10 W.R. 148 (149); *Sherajooddeen* v. *Horelsingh*, 25 W.R. 116 (the judgment does not support the head-note).

(4) *Anundee Koonwar* v. *Khedoo Lal*, 14 M.I.A. 412 (422), cited and followed in *Ganesh Dutt* v. *Jewach Thakurain*, 31 C. 262 (269) P.C. In *Banee Madhab* v. *Bhagobutty*, 8 W.R. 270, mere separation in mess held insufficient.

years prior to the institution of a suit for partition, they were found to be in possession of portions of the originally undivided property in the assertion of titles mutually exclusive, the court held that such severance of enjoyment necessarily drew after it a severance of right.[1] This was conceded in a later case in which, however, it was pointed out that, though exclusive possession and enjoyment is cogent evidence of partition, it merely creates a presumption in its favour which may be rebutted by proving that it was due to a family arrangement[2] or convenience of management or enjoyment. But such arrangement if continued for 30 or 40 years would almost certainly be conclusive of a separation.[3] Certain descendants from a common ancestor commenced to live apart without any formal separation. About 11 years after, one of the parties to the separation sued the others for possession of some property in defendant's possession on the ground that it was joint property. The court held that the separation being admitted it was on the plaintiff to establish his allegation and that he could start with no presumption in his favour.[4]

1131. Possession is *prima facie* evidence of ownership.[5] But of course, such possession must be *prima facie* exclusive and exhaustive. In the case of joint families, however, the possession of one is the possession of all. Consequently, the presumption, arising from the separate possession of a single member, is neutralized by the counter presumption in favour of jointness. In such a case, therefore, if the plaintiff sues for a partition on the basis of joint property, he must establish his case.

Section 110. Evidence Act.

1132. Clause 2 (*a*) and (*b*) are merely consequential, and are supported by the authority of Phear, J., who said: "It is no doubt laid down in many cases that the normal condition of a Hindu family is joint; therefore, starting with the fact of a family being joint, it must be presumed to afterwards remain joint, unless some proof of a subsequent separation is given. Also that where property is shown to have been once joint family property, it is presumed to remain the joint property of all the members of the joint family, until something to the contrary is shown."[6]

Clause (2) (a).

This is in accordance with the principle of S. 114 of the Evidence Act which presumes a thing in accordance with probability. As such, the presumption is peculiarly strong in the case of the sons of one father,[7] but not so strong in the case of step-brothers, and it gets weaker with each degree of distant relationship. Where a party admits a partition on a

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(1) *Yellappa* v. *Tippanna*, 56 I.A. 13: (1929) P.C. 8; *Seshapa* v. *Igapa*, (1875) B.P.J. 37.

(2) *Atmaram* v. *Madhavarav*, (1880) B.P.J. 311.

(3) *Yellappa* v. *Tippanna*, 56 I.A. 13: (1929) P.C. 8 (10); following *Robinson* v. *National Trust Co.*, (1927) A.C. 515 (520); *Vijli* v. *Magan*, (1891) B.P.J. 44; *Vishnu* v. *Ramachandra*, (1883) B.P.J. 53; *Gurucharya* v. *Bhimacharya*, (1876) B.P.J. 241; *Surbussur* v. *Gossain Doss*, 17 W.R. 210.

(4) *Badul Singh* v. *Chuttur Dharee*, 9 W.R. 558; *Harish Chunder* v. *Nufur Chunder*, 9 W.R. 461.

(5) S. 110, Evidence Act.

(6) *Deo Narain Singh* v. *Agya Ram*, 101 I.C. 249: (1927) P.C. 52; *Shiv Golam* v. *Barran Singh*, 1 B.L.R. (A.C.) 164 (166); *Budha Mal* v. *Bhagwan Das*, (1886) P.R. 86.

(7) *Nageshar* v. *Ganesha*, 42 A. 368 P. C.

certain date, it lies on him who alleges a prior partition to prove it, the presumption being that the family was joint before the date of the alleged partition.[1]

Clause (2) (b).

1133. And as a necessary deduction, law equally presumes that not only the joint family, but its joint property continues joint, since the two go together and one cannot be separated without separating the other. But this is merely a presumption applicable to the property proved or presumed to be joint. Where, therefore, the common family house belonging to a joint undivided family having been long ago burnt down, each of the members occupied separate sites and erected their own buildings thereon, they were held to be the separate property of each.[2]

Clause (4).

1134. There is, of course, no presumption that a family, because it is joint, possesses joint property or that any property in possession of a member is presumably joint. Where, therefore, a Hindu father creates a mortgage, it is for the sons of the mortgagor to allege and prove that the property mortgaged by him was joint family property.[3]

Clause (3).

1135. No Presumption Where Separation Admitted.—The presumption of jointness with all its corollaries has however, no application where a separation is once admitted. So where the plaintiff sued on the allegation that his father and defendant had continued joint, while their brother separated from the family, the court held that a separation of the family being once admitted it was on the plaintiff to prove that notwithstanding this separation, his father had remained joint with the defendant.[4] As the Privy Council observed: "There is no presumption when one coparcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares in which the other coparceners are or would be entitled to, and in this sense, the separation of one is said to be a virtual separation of all."[5] But this does not mean that the separation of one member has necessarily the effect of the separation of all other members *inter se*.[6] As their Lordships point out, it may be so in many cases where it is necessary to fix the shares of other members, and then it may virtually amount to a separation of all. But it is submitted that even in such a case, there can be no separation without an intention to separate, and a mere hypothetical allocation of a share for mere computation can never amount

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(1) *Gobind Prasad* v. *Chattarbhuj*, 60 I.C. (Pat.) 482.

(2) *Gujjalapadi* v. *Gujjalapadi*, 11 M.L.T. 33: 13 I.C. 113.

(3) *Shadi Lal* v. *Lal Bahadur*, (1933) P.C. 85 (87).

(4) *Radha Churn* v. *Kripa Sindhu*, 5 C. 474; *Swamirayachari* v. *Heirs of Mudgalachari*, (1875) B.P.J. 40; *Somungowda* v. *Bhurmogodda*, 1 B.H.C.R. 43; *Gopal* v. *Khande Rao*, (1877) B.P.J. 328; *Maruti* v. *Vishvanath*, (1877) B.P. J. 347; *Uma Shankar* v. *Bai Ratan*, (1873) B.P.J. 217; *Badulsingh* v. *Chutterdharee*, 9 W.R. 558; *Bannoo* v. *Kashi Ram*, 3 C. 315; *Amirchand* v. *Ghasita*, (1882) P.R. 143; *Samdas* v. *Sahib Debi*, (1892) P.R. 140; *Vaidyanatha* v. *Aiyasamy*, 32 M. 191.

(5) *Balabux* v. *Rukhma Bai*, 30 C. 725 (736) P.C.; *Jatti* v. *Banwari Lal*, 4 L. 350 P.C.

(6) *Ranganatha* v. *Narayanasami*, 31 M. 482; *Babaji* v. *Dattu*, 38 B. 64; *Ramalinga* v. *Narayana*, 30 M.L.J. 255 P.C.

to anything more than a mere computation unless the allotment of the shares accompanies at least the intention giving the allottee the option to separate or continue joint.[1] But apart from this, the case is a clear authority for the view stated in clause (3), *viz.*, that where once any separation is admitted or proved, it suffices to destroy the general presumption of jointness and its consequential presumptions. But of course, that presumption is not displaced by the mere fact of a separation, when the question is whether the separation took place at a given time material to the case. Where for instance, the question was whether a person died separate or in jointness in 1886, proof of the fact that the members of his family were separate in 1896 would not displace the presumption of jointness ten years earlier.[2]

[For the effect of such separation on the general law of partition, see *post*, chapter on Partition.]

Clause (2) (c).

1136. As to clause 2 (c), Phear, J., in the case already cited, said: "But on the other hand, there is more than one case which lays down, that the single fact of a family living joint or in commensality, is not enough to raise a presumption in law that property acquired by one individual member of that family is joint property. To render it joint property, the consideration for its purchase must have proceeded either out of ancestral funds, or have been produced out of joint property, or by joint labour. But neither of these alternatives is a matter of legal presumption. It can only be brought to the cognizance of a court of Justice in the same way as any other fact, namely, by evidence. Consequently, whomsoever's interest it is to establish, he must produce the evidence."[3]

1137. It must, however, be noted that this distinction does not appear to have influenced the decision in some earlier cases, where the courts have gone the length of presuming joint ownership even without the proof of nucleus. So Couch, C. J., in one case said: "The presumption of law is that all the property, the family is in possession of, is joint property. The rule that the possession of one of the joint owners is the possession of all would apply to this extent that, if one of them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of a joint family."[4] He then referred to the judgment of Phear, J., on the necessity of a nucleus and dissented from it as being in conflict with the view of the Privy Council.[5] But the Privy Council have since in several cases insisted upon the existence of a nucleus as a condition precedent to any presumption,[6] and it has been

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(1) *Hira Singh* v. *Manglau*, (1928) L. 122; *Syed Kasim* v. *Jorawar Singh*, 50 C. 84 P.C.

(2) *Bhagwan Kumar* v. *Mohan Singh*, 23 A.L.J. 589: 88 I.C. 385: (1925) P. C. 132.

(3) *Shiv Golam* v. *Barran Singh*, 1 B.L.R. (A.C.) 164 (166). This case, however, erroneously cast on the plaintiff the burden of proving that the family was joint. To the same effect, on the necessity of a nucleus; *Prankristo* v. *Bhageerutee*, 20 W.R. 158.

(4) *Taruck Chunder* v. *Jodeshur*, 11 B.L.R. 193 (200).

(5) *Dhurm Das* v. *Shama Soondari*, 3 M.I.A. 229.

(6) *Anand Rao* v. *Vasant Rao*, 5 C. L.J. 338 P.C.; *Lal Bahadur* v. *Kanhaiyalal*, 29 A. 244 (254, 255) P.C.

recognized in several cases,[1] and is held to be equally applicable to the Dayabhag families.[2] It will thus be seen that the clause has not been settled without a contest.

These principles do not, of course, suffice to solve the many perplexing riddles which their presumptions and counter-presumptions present in practice.

They will now have to be considered.

Presumption Only in Normal Family.

1138. What is then a normal Hindu family? It is a family which is in every respect joint—joint in mess, joint in residence, joint in worship, joint in estate, and joint in every other respect. Where such family is found, the presumption is legitimate; since it is a fair inference to make that one must live in the same state in which most of the others belonging to the same community live. But if it is admitted or proved that the family to which the presumption is sought to apply is not a normal family, but one of which some members are not joint in one or more respects, the presumption would naturally weaken, and if it is found that they were separate in most respects, then there would be no room for the application of the presumption at all; since the initial presumption of law in favour of jointness would in such a case be displaced by the counter-presumption of logic that where a person is separate in most respects it is not likely that he would continue joint only in some respects.

This is, sometimes, stated in a different form, namely, that a partition is presumed to be complete, but the two rules are different.

Dayabhag Law.

1139. It will be presently seen that a Dayabhag coparcener is no more than a co-sharer and is, therefore, not subject to any of the disabilities of a Mitakshara coparcener.

Explanation.

1140. Possession of Female Members.—From the fact that women in this country are dependent for their support on their male relatives and have no means of their own, law ordinarily presumes that property standing in their names really belongs to their male relatives. But this is only a presumption which cannot be invariably made and when made, it may be neutralized by other facts and circumstances. The subject will be found discussed under the next section (§§ **1146-1148**).

Coparceners' acquisition presumed joint.

129 (1) All acquisitions made by the manager of a joint family in the name of any of its coparceners will be presumed to be made out of its fund and for its benefit.[3]

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(1) *Tarachurn* v. *Joy Narain*, 8 W.R. 226; *Banee Madhub* v. *Bhagaobuty*, 8 W. R. 270; *Chundro* v. *Buksh Ali*, 11 W.R. 305; *Radhika Prasad* v. *Dharma Dasi*, 11 W.R. 499; *Ramkristo* v. *Bhageerutee*, 20 W.R. 158; *Jagodumba* v. *Rohinee*, 23 W.R. 522; *Kunja Behari* v. *Nemai Chand*, 2 I.C. (C.) 526; *Kamla Kant* v. *Madhoji*, 59 B. 573; *Joa Ram* v. *Surasti*, (1883) P.R. 3.

(2) *Ram Nath* v. *Kusum Kumari*, 4 C.L.J. 56; *Kunja Behari* v. *Nemaichand*, 2 I.C. (C.) 526 (529).

(3) *Dhurm Das* v. *Shama Soondari*, 3 M.I.A. 229; *Gopee Krist* v. *Gunga Persad*, 6 M.I.A. 53 (75) followed in *Parbat Dasi* v. *Baikunth Nath*, 18 C.W. N. 428: 22 I.C. 51 (53) P.C.; *Bhagbut* v. *Huro Gobind*, 20 W.R. 269; *Kanshi Ram* v. *Shankar Das*, (1928) L. 397 (409); *Nga Tingyi* v. *Nga Twe Auna*, 35 I.C. (R.) 12; *Narhar* v. *Narain*, 56 I.C. (N.) 386.

(2) But no such presumption arises where the property stands in the name of a non-coparcener:[1]

Provided, however, that where any property is acquired or held in the name of a dependent near female relation of a coparcener, such as his wife or daughter, the same presumption may be made, if it appears that the acquisition was made out of the funds of the joint family and there appears no ground for believing that it was a provision by or on behalf of the joint family.[2]

1141. Analogous Law.—This section states a rule and its necessary corollary, the rule being that in a Mitakshara family the coparceners being all joint owners, any acquisition made by the manager must be deemed to be made *qua* manager, on behalf of, and for the benefit of, the family, and the corollary being that such acquisition, if made for or by a non-coparcener, cannot be so presumed, and that a coparcener challenging it as made out of the family funds must prove it like any other fact.

The same rule equally applies to other coparceners;[3] but it is the limit; since in the case of other relations, *e.g.*, the wife, strictly speaking, there is no room for the presumption, because there is no presumption of joint funds,[4] but at the same time, since the wife has ordinarily no funds of her own, that fact suffices to rebut the initial presumption, so that it has been held that a purchase by an Indian husband of property in India in the name of his wife, is presumed to be *benami*.[5] In the case of purchase in the name of other relations the same presumption cannot be stretched, though owing to the fact that *benami* is common in India, the initial presumption arising in favour of the apparent owner is susceptible of easy rebuttal by proof that the consideration flowed from another person.[6] But still the fact remains that the initial burden in such cases rests on him who alleges that a transaction was *benami*.[7]

As there are no coparceners in the Dayabhag system of law, the same presumption cannot be extended to a family governed by that school.

It is a general rule that an apparent title is presumably the real title until the contrary is proved. But in the case of a joint family that rule is necessarily reversed on the ground that since all property held by a joint family is presumably joint, any acquisition by the father or other manager in the name of any of a coparcener must be presumed to be for the joint family.[8]

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(1) *Mg. Po Kin* v. *Mg. Po Shin*, 4 R. 518 (519, 520) P.C.; *Bharat* v. *Mhd. Mahbub Ali*, 31 I.C. (A.) 586 O.A. 23 C.W.N. 71: 53 I.C. 54 P.C.; *Thanikachala* v. *Alamelu*, 25 I.C. (M.) 153; *Abdul* v. *Mirathayar*, 24 I.C. (M.) 10; *Durga Prasad* v. *Pran Krishna*, 39 I.C. (B.) 530; *Surat Laksmiah* v. *Kothandarama*, 48 M. 605 P.C.

(2) *Diwan Ram Bijai* v. *Indarpal*, 26 C. 871 (873) P.C., and cases *post*.

(3) *Venkatarama* v. *Maruthappa*, 86 I.C. 886; (1925) M. 448.

(4) *Mg. Po Kin* v. *Mg. Po Shein*, 4 R. 518 P.C.; *Hitendra Singh* v. *Rameshwar Singh*, 4 Pat. 510.

(5) *Sura Lakshmiah* v. *Kothandarama*, 48 M. 605 P.C.

(6) *Uman Parshad* v. *Gandharp Singh*, 15 C. 20 (23) P.C.; *Mhd. Mahbub* v. *Bharat*, 31 I.C. 586, O.A. 23 C.W.N. 321: 53 I.C. 54 P.C.; *Bhubanmohini* v. *Kumudbala*, 28 C.W.N. 131; (1924) C. 467; *Promode Kumar* v. *Kali Mohan*, 27 C.W.N. 305: 70 I.C. 555: (1923) C. 228; *Tirthamayi* v. *Atikulla*, 98 I.C. (C) 129 (132): (1927) C. 140; *Mirza Ahmed* v. *Model Mills*, 92 I.C. (N.) 25: (1926) N. 262.

(7) *Arab Ali* v. *Mohmud Ali*, 67 I.C. 444; (1922) P.C. 84; *Jasoda Lal* v. *Balaram*, 35 C.L.J. 589; 69 I.C. 67.

(8) *Dhurm Das* v. *Shama Soondari*, 3 M.I.A. 229; *Gopee Krist* v. *Gungapersad*, 6 M.I.A. 53 (75) followed in *Parbat Dasi* v. *Baikunth Nath*, 18 C.W.

1142. Acquisition by a Coparcener Presumed Joint.—In view of the presumed jointness of all members of a family, any property found in possession of such member is presumably joint, and the purchaser of such property from him is put on inquiry.[1] This presumption equally extends to property which, having passed out of the family by sale into the hands of a stranger is repurchased by a coparcener.[2]

Such a presumption may, however, be rebutted by showing either that the family had no property, or that it was not joint, or that the acquisition was made by a member out of his separate property, or that it was so acquired with the consent of the coparceners, or that the latter acquiesced in its separate enjoyment as separate property.

1143. Presumption and Mode of Proof.—A coparcener alleging any property to be his self-acquisition must, of course, prove it since it is an exception to the presumed community of estate.[3] Such presumption is not rebutted by the mere proof that the property was purchased or stood in the name of a single member, since the evidence in such cases must prove the source of the purchase money; though the purchaser is not bound to prove particularly as regards each item of property that it had been purchased out of his separate fund. Such proof may be supplied by the acts of his exclusive ownership, if acquiesced in by the other coparceners,[4] when he has merely to prove generally his case without being required to trace the very fund with which each purchase was made, from the time of its acquisition in a given year to the moment when it was paid to the seller of the property. But the claimant must adduce evidence of his possession of separate funds[5] which is the criterion for determining whether the purchase was a self-acquisition or for the joint family.[6] No doubt evidence as to the source of the purchase money is generally the most satisfactory, but it is not indispensable.[7]

N. 428: 22 I.C. 51 (53) P.C.; *Kanshi Ram* v. *Shankar Das*, (1928) L. 397 (409).

(1) *Shibosoondery* v. *Rakhal Dass*, 1 W.R. 38.

(2) *Gooroo Pershad* v. *Debee Pershad*, 6 W.R. 58.

(3) *Dhurm Das* v. *Shama Soondari*, 3 M.I.A. 229 (240); *Prankishen* v. *Mothoora Mohun*, 10 M.I.A. 403; *Cheetha* v. *Miheen Lall*, 11 M.I.A. 369; *Bessesur* v. *Luchmessur*, 5 C.L.R. 477 (479); *Parbati* v. *Baikunth Nath*, 18 C.W.N. 428 P.C.; *Pran Nath* v. *Kashi Nath*, (1864) W.R. 169; *Deela Singh* v. *Toofanee*, 1 W.R. 306; *Nilmoney* v. *Gunga Narain*, 1 W.R. 334; *Gopee Lal* v. *Bhagwan*, 12 W.R. 7; *Bodh Singh* v. *Ganesh*, 19 W.R. 306; *Heeralal* v. *Bidyadhur*, 21 W.R. 343; *Jugodumba* v. *Rohinee*, 23 W.R. 422; *Ramphul* v. *Deg Narayan*, 8 C. 517; *Narayan* v. *Anaji*, 5 B. 130; *Cassumbhoy* v. *Ahmedbhoy*, 12 B. 280 (309); *Balaram* v. *Ramchandra*, 22 B. 922; *Kanhialal* v. *Debi Das*, 22 A. 141.

(4) *Bippra Pershad* v. *Kena*, 3 W.R. 165 (167, 168): 5 W.R. 82; *Gane Bhive* v. *Kane Bhive*, 4 B.H.C.R. (A.C.) 169; *Kanhia Lal* v. *Debi Das*, 22 A. 141.

(5) *Dhurm Das* v. *Shama Soondari*, 6 W.R. 43 (44) P.C.; *Pran Kishen* v. *Mothoora*, 5 W.R. 11 P.C.; *Gopi Krist* v. *Ganga Pershad*, 6 M.I.A. 53; *Parbati* v. *Baikunth Nath*, 18 C.W.N. 428 P.C.

(6) *Bissessur* v. *Luchmessur*, 5 C.L.R. 477 (479) P.C., following *Gopee Krist* v. *Ganesh Persaud*, 6 M.I.A. 53; *Cheetha* v. *Miheen Lal*, 11 M.I.A. 369; *Yanumala* v. *Yanumala*, 13 M.I.A. 333; *Pran Nath* v. *Kashi Nath*, (1864) W.R. 169; *Deela Singh* v. *Toofanee Singh*, 1 W.R. 306; *Nilmoney* v. *Gunga Narain*, 1 W.R. 334; *Beharee* v. *Madho Pershad*, 6 W.R. 69; *Gopee Lal* v. *Bhagwan Dass*, 12 W.R. 7; *Bodhu Singh* v. *Ganesh*, 19 W.R. 356; *Jugodamba* v. *Rohinee*, 23 W.R. 422; *Nunsingh* v. *Narain Das*, 26 W.R. 17 P.C., O.A. from 3 N.W.P.H.C.R. (217); *Narain* v. *Anaji*, 5 B. 130; *Balaram* v. *Ramchandra*, 22 B. 922; *Subhayya* v. *Chellamma*, 9 M. 477; *Subhayya* v. *Surayya*, 10 M. 251; *Ramphul* v. *Dagnarain*, 8 C. 517; *Kanhia Lal* v. *Debi Dass*, 22 A. 141.

(7) *Dhurm Dass* v. *Shama Soondari*, 3 M.I.A. 229; *Dhunookdhari* v. *Gurpat Lall*, 10 W.R. 122; *Bhola Nath* v. *Ajoodhia*, 20 W.R. 85.

No Presumption.

1144. But where the joint family is itself of an anomalous character, then the presumption arising in the case of normal family would be correspondingly modified. The Privy Council had to consider the case of one such family where two brothers had separated their transactions by a mutual agreement. Years afterwards one branch sued the other for partition and the question that exercised the courts was whether the property acquired by the defendant's branch was out of the joint property. It was shown that, though the properties were so acquired, for 16 years, the defendants had openly treated them as their exclusive properties, to which the plaintiff's branch took no exception. It was held that the plaintiffs had precluded themselves by their conduct from claiming the properties as joint which they had for so many years suffered the defendants to treat as separate.[1]

Again, such presumption, being founded on the fact of union, there can be no presumption where any property stands in the name of a non-coparcener, such as son-in-law[2] or a female member of the family.[3] As observed in a case: "Where a family lives in coparcenary, the presumption which exists in the case of male members arises from the circumstance that they are coparceners. On the other hand, the ladies are not, in an undivided family, coparceners; whatever property they acquire by inheritance or gift is their separate estate, and although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members, or to place it beyond the risk of extravagance on the part of the member, such dealings are exceptional and can afford no ground for a general presumption."[4]

Dayabhag.

1145. The presumption of law that, while a family remains joint, all property including acquisitions made in the name of individual members is joint property, has no application to a Dayabhag family in which the father reigns supreme, and the other members have no vested interest in the family property during his lifetime. Nevertheless, the Privy Council have observed no such distinction, but have held that the presumption applies equally to all joint families whether subject to the Mitakshara or the Dayabhag schools of law.[5]

Clause (2).

1146. Purchase by Non-coparcener.—A non-coparcener is like any other owner free to acquire and hold property unfettered by the tie of coparcenership. Consequently, where any property is found in the possession of such person, law will make the usual presumption that he is its sole owner.[6] But this raises the question whether the same presumption can be extended equally to the female members of a joint family, *e.g.*, the wife, or a daughter, who, it is notorious, have seldom any funds of their own. Of course, where it is known that the husband or the father, as the case may be, had made any purchase in the name of his wife or daughter, it is no longer a case for presumption, since that fact alone suffices to establish the *benami*

(1) *Narsingdas* v. *Narain Dass*, 26 W. R. 17 P.C., affirming O.A. 3 N.W.P. H.C.R. 217.
(2) *Dossee Monee* v. *Ramchand*, 7 W.R. 249.
(3) *Narayana* v. *Krishna*, 8 M. 214.
(4) *Ib.*, p. 218.
(5) *Chand Huree* v. *Narendra Narain*, 19 W.R. 231 P.C.; *Dhurm Das* v. *Shama Sundari*, 3 M.I.A. 229; *Gopee Krist* v. *Ganga Prasad*, 6 M.I.A. 53; *Parbati Dasi* v. *Baikuntha Nath*, 18 C.W.N. 428 P.C.: 22 I.C. 51 P.C.
(6) S. 110, Evidence Act.

character of the transaction, unless it is shown to be a gift or a family settlement. As will be seen in the sequel (**S. 221**), there is no presumption in this country that an Indian, purchasing any property in the name of his wife or child, does so by way of advancement, and consequently, unless the transaction is otherwise explained, it must be presumed to be *benami*. As their Lordships of the Privy Council observed: "There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife, does not apply in India."[1] At the same time, since women are not debarred the right of holding property in India, any property standing in their name cannot be treated as *benami* where, therefore, a property was bought apparently by a wife and there was no evidence as to who paid the purchase money, the court held that there was no room for presumption that the purchase had been made by the husband.[2] Consequently, where property is found in possession of a woman of the acquisition of which no account is given, it will be presumed to be her property until the contrary is shown. This presumption is not rebutted by shewing that her husband had died possessed of considerable property; *a fortiori*, where there is no such evidence.[3]

1147. The rule applicable to the wife applies equally to the mistress, since there is no presumption that a purchase by a person in the name of his mistress, is made for her benefit,[4] though where such property was registered in the name of the woman who was, therefore, the only person equally entitled to collect the rents, the facts that the person, advancing the money, possessed a number of other properties none of which was put in the name of the woman, that the value of the property in the woman's name was very small and that the woman's right to the property was not disputed, until some six years after the man's death, were held to be circumstances sufficient to show that the title passed to the woman.[5] So where a person had brought up a daughter of his wife's relative as his own child, treated her with affection and married her to his cousin at considerable expense, kept her husband as his *Khana Damad* (resident son-in-law) and purchased a valuable garden and a house in her name with his own money, and treated that property as belonging to her upto the time of her death, it was held that the purchase was really for the benefit of the adopted daughter and not merely *benami*, and that the transaction was in effect a marriage settlement by way of gift of the money, for which the property was purchased.[6]

1148. A question suggests itself in this connection whether the rule here enunciated is in conflict with the provisions of S. 110 of the Evidence

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(1) *Lakshmiah*, v. *Kothandarama*, 48 M. 605 (608) P.C.; *Motivahoo* v. *Purshotam*, 29 B. 306 (314); *contra* in *Abdul Rahim* v. *Mira Mayar*, 24 I.C. (M.) 10; *Chellamuthu* v. *Muthudayar*, 17 I.C. (M.) 740; *Durga Prasad* v. *Pran Krishna*, 39 I.C. (P.) 530, must be held overruled.

(2) *Durga Prasad* v. *Pran Krishna*, 3 Pat.L.W. 341: 39 I.C. (B.) 530; distinguishing *Motivahoo* v. *Purshotam*, 29 B. 306 (314).

(3) *Diwan Ram Bijai* v. *Indarpal*, 26 C. 871 (873) P.C.; *Chowdhrani* v. *Tariny Kant*, 8 C. 545; *Ganpat* v. *Secretary of State*, 45 B. 1108; *Narayan* v. *Krishna*, 8 M. 214.

(4) *Bilas Kunwar* v. *Dasraj*, 37 A. 557 P.C.

(5) *Jitan* v. *Manbarta*, 5 I.C. 85.

(6) *Inamullah* v. *Aisha Bi*, (1913) P. L.R. 41: 18 I.C. 705.

Act and Art. 144 of the Limitation Act, the effect of which is to raise the presumption of title from mere possession, and since all possession is *prima facie* exclusive and adverse, it creates a title, where there was none, by the mere efflux of time. Both these points have been answered in the affirmative by the Privy Council.[1]

Alienation of coparcenary property by consent.

130. (1) Any coparcenary property may be alienated by or with the consent of all the coparceners;[2]

(2) Where any of the coparcenary property has been alienated with the consent of the coparceners, those born thereafter are not entitled to impeach its validity;[3]

(3) Where a coparcenary comprises members some of whom are minors, no consent of the adult coparceners can affect their interest beyond furnishing evidence of necessity, which may be rebutted.[4]

(4) Where of several co-parceners some only consent to an alienation, it is valid to the extent of their interest, and their consent may be further evidence of necessity which may, however, be rebutted.[5]

Exception.—Nothing herein applies to property which is otherwise inalienable.

Illustration.

The father sold his ancestral fields and with the proceeds thereof built a family house. The son takes possession of the house, but seeks to avoid the sale of his fields on the ground that it was made without his consent. The son cannot avoid the sale which he must be deemed to have ratified by his conduct.[6]

1149. Analogous Law.—The dim genesis of the section will be found in the undernoted texts.[7]

1150. Principle.—The principle of this section is clear. What belongs to all may be alienated by all or by the consent of all. At any rate, those who join in the alienation and those who concur therein by their act or conduct cannot be afterwards permitted to repudiate their own act. The section may partially operate by contract and partially by force of estoppel.[8] The rule is subject to the disability which the Mitakshara coparcener, according to the Calcutta and Allahabad view, suffers from, in that while his share may be seized and sold in execution of a decree passed against him, it cannot be alienated by him by a voluntary act. This limitation is, however, immaterial to the applicability of the law of estoppel, since his consent to the manager's alienation would, in that case, still furnish *prima facie* proof of necessity. All authorities appear, however, to be agreed that his consent would not validate a gift or devise not otherwise valid, since the donee or devisee is not a transferee for value and there is no equity in his favour for enlarging the interest for which he has never paid.

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(1) *Jowala Buksh* v. *Dharam Singh*, 10 M.I.A. 511 (528, 529, 535); *Shadi Lal* v. *Lal Bahadur*, (1933) P.C. 85; *Saraswati Bai* v. *Waman Rao*, 15 C.P. L.R. 3 (6).

(2) *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 (165) P.C.

(3) *Lal Bahadur* v. *Ambika Prasad*, 47 A. 995.

(4) *Kandasami* v. *Somaskanda*, 35 M. 177 (181).

(5) Mit. I-1, §§ 27-29 see § 1154.

(6) *Ganga Bai* v. *Vamanji*, 2 B.H.C. R. 301 (305); *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 (165) P.C., explained in *Biswanath* v. *Jagdip Narain*, 40 C. 342 (350); *Kunjan Chetti* v. *Sidda Pillai*, 22 M. 461 (463); *Kamakshy* v. *Chakrapany*, 30 M. 452 (453).

(7) Mit., I-1, §§ 28; 32; Vivad Chintamani, pp. 72, 77.

(8) *Musiligadu* v. *Nannigadu*, 15 M. L.J. 492; followed in *Kandasami* v. *Somaskanda*, 35 M. 177 (181, 182).

1151. Alienation of Joint Property.—Since joint property belongs to the coparceners jointly, it follows that the coparceners are conjointly entitled to alienate it. Since the right of alienation is one incident of ownership, it necessarily vests in the coparceners collectively. It is an obvious truth and has been so affirmed by the Privy Council.[1] Apart from the coparceners, the other person entitled to alienate joint property is its manager. But though it is legally the incident of his management, the circumstances which justify his alienation must, beyond those stated in the next section be such as amount to the express or implied consent of the remaining coparceners. Necessity or consent is then the touchstone of a valid alienation of joint property. But the consent of all coparceners may not be always possible; where some of them are minors, consent is out of question; but where only some of the rest consent, what is its effect? According to the Madras view, "an assent by some alone, though evidence of the propriety of an alienation, will not, in the face of positive proof of its impropriety, suffice to pass their interests, for such assent does not amount to a transfer."[2] In other words, such consent is merely evidence of justifying necessity the value of which is lost in the face of evidence to the contrary. Apart from estoppel, it does not affect the share of the consentient coparcener. But it is submitted that this statement is too wide, since there can scarcely be any doubt that a coparcener who is entitled to alienate his share for value may equally permit its alienation by the manager, and that in the case of such coparcener at least his consent would affect his share. But in order to have that effect, the alienation must be for value and it must relate to the provinces where the coparcener's right of alienation of their undivided coparcenary interest has become recognized. (**S. 126.**)

1152. In strict principle, even this fact would appear to make no difference. A reversioner is disentitled to alienate his interest, but nevertheless, his consent is held to validate the widow's alienation. It might be said that while the widow and the next reversioner combined represent the whole estate, the manager and a consentient coparcener, when there are others who stand out, do not. But the fact remains that a coparcener everywhere is entitled to dispose of his coparcenary interest in all provinces except the U.P., Behar and Bengal, subject to the Mitakshara, where his interest is nonetheless liable to seizure and sale in execution of a decree obtained against him. In both cases, therefore, his interest is alienable, though the procedure for its sale differs. As such, he possesses something more than a reversioner's contingency and his concurrence in the sale cannot be of less value. That it is evidence of propriety is, however, admitted. But in either case consent dispenses with the proof of necessity.

1153. But here again consent may operate to feed a title by estoppel. Suppose that coparcener in the United Provinces, who is not permitted to alienate his interest, actively assists his father in the sale of the family estate, would he on the father's death be permitted to unravel a transaction which his own complicity has brought about? In such cases, the transferee must, of course, take in good faith. If he takes with notice of the limited powers of his transferor, the fact that his coparcener concurs in

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(1) *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 (165) P.C.

(2) *Kandasami* v. *Somaskanda*, 35 M. 177 (181).

the sale would not implement his title, for there can be no estoppel where the transferee knows the truth.[1]

1154. The same rule would appear to apply to a reversioner in respect of an alienation made by a Hindu widow which the reversioner may either assent to or ratify.[2] Of course, a person is not bound by his consent signified conditional upon the consent of the other coparceners,[3] or a consent based upon any other contingency previously disclosed or known to the parties. The consent in such cases is not a free consent so as to give validity to the transaction.[4] An alienation is good if made by the coparceners then existing. Those born thereafter cannot question it.[5] It is, sometimes, said that the coparceners' consent, express or implied, is always necessary to validate an alienation even though supported by legal necessity,[6] though it is reasonable to presume such consent from the presence of necessity.[7] But consent does not appear to be an invariable adjunct of a valid alienation, since an alienation if supported by necessity, would be valid independently of the consent or dissent of the coparceners.[8] The text of the Mitakshara[9] no doubt postulates such consent, but it does so merely as evidence, not the only evidence, of necessity. If, added thereto, there is the consent of adult coparceners, the alienation binds all members of the family including the minor coparceners who are precluded from challenging its validity.[10]

MANAGEMENT OF JOINT FAMILY.

Coparcenary Manager.

131. (1) Except in the case of a trading family, the father,[11] and in his absence, the next senior male relation is the rightful manager of a co-parcenary:

(2) Provided that during the incapacity[12] or absence of the manager or in case of emergency, any other co-parcener may with the express or implied consent of the co-parceners act for him.[13]

1155. Analogous Law.—The father, and in his absence, the other seniormost member of the family is its rightful manager. But the following text provides for a contingency occurring when the manager is absent:—

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(1) *Gur Narayan* v. *Sheolal Singh*, 45 C. 566 P.C.

(2) *Prem Sukhdas* v. *Ram Bhujawan*, (1919) Pat. 451: 52 I.C. 964 (969); *Subba Goundan* v. *Krishnamachari*, 45 M. 449 (466), dissenting from *contra* in *Kandasami* v. *Somaskanda*, 35 M. 177 (181).

(3) *Sivasami* v. *Sevugan*, 25 M. 389.

(4) *See* this subject discusssed in the chapter on "Woman's Estate".

(5) *Buraikchutter* v. *Greedharee Singh*, 9 W.R. 337; *Bhagwan* v. *Ujagar*, (1928) P.C. 20.

(6) Mitt., I-I, §§ 27-29; *per* West, J., in *Chimnaji* v. *Dinkar*, 11 B. 320 (324); *Kamta* v. *Bhagirath*, 2 O.L.J. 30: 27 I.C. 517; *Kamla Prasad* v. *Nattui*, (1922) Pat. 136.

(7) *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 (165) P.C.; *Biswanath* v. *Jagdeep Narain*, 40 C. 342 (350).

(8) *Anant Ram* v. *Collector*, 40 A. 171 (175) P.C.; *Brij Narain* v. *Mangal Prasad*, 46 A. 95 P.C.; *Jogi Das* v. *Ganga Ram*, 21 C.W.N. 957 P.C.; *Thakurji* v. *Nanda Ahir*, 43 A. 460.

(9) Mit., I-I, §§ 27-29.

(10) *Gharibullah* v. *Khalak Singh*, 25 A. 407 (415) P.C.; *Miller* v. *Runga Nath*, 12 C. 389; *Buraik Chuttar* v. *Greedharee*, 9 W.R. 337; *Kandasami* v. *Somaskanda*, 35 M. 177 (181); *Chhotiram* v. *Narayan Das*, 11 B. 605; *Chimnaji* v. *Dinkar*, 11 B. 320 (324) (position of widow and manager compared, *per* West, J.).

(11) *Surja Prasad* v. *Golab Chand*, 27 C. 724 (743).

(12) *Udit Narayan* v. *Ranglal*, 29 C. 797.

(13) Mit. I-I, §§ 28, 29.

1156. Qualified Manager.—The right of the father to manage his family stands above the right of any other relation.[1] It is the survival of the *patria potestas*. After the father, its management devolves upon the eldest male member of the family, especially the eldest brother. This is the normal rule, but where the person qualified to be the manager of his family lacks the qualification to manage it, its management devolves upon one better qualified.[2] The nature of business of the family often points to the member best fitted to act as the manager. In a banking business, for instance, the father may be superseded by a younger son more adept in the business; while in a trading partnership with several branches, it is usual for a relative to manage each branch subject to, or independently of, the supervision of the head-manager.

But such management is not to be confused with the rights and powers of the *karta* who manages the orthodox household owning its ancestral lands. He owes his selection to his seniority, not as a matter of coparcenary discretion, for if any coparcener should disagree, his remedy lies in partition.

It will be noted that the section is only declaratory of the rightful manager. It does not exclude the possibility of a junior member acting as such. As a matter of fact, with the spread of education and the more diversified activities of the members of a joint family in these days, the right to the management of family business is not infrequently determined by competency more than by seniority. Where it is so, the *de jure* manager will exist side by side with the *de facto* manager, whose powers to pledge the family assets would then be those of an ordinary manager.[3]

1157. Right of Juniors.—Though the *karta* or manager has a definite status in a joint family, the Mitakshara recognizes the possibility of his absence or incapacity, in which case it allows any coparcener to act for him.[4]

It has even been held that a mortgage of family property by a junior member is not invalid merely because he was not the *karta*, provided the mortgage was justified by necessity.[5] The necessity in this case was the defence of some of the coparceners of a criminal charge, but it was not shown that the manager was unavailable or unwilling to act. It does not appear to be the law that any coparcener may without reference to the manager alien joint property merely because there was necessity. The use of the term "even" in the Mitakshara text shows that the authority conferred on the junior members was exceptional and exercisable only in case of emergency.

Manager's powers.

132. The manager possesses the following powers:—

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(1) *Surja Prasad* v. *Golab Chand*, 27 C. 724 (743); *Gajindra* v. *Harihar*, 12 C.W.N. 687.

(2) *Udit Narayan* v. *Ranglal*, 29 C. 797.

(3) *Krishna* v. *Krishnaswami*, 23 M. 597 (600); *Obelisetti* v. *Atyan*, 41 M.L.J. 554; *Dhanukdhari* v. *Rambirich*, 1 Pat. 171 (173); *Tara Kiran* v. *Hari Kishan*, 50 A. 447.

(4) Mit., Ch. I-I; § 28.

(5) *Dhanukdhari* v. *Rambirich*, (1922) 1 Pat. 171.

(1) He is entitled to be in physical possession of the joint property, and perform, in respect of it, all acts of management;[1]

(2) As such, he may realize and expend its income at his discretion;[2]

(3) He is not accountable to his co-parceners for his management, nor liable to them for his negligence or mis-management;[3]

(4) He becomes, however, so liable if he has fraudulently misappropriated any of its income, or spent it on purposes not binding on the family;[4]

(5) He is entitled to contract debts and alienate or charge the joint estate for legal necessity, or for its benefit, to the extent hereinafter provided;[5]

(6) He is entitled to represent the co-parcenary in all suits and proceedings affecting its interests, to make contracts,[6] give discharges;[7] pass receipts, acknowledge debts, refer to arbitration, compromise any claim or dispute affecting it, and generally to do all such acts as he may consider necessary or for its benefit;

(7) He is the *de facto* guardian of the coparcenary interest of the minor members of the family.

1158. Analogous Law.—The following texts bear on the powers of the manager:—

Manu.—"By the eldest, at the moment of his birth, the father, having begotten a son, discharges his debt to his own progenitors; the eldest son therefore, ought before partition, to manage the whole patrimony.

"That son alone by whose birth he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty; all the rest are considered by the wise as begotten from love of pleasure.

"Let the father alone support his sons; and the first-born, his younger brothers; and let them behave to the eldest according to law, as children should behave to their father."[8]

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(1) *Baldeo* v. *Shamlal*, 1 A. 77, followed in *Jallidar* v. *Ram Lal*, 4 C. 723; *Dharm Das* v. *Amulyadhan*, 32 C. 1119 (1131, 1132); *Bhiku* v. *Buttu*, 8 Bom.L.R. 99; as to trust property, see *Sri Ram* v. *Sri Gopal*, 19 A. 428; *Ramanathan* v. *Murugappa*, 27 M. 193 (201); *Bhaskori* v. *Bhaskaram*, 31 M. 218; *Thandavaroya* v. *Shunmugam*, 32 M. 167.

(2) *Damodar Das* v. *Uttamram*, 17 B. 271; *Narayan* v. *Nathaji*, 28 B. 201 (208); *Balkrishna* v. *Muthusami*, 32 M. 271 *contra* in *Abhaychandra* v. *Pyari Mohun*, 5 B.L.R. 347.

(3) *Shookmoy* v. *Monoharri*, 11 C. 684 (694) P.C.; *Setrucherla* v. *Setrucherla*, 22 M. 470 P.C.; *Tara* v. *Reele*, 3 M.H.C.R. 177; *Balakrishna* v. *Muthusami*, 32 M. 271; *Bhowani* v. *Juggernath*, 13 C.W.N. 309; *Parmeshwar* v. *Gobind*, 43 C. 459 (464, 465); *Nonerra* v. *Gurrav*, 5 B. 589; *Narayan* v. *Nathaji*, 28 B. 201.

(4) *Abaychandra* v. *Pyari Mohan*, 13 W.R. 75 F.B.; *Parmeshwar* v. *Gobind*, 43 C. 499; *Balakrishna* v. *Muthusami*, 32 M. 271; *Damodar Das* v. *Uttamram*, 17 B. 271; *Narayan* v. *Nathaji*, 28 B. 201 (208).

(5) *Dwarka Nath* v. *Bungshi*, 9 C.W.N. 879; *Moheshur* v. *Kishun Singh*, 34 C. 184.

(6) *Kishen Pershad* v. *Har Narain*, 33 A. 272 P.C., overruling *Alagappa* v. *Velian*, 18 M. 33; *Bal Savani* v. *Narayan*, 7 B. 467; *Balji* v. *Keshowji*, 37 B. 340; *Gopal Das* v. *Badri Nath*, 27 A. 361; *Durga Prasad* v. *Damodar Das*, 32 A. 183; *Girwar* v. *Makbunessa*, 1 Pat.L.J. 468; *Pitam Singh* v. *Ujagar Singh*, 1 A. 651; *Ram Kuber* v. *Ram Dasi*, 35 A. 428; *Ram Das* v. *Chabildas*, 12 Bom.L.R. 621; *Jagan Nath* v. *Mannulal*, 16 A. 231 (family arrangement); *Balaji* v. *Nana*, 5 Bom. L.R. 95 (reference to arbitration).

(7) *Hanooman Pershad Pandey* v. *Mt. Baboee*, 6 M.I.A. 393 (413); *Gharibullah* v. *Khalak Singh*, 25 A. 407 P.C.

(8) Manu, IX-104-108.

Gautam.—"After the father's death, let the sons divide his estate.

"Or, during his lifetime, when the mother is past child bearing, if he desires it.

"Or the whole estate may go to the first-born; and he shall support the rest as a father."[1]

Narad.—"Or the senior brother shall maintain all the junior brothers, like a father, if they wish it, or even the younger brother, if able; the well-being of a family depends on the ability of its head."[2]

"One who being authorized to look after the affairs of the family charges himself with the management (of the family property) shall be supported by his brothers with presents of food, clothing and vehicles."[3]

1159. Manager's Powers.—With the exception of the father, who has an almost absolute right to be the manager of his household, the right of any other relation depends, in the first instance, upon his seniority, but, for its continuance, upon the consent or acquiescence of the other coparceners, who may supersede him or limit his powers. But exercise of his ordinary power does not depend upon any assent or acquiscence of the coparceners. His position is independent of the will of the coparceners.[4] As observed by Mr. Cowell: "When, therefore, we come to define the relation of each member, especially of the managing member, to the joint family and the joint estate, we are brought into contact with a relationship which has no counterpart in English law. Neither the term partner, nor principal, nor agent, nor even a coparcener, will strictly apply."[5] Consequently, while the family remains joint, the powers of the manager cannot be altered by contract so as to affect the very constitution of the coparcenary. This was the *ratio decidendi* of the case in which three brothers separated from their nephew, the son of their eldest brother, themselves agreeing to remain joint for 12 years after which they were to effect a partition. The eldest of them was to manage the estate and maintain an account of the profit and loss accruing up to that date which was also to be then divided with the *corpus*. This arrangement was adhered to for the stipulated term of 12 years, after which the youngest brother sued for a partition and profits of his share during the twelve years' term. The manager resisted the claim for accounts, pleading that he was not accountable for past profits, as the family was joint but the Privy Council held that the agreement was not a simple agreement to postpone the partition, but had put the family upon a new footing and that his position during the term, though not that of a trustee, was that of an agent, which made him accountable for his receipts and the expenditure.[6]

1160. The same view was taken in another case, in which, by a family arrangement, the head of the family, a talukdar, was alone to hold the estate by primogeniture, but was accountable to the junior members for their shares of the profits. The Privy Council held this kind of managership entirely unknown to Hindu Law, and observed: "A talukdar, here in question, was in a very peculiar position; the family were living together as a joint family, and in commensality, Anant acting as head and

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(1) Gautam, XXVIII-1-3; 2 S.B.E.
(2) Narad, XIII-5.
(3) *Ib.*, XIII-34.
(4) *Ramanathan* v. *Murugappa*, 27 M. 192 (201); *Thandavaroya* v. *Shunmugam*, 32 M. 167 (169, 170); *Sri Raman* v. *Sri Gopal*, 19 A. 428.
(5) Tagore Law Lectures, 1870, p. 108; cited and followed in *Mhd. Askari* v. *Radhe Ram*, 22 A. 307 (317-321); to the same effect, *Thandavaroya* v. *Shunmugam*, 32 M. 167.
(6) *Setrucherla* v. *Setrucherla*, 22 M. 470 (475) P.C.

not accounting for the profits, which is the case with an ordinary Hindu family; but still they were living under the most distant agreement that they were entitled, not as in an ordinary joint family but in specific and definite shares. Their Lordships consider that, if the enjoyment of those shares is in any way disturbed, the right to sue for the profits will arise, as well as a right to partition."[1]

1161. The manager, as such, is not entitled to any remuneration for managing the estate, of which he is the joint owner, though there is nothing in law to prevent him from receiving remuneration, if the coparceners agree to pay him.[2] The coparceners cannot limit his authority to manage the family estate by rotation,[3] though the family may place another member in joint management of their estate; and where this has been the practice, the son will, as of right, succeed to the joint managership on the death of his father.[4]

1162. The *karta* of a Hindu family has been variously described and likened to the manager of an estate, a trustee, or the managing director of a corporation or company. But his position is in some respects unique, for while as manager he must, and does necessarily possess, some of the attributes of a manager and trustee, his status and powers are the result of combined necessity and ancient privilege. They are stated in the several clauses which may now be taken as settled by the preponderance of precedents; and their full effect will now be discussed.

1163. The fact that a person is a manager, does not create any presumption that all his acts are performed in that capacity, since in becoming the manager, he does not cease to act in his individual capacity. As such, he continues to possess all the rights of a coparcener.[5] Where, therefore, all members of a joint family were to have executed a mortgage, which was in fact only executed by the manager, the question was held to be one of intention, whether he had executed it on behalf of all or only as a co-executant. The question is one of fact to be decided upon the circumstances of each case: "If the parties intended that all the members of the family should execute the document, it cannot take effect by reason that the person who alone executed the document, happens to be the managing member, and that the debt is recited to have been incurred for the benefit of the family."[6] In one such case the court held the mortgage incomplete so that it was held to be inoperative even against the individual share of the manager who executed it.[7] This view is justifiable on the ground that a person who undertakes a joint liability cannot be burdened with undivided liability which he never undertook. Even in other cases, as where a negotiable instrument, such as a promissory note, is passed by the *karta* it is expedient that the instrument should on its face show the persons to be charged.[8] If this is wanting, the plaintiff can only recover on the pro-

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(1) *Shankar* v. *Hardeo*, 16 C. 397 (412, 413) P.C.

(2) *Krishnasami* v. *Rajagopala*, 18 M. 73 (86).

(3) *Sri Raman* v. *Sri Gopal*, 19 A. 498; *Ramnathan* v. *Marugappa*, 27 M. 193 (201); *Thandavaroya* v. *Shunmugam*, 32 M. 167 (169).

(4) *Purappavanalingam* v. *Nullasivan*, 1 M.H.C.R. 415.

(5) *Damodhar* v. *Damodhar*, 1 B.H.C. R. 182.

(6) *Sivasami* v. *Sevugan*, 25 M. 389 (393).

(7) *Sivasami* v. *Sevugan*, 25 M. 389 (393).

(8) *Sadasuk* v. *Kisan Pershad*, 46 C. 663 P.C.

missory note from the manager, though it is open to him to set up an alternative case that the debt was borrowed for the necessity or benefit of the family in which case all its members would be liable.[1]

Manager as Administrator.

1164. If the manager is also the administrator of the estate he cannot exercise power as manager which he is prevented from doing as administrator.[2]

Cl. 1 (a) Possession.

1165. Manager's Right to Possession.—It being clear that no coparcener has any right to separate possession of the coparcenary estate, and all alike being entitled to joint possession and enjoyment, its actual possession and management must vest in the manager. He is entitled to physical possession of the entire joint estate and can consequently eject a coparcener if he has taken exclusive possession of any portion of the joint estate.[3] So where the son had removed himself from the family dwelling-house as he objected to live with his mother-in-law and had taken up a separate residence in a house which used to be rented, the father was held entitled to eject him on the ground that a coparcener was not entitled to exclusive possession of any portion of the joint property.[4] But, of course, the manager cannot eject any one from the joint occupation of the family-house[5] though where the coparcener disturbs by his conduct the peace of the family, he may even exclude him therefrom, if necessary, by an injunction restraining the coparcener from entering upon any portion of the property without the consent of the manager[6] who "has a recognized position of superiority with well-defined rights of management and possession independent of the consent of the other members of the family."[7] The Court will protect his possession even under S. 145 of the Code of Criminal Procedure.

1166. But where a coparcener's possession has been acquiesced in for some time by the manager, he cannot be permitted to disturb it in the mere assertion of his right to exclusive possession. Such was the case of a coparcener's possession of a garden which he had beautified at his own expense, but from which the other coparceners wished to eject him out of spite. The court refused to assist them adding: "To do that would be to take away from the defendant the whole advantage of that which he had been allowed so long a time to occupy, and would, in fact, have the effect of constituting the courts a source of annoyance rather than giving plaintiffs any reasonable and necessary relief."[8] The same principle guided the court in maintaining the *status quo ante* in a case where different co-sharers had been for a considerable time allowed to hold separate portions of the bank of a tank.[9] The manager is, of course, entitled to

(1) *Hari Mohan* v. *Sourendra Nath*, 41 C.L.J. 535: 88 I.C. 1025: (1925) C. 1153; *Sukhada Kanta* v. *Joginee-Kanta*, 60 C. 1197; *Vithal Rao* v. *Vithal Rao*, 25 Bom.L.R. 151: 72 I.C. 242: (1923) B. 244.

(2) *Obiter* in *Ranjit Singh* v. *Amullya Prasad*, 9 C.W.N. 923.

(3) *Baldeo* v. *Shamlal*, 1 A. 77, followed in *Jallidar Singh* v. *Ram Lal*, 4 C. 723 (724); *contra* in *Raghoba* v. *Ziboo*, 7 N. L.R. 82, overlooks the law of coparcenary.

(4) *Baldeo Das* v. *Shamlal*, 1 A. 77 (78); *Badri Das* v. *Ratan Lal*, (1892) A. W.N. 35.

(5) *Dharma Das* v. *Amulyadhan*, 32 C. 1119 (1131, 1132); *Bhiku* v. *Puttu*, 8 Bom.L.R. 99.

(6) *Bhaskari* v. *Bhaskaran*, 31 M. 318, (320).

(7) *Ib.*, p. 320.

(8) *Collector* v. *Debnath*, 21 W.R. 222.

(9) *Surbessur* v. *Gossain Dass*, 17 W. R. 210.

hold the shares of a Joint Stock Company belonging to the joint family, and on the death of one manager another succeeding to him would be legally entitled to have his name registered in the books of the Company.[1]

Cl. (2), (3) Manager not accountable for Current Income.

1167. The manager of a coparcenary is not bound to keep accounts[2] or is accountable to the coparceners for his income and expenditure in the same way as if he were their agent. As previously remarked, he has in the family a position of superiority, and he is left to his own judgment to act according to what he considers best in the interest of the family.[3] Where the discretion of the managing member is exercised *bona fide* and for the benefit of the estate and the family has the benefit, such discretion should not be narrowly scrutinized.[4] He cannot be held liable for his negligence.[5] He manages the joint estate for the benefit of the family and so long as he does this, he is not under the same obligation to economise or to save as would be the case with a paid agent or trustee: "It is now well settled that when accounts have to be taken with a view to a partition of joint family properties, the account which has to be taken of the entire family property in the hands of the different members is mainly an enquiry into the existing assets. The head of the family cannot in general be called upon to defend the propriety of the past transactions of the family."[6]

This view is supported by the fact that, apart from fraud or misappropriation by the manager, unless something is shown to the contrary, every adult member of an undivided family living in commensality with the manager must be taken to be a participator in and authorizor of all that has been done in the management of the property,[7] and that except where misappropriation is proved, the manager is liable to account only for what he has actually received and not for what he ought to have received.[8]

Cl. (4) Fraud Excepted.

1168. Of course, the manager cannot escape his liability for fraud or gross negligence, nor can he saddle its effect upon his coparceners, unless they have profited by his wrong.[9] The manager's accountability for fraud or misappro-

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(1) *Piari Lal* v. *Mait Mills*, 41 A. 619.

(2) *Ram Nath* v. *Goturam*, 44 B. 179, (183); *contra* in *Abhoychunder* v. *Piaree Mohun*, 13 W.R. 75 F.B. (a Dayabhag case, but statement not so limited); cf. *Pirthi Pal* v. *Jowahir*, 14 C. 493 (508) P. C. (cannot sue for profits); *Arumilli* v. *Subbarayadu*, 44 M. 656 (663) P.C.; *Srinivas* v. *Thiruvengada*, 38 M. 556 (except from the date of his exclusion); to the same effect, *Balakrishna* v. *Muthusami*, 32 M. 271 (274).

(3) *Tara Chand* v. *Reeb Ram*, 3 M.H. C.R. 177 (180).

(4) *Ratnam* v. *Govindrajulu*, 2 M. 339.

(5) *Raya* v. *Gopal*, 11 I.C. (M.) 666.

(6) *Shookmoy* v. *Monoharri*, 11 C. 684 P.C.; *Arumilli* v. *Subbarayadu*, 44 M. 656 (663) P.C.; *Bhowani* v. *Juggernath*, 13 C.W.N. 309: 3 I.C. 241, following *Jug Mohan* v. *Mangal Das*, 10 B. 528 (561, 581); *Narayan* v. *Nathaji*, 28 B. 201; *Babu* v. *Dadjirao*, (1893) B.P.J. 166; *Haridas* v. *Narotam*, 14 Bom.L.R. 237; *Parmeshwar* v. *Gobind*, 43 C. 459 (464, 465).

(7) *Shookmay* v. *Monoharri*, 11 C. 684 (694) P.C.; *Ramabhadra* v. *Virabadra*, 22 M. 470 (475, 476) P.C.; *Arumilli* v. *Subharayadu*, 44 M. 656 (663) P.C.

(8) *Arumilli* v. *Subharavadu*, 44 M. 656 (663) P.C.; *Tammireddi* v. *Gangireddi*, 45 M. 281 (286, 287).

(9) *Jai Narain* v. *Prag Narain*, 29 C.W.N. 775 P.C.: (1925) P.C. 11; *Obhoy Chunder* v. *Pearee Mohun*, 13 W.R. 75 (79) F.B.; *Some* v. *Dhondu*, 28 B. 300.

priation is reserved even in cases in which he is held to be generally unaccountable.[1] But even in such a case no coparcener can sue for account of a portion of joint property or for one or two items. Where he has the right to call for accounts, he must do so of the whole joint property.[2]

Accounts by Agreement.

1169. Again, it is no exception to the general rule that the manager has to account where he has agreed to as he well might in a banking business, or other business carried on in the nature of partnership.[3]

Must account for Admitted Assets.

1170. The manager is, of course, liable to account for all assets of the joint family existing at the time of partition.[4] For this purpose the coparceners are not bound to accept the manager's *ipse dixit* as to the extent and value of the property. That would be no account at all. He must show what has become of the family property, and if any is alienated, for what purpose and to whom it has been sold, and in fact he must not only state what the family property is but explain what has become of the rest. So where the manager admitted the existence of certain estate, family jewels which were worn by members of the family on special festive occasions, he was held primarily responsible and accountable for them and could not charge the other coparcener with possession of them.[5]

Cl. (5). Contract Debts.

1171. The manager of a joint family, including minor members, is necessarily the guardian of the minor's interest in the joint family; but if he enters into a contract he does so *qua* guardian of the minor, though he may so describe himself. As such, his contracts stand on a different footing and would be judged by the test of Hindu Law and neither the test of mutuality nor that of benefit to the minor applies to them.[6] As such the manager possesses the power to borrow money for a family purpose in his capacity as manager so as to bind the other members to the extent of their interest in the joint property.[7] But there is no presumption that any loan contracted by a manager in his own name is or has been contracted on behalf of the family[8] or is within his authority[9] or that it is for a family purpose.[10] It is,

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(1) *Parmeshwar* v. *Gobind*, 43 C. 459 (465); *Balakrishna* v. *Muthusami*, 35 M. 271 (278); *Bhawani Prasad* v. *Juggernath*, 13 C.W.N. 309; *Narayan* v. *Raja Ram*, 28 B. 101.

(2) *Nowlase* v. *Lalloee*, 22 W.R. 202.

(3) *Rungun* v. *Kassinath*, 13 W.R. (F.B.) 76 *n.*: 3 B.L.R. (O.C.) 1.

(4) *Parmeshwar* v. *Gobind*, 43 C. 459 (465).

(5) *Venkata* v. *Bhashyya Karlu*, 25 M. 367 (379) P.C.

(6) *Hari Charan* v. *Kaula Rai*, 40 I.C. (Pat.) 142 F.B., followed in *Dhapo* v. *Ramchandra*, 57 A. 374. *Adinarayana* v. *Venkata*, (1937) M. 869.

(7) *Chelamayya* v. *Varadayya*, 22 M. 166; *Bimala* v. *Tarasundari*, 14 W.R. 480; *Aghora Nath* v. *Girish Chunder*, 20 C. 18; *Baldeo* v. *Moburak Ali*, 29 C. 583; *Haricharan* v. *Kaulla Rai*, 40 I.C. (Pat.) 142 F.B.; *Dhapo* v. *Ramchandra*, 57 A. 374.

(8) *Sankur* v. *Goury Pershad*, 5 C. 321.

(9) *Nagendra* v. *Ama Chandra*, 7 C. W.N. 726; *Ganpat Rai* v. *Munni Lal*, 34 A. 135.

(10) *Soiru* v. *Narayan*, 18 B. 520; *Krishna* v. *Vasudev*, 21 B. 808; *Gannat Rai* v. *Munni Lal*, 34 A. 135; *Bhura* v. *Bansrai*, (1915) P.W.R. 113; *Paras Ram* v. *Gian Chand*, (1919) P.W.R. 48; *Ram Dhan* v. *Ramji*, 50 I.C. (L.) 215; *Khazana Mal* v. *Jagannath*, 4 L. 200; *contra* in *Brij Lal* v. *Jaishi Ram*, (1915) P.W.R. 106, dissented from.

therefore, on the plaintiff who seeks to bind the other member of the joint family to prove that it is a debt contracted for the benefit, or with their consent or that there was an urgent family necessity therefor.[1]

1172. The question whether junior members of a coparcenary are liable on a promissory note executed by the manager depends upon the character disclosed by him in his note. If he was the manager of a trading family, which traded under a business name, a note by the manager of such business will bind all members of the family, trading under that name.[2] But if the family was not a trading family, then the manager executing a negotiable instrument, like a promissory note, will himself be liable in any case, unless the note shows[3] or the promisee can shew that he had advanced the money on the security of the joint family. In other words, in such a case, the manager has two capacities (*a*) as a coparcener, and (*b*) as the manager, and such is also the extent of the liability of the non-disclosed coparceners, and it is in fact in each case whether he had acted in one or the other capacity,[4] and whether it had been executed with the consent, express or implied, previous or *post facto, e.g.,* ratification, in which case they will all be personally liable.[5] But it is said that to make the family liable, its names must appear on the note.[6] Such a course is essential, but its absence does not exonerate the other members, though the latter can then deny the debt or show that it was not incurred or applied so as to bind the family.[7] Even in cases which exclude the possibility of non-disclosed coparceners, it is conceded that the promisee or his assignee may abandon the note and sue the coparcenary on the liability therein secured, in which case, he will have to prove necessity or benefit and recover it as an ordinary debt.[8]

1173. Where the manager contracts a debt, it is open to the creditor to hold him personally liable,[9] or to sue him in his representative capacity,[10] or to sue the whole family as liable to him.[11] Where he elects to sue the

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(1) *Ganpat Rai* v. *Muni Lal,* 34 A. 135; *Soiru* v. *Narayan,* 18 B. 520; *Krishna* v. *Vasudev,* 21 B. 708; *Narayan* v. *Political Agent,* 7 Bom.L.R. 172; *Dwaraka Nath* v. *Bungshi,* 9 C.W.N. 879.

(2) *Abdul Majid* v. *Saraswati Bai,* (1934) P.C. 1.

(3) *Sadasuk* v. *Kisan Pershad,* 46 C. 663 P.C.

(4) *Abdul Majid* v. *Saraswati Bai,* (1934) P.C. 1; *Siri Kanta* v. *Sidheswari,* 16 Pat. 441; *Hari Mohan* v. *Sourendra Nath,* 41 C.L.J. 335: (1925) C. 1153; *Sukhadakanta* v. *Joginikanta,* 60 C. 1197; *Krishna* v. *Krishnaswami,* 23 M. 597 F.B.

(5) *Siri Kant* v. *Sidheswari,* 16 Pat. 441 (451, 452).

(6) *Hari Mohan* v. *Sourendra,* (1925) C. 1153; *Ram Gopal* v. *Dhirendra,* 54 C. 380 (391); *Sita Ram* v. *Chiman Das,* 52 B. 640; *Moti Lal* v. *Punjaji,* 29 N.L.R. 312: (1933) N. 160; *Jiback Mahto* v. *Shib Shanker,* (1933) Pat. 687; *Krishnanand* v. *Raja Ram,* 44 A. 393; *Raghunath* v. *Sri Narain,* 45 A. 434; *Tikam Chand* v. *Sudarsan,* (1933) Pat. 263; *Bhagwan Singh* v. *Bakshi Ram,* (1933) L. 494.

(7) *Ram Gopal* v. *Dhirendra,* 54 C. 380; *Palukkavandy* v. *Periakaruppa,* 2 I.C. (M.) 203.

(8) *Jiback Mahto* v. *Shib Shanker,* (1933) Pat. 687.

(9) *Deen Dayal* v. *Jugdeep Narain,* 3 C. 198 P.C.; *Jumoona Pershad* v. *Dignarain,* 10 I.C. 7 (8).

(10) *Bissessur* v. *Luchmessuri,* 5 C.L.R. 477 P.C.; *Deva Singh* v. *Ram Manohar,* 2 A. 746.

(11) *Sundar Lal* v. *Chhitar Mal,* 29 A. 1; *Dwarka Nath* v. *Bungshi Chandra,* 9 C.W.N. 879; *Arumugam* v. *Sabapathi,* 5 M. 12; *Subramaniappan* v. *Subramaniayyan,* 5 M. 125; *Dasaradhi* v. *Jodumoni,* 5 M. 193; *Guruvappa* v. *Thimma,* 10 M. 316; *Maruti* v. *Lilachan,* 6 B. 564; *Kisansingh* v. *Moreshwar,* 7 B. 91; *Babaji* v. *Dhuri,* 9 B. 305; *Abilak Roy* v. *Rubbi,* 11 C. 293; *Baldeo* v. *Mobarak Ali,* 29 C. 583; *Ranjit Singh* v. *Amullya,* 9 C.W.N. 923; *Hari Mohan* v. *Sourendra Nath,* 41 C.L.J. 535: 88 I.C. 1025: (1925) C. 1153; *Sukhadakanta* v. *Jogneekania,* 60 C. 1197; *Ram Ratan* v. *Lachman Das,* 30 A. 460.

manager personally as liable on a contract, he will obtain only a personal decree, in execution of which he is not entitled to bring to sale the right, title and interest of any member except his own judgment-debtor's. If, however, he elects to sue him in his representative character and has obtained a decree in that capacity, he would be entitled to sell the right, title and interest of all or any of the members of the joint family at his discretion.

1174. Lastly, the creditor may implead all members as jointly liable, in which case, a decree might be passed so as to bind them all, should be debt be held recoverable from their estate. The creditor can only choose the first alternative where he has no proof of legal necessity, for in a suit based on the manager's contract, the question of legal necessity would be immaterial and would not affect his liability. It is only when he adopts the second or the third course that he has to adduce proof of the legal necessity or *bona fide* enquiry. In this respect there is no difference between the Mitakshara and the Dayabhag schools.[1]

1175. There remains the question whether the other coparceners' liability can be enlarged by his subsequent acquiescence. That this is possible has been observed in several cases.[2] The acquiescence of the coparcener is evidence of necessity.[3]

1176. Where the members are liable, their liability would be unlimited and not necessarily limited to their interest in the joint family. This is the necessary consequence of the rule that the manager may acknowledge the liability of the family for the debts which he has properly contracted.[4] The contrary has been held, since the utmost capacity of the manager is to sell the joint estate, he could not by his act bind the coparceners indirectly so as to involve property which he could not have sold directly under any circumstances.[5]

Cl. (5) Alienation for Family Necessity.

1177. Not only is the manager entitled to contract debts, but he is equally entitled to alienate the joint property for family necessity without the consent of the other coparceners. Whether the manager be the father or some other coparcener, his alienation is subject to the following principles:—

(*a*) The power must be exercised only in case of need.

(*b*) The matters to be considered are:—

(*i*) the existence of the pressure,

(*ii*) the means of adverting it, and

(*iii*) the benefit to be conferred.

(*c*) If the lender or purchaser be a party to the mismanagement, he cannot take advantage of his own wrong;

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(1) *Dwarka Nath* v. *Bungshi Chandra*, 9 C.W.N. 879 (882); *Sukhadakanta* v. *Jogineekanta*, 60 C. 1197.

(2) *Ranjit Singh* v. *Amullya*, 9 C.W.N. 923; *Kandasami* v. *Somaskanta*, 7 M.L.J. 165: 5 I.C. 922.

(3) *Garibullah* v. *Khalak Singh*, 25 A. 407 (417) P.C.; *White* v. *Risto Chunder Bose*, 2 Hay, 557.

(4) *Krishna* v. *Vasudav*, 21 B. 808 (815).

(5) *Bhaskar* v. *Vijalal*, 17 B. 512; *Gosal* v. *Amarchand*, 9 Bom.L.R. 1289 (1292), dissenting from *contra* in *Chalamayya* v. *Varadayya*, 22 M. 166.

(*d*) Otherwise, the lender or purchaser, unless he acts *mala fide*, is not affected, though better management might have preserved the estate from debt;

(*e*) If there is no necessity, the lender or purchaser must have enquired, but—

(*f*) If he does enquire and acts honestly, the real existence of necessity is not a condition precedent to the validity of the transaction, provided the necessity alleged is sufficient and reasonably credited.

(*g*) The lender or purchaser is not bound to see to the application of the money advanced.[1]

1178. Extent and Limits of his Power.—Apart from the question of necessity, which is the touchstone of all alienators,[2] there remains the question of his discretion within the limits of which the manager may ordinarily alien family property. He is, of course, entitled to dedicate a portion of the joint property with the assent, express or implied, of the other coparceners; but if the property be small, he may dedicate it even without their consent.[3] But he can do so only by an act *inter vivos* and not by will.[4]

1179. Apart from this, his powers generally are deducible from the leading case of *Hanuman Pershad Pandey*,[5] in which the Privy Council have laid down the powers and the limits of the manager's authority to alienate or charge a coparcenary estate. These principles have since been enacted as a part of the more general statute which protects a *bona fide* transferee for value who takes a transfer from the manager after reasonable enquiry into its necessity.[6]

Is the Other Coparceners' Consent Essential?

1180. The question whether the manager has the right to transfer the joint estate or any portion of it in case of necessity on his own authority without consulting his coparceners has been answered in unequivocal terms by the Mitakshara, which states both the rule and an exception to it, the rule being that no man should make a sale or gift of anything without consulting all the sons[7] and the exception being that he may sell or gift it in a season of distress, for the sake of the family and especially for pious purposes.[8] This text was regidly enforced in earlier cases in which the courts were inclined to hold that the manager had no power to alienate the coparcenary property without the express consent of the coparceners. Even the Privy Council were not quite so sure of the correct rule[9] nor were

(1) *Hanuman Pershad Pandey* v. *Babooee*, 6 M.I.A. 393; *Ramkrishna* v. *Ratan Chand*, 53 A. 190 P.C.; *Chalamayya* v. *Varadayya*, 2 M. 166 (169).

(2) *Per* Batty, J., in *Nathaji* v. *Sita Ram*, 4 Bom.L.R. 587 (591, 592); *Kalu* v. *Barsu*, 19 B. 803; *Krishnaji* v. *Sakharam*, 3 Bom.L.R. 243; *Sheikhchand* v. *Hiralal*, 9 Bom.L.R. 1114; *Chinna* v. *Sada Barka*, 12 Bom.L.R. 811; *Jagrup* v. *Ram Sunder*, 6 M.L.T. 249; *Johurra* v. *Sree Gopal*, 1 C. 470; *Sham Narain* v. *Raghoober*, 3 C. 508; *Bemala* v. *Mohun*, 5 C. 792; *Piare* v. *Ghasi Ram*, (1881) C. P.S.C.Pt. 8 No. 21; *Ramlall* v. *Lakhmi Chand*, 1 B.H.C.R. (App.) 51; *Trimbak* v. *Gopalshet*, 1 B.H.C.R. (A.C.) 27; *Tandavaraya* v. *Valli Ammai*, 1 M.H.C.R. 398.

(3) *Gangi* v. *Tammi*, 50 M. 421 (425) P.C.

(4) *Ib.*, pp. 435, 426.

(5) *Hanuman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393.

(6) S. 38, Transfer of Property Act, for which *see* 1 1 Gour's Law of Transfer (6th Ed.), §§ 681-690.

(7) Mit., I-I-27.

(8) *Ib.*, I-I-28, *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 (165) P.C.

(9) *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 P.C.; citing from *Upooroop* v. *Vandhee*, 6 C. 749 (753).

the Indian courts, since there were cases in which the express consent[1] of the coparceners was held essential as also those in which implied consent[2] was held to be sufficient, while there were cases in which the courts seemed to have held neither as absolutely essential.[3] Lastly, there were cases in which the manager's power of alienation without the consent of the coparceners was affirmed.[4]

1181. The state of the law has since been clarified by the later decisions of the Privy Council in which they have upheld the manager's alienation if supported by necessity, in which case, they held that where necessity existed upon an estate it equally rested upon the coparceners as a whole, and it was proper to imply the consent of all of them to that act which such necessity had demanded.[5] In a later case, their Lordships extended this principle equally to the alienation for the benefit of the estate,[6] while as regards the transferee they laid down the principle which accords with the general law as enacted in S. 38 of the Transfer of Property Act. It is true that that section does not directly affect any rule of Hindu Law to the contrary; but the tendency of recent cases is to regard the manager as entitled to transfer the joint estate, either with the consent of the coparceners, or without their consent for legal necessity or benefit of the family. And this appears to be the rule in consonance with the text and the spirit of Hindu Law.

It is said that if the debtor did not borrow money for legal necessity the fact that it was afterwards so applied would not enlarge the liability of other coparceners.[7] But this view appears to be too narrow and unsupported by principles or the precedent quoted for it.

1182. It has already been stated that the term "benefit" includes spiritual benefit (**S. 116**). The *karta* is, therefore, entitled to dedicate a portion of the family property for the purpose of religious charity, with the assent, express or implied, of the other coparceners, and if the property be small, he may dedicate it even without their consent, though he can only do so by an act *inter vivos* and not by will.[8]

1183. The right of the manager to enter into contracts on behalf of the coparcenary is also settled by the Privy Council who said: "The Indian decisions as to the powers of the managing members of an Indian joint family are somewhat conflicting. It is, however, clear that where a business like money-lending has to be carried on in the interest of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving

Clause (6). He can make contracts.

(1) *Miller* v. *Runga Nath*, 12 C. 389 (399).

(2) *Chhotiram* v. *Narayan Das*, 11 B. 605 (608).

(3) *Bishambhar* v. *Sudasheeb*, 1 W.R. 96; *Sadabart* v. *Foolbash*, 12 W.R. 1 F. B.

(4) *Juggernath* v. *Doobo*, 14 W.R. 80 F.B.; *Bunsee Lall* v. *Achadh*, 22 W.R. 552; *Phulchand* v. *Man Singh*, 4 A. 309; *Chandradeo Singh* v. *Mata Pershad*, 31 A. 176 F.B.

(5) *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (443) P.C. followed in *Jogi Das* v. *Ganga Ram*, 21 C.W.N. 957 P.C.; *Karm Chand* v. *Ram Labhay*, 7 L. 476.

(6) *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.

(7) *Nandan Prasad* v. *Abdul Aziz*, 45 A. 497, following *Balwant Singh* v. *Clancy*, 34 A. 296 P.C.; *Puttoo Lal* v. *Raghubir*, 9 Luck. 238; *Luchman Singh* v. *Sarnam*, 39 A. 500 P.C.

(8) *Gangi* v. *Tammi*, 50 M. 421 (425, 426) P.C.

receipts and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort, it would be impossible for the business to be carried on at all."[1] This power is not affected by the fact that the other coparceners are minors,[2] and in such cases the test to be applied is rather the apparent authority of the manager than the actual necessity of the family.[3]

The entire coparcenery is bound by the manager's contracts, if made within the scope of his authority. But where the contract fails to be binding on the coparcenary, it is within the discretion of the court to grant specific performance in respect only of the manager's share, or award damages.[4] Such discretion would naturally be against specific relief in Bengal, Behar and the United Provinces and the Punjab[5] where a coparcener is not permitted to alien his share even for value. Even in Bengal, the rule of practice may be overborne by the rule of equity; as where a coparcener has contracted to sell a share of the joint property to plaintiff, representing that he had authority to do so, in which case the court would decree specific performance if the share allotted to him would suffice to fulfil the rontract.[6] In a suit for specific performance against a coparcener, other coparceners are not necessary parties, unless there has been, since the contract, a partition and fraudulent design against the alienee.[7]

Pass Receipts.

1184. The power to make contracts necessarily implies the power to discharge it, and the Privy Council have in the case last cited ruled that he has the power to pass receipts as a necessary incident of management. As such, he alone can give discharge so as to bind his minor coparceners within the meaning of S. 7 of the Limitation Act.[8]

Compromise and Refer to Arbitration.

1185. Such are also the powers to compromise claims or refer them to arbitration.[9] So where a person sued the joint family for a share therein, and the father as manager compromised his suit by giving him a share, the court held that in the absence of collusion or fraud, the compromise bound the joint family,[10] and this case was followed in another case in which it was held that it was competent to the father in his capacity of manager to refer to arbitration the partition of the joint family property and the award made on such a reference, would, if in other respects valid, be binding on the sons.[11] The same rule

(1) *Kishen Prasad* v. *Har Narayan Singh*, 33 A. 272 (276) P.C.; *Raghunathji* v. *Bank of Bombay*, 34 B. 72; *Uma Kant* v. *Martand*, (1933) B. 245.

(2) *Raghunathji* v. *Bank of Bombay*, 34 B. 72 (87); *Dhopo* v. *Ramchandra*, 57 A. 374.

(3) *Raghunathji* v. *Bank of Bombay*, 34 B. 72 (86).

(4) *Janki Nath* v. *Jaimini Kanta*, 22 I. C. (C). 612; *Jadhu Nandan* v. *Abdul Rahman*, 16 C.W.N. 93: 11 I.C. 892, O.A.; *Abdul Rahman* v. *Jadumandan*, 18 C.L.J. 344; 21 I.C. 528, citing *Lumley* v. *Ravenscroft*, L.R. 1 Q.B. 683.

(5) *Seetla Sahai* v. *Thakur Din*, 11 A.L.J. 456: 20 I.C. 247.

(6) *Shama Charan* v. *Kumed Dasi*, 27 C.L.J. 611: 42 I.C. 378.

(7) *Rungayya* v. *Subramania*, 40 M. 365.

(8) *Suptu* v. *Sakharam*, 30 Bom.L.R. 537.

(9) *Kishen Prasad* v. *Har Narayan Singh*, 33 A. 272 (276) P.C.; *Pitam Singh* v. *Ujagar Singh*, 1 A. 651; *Jagannath* v. *Madulal*, 16 A. 231 (233); *Ram Dayal* v. *Moti Ram*, 10 N.L.R. 74 (76).

(10) *Pitam Singh* v. *Ujagar Singh*, 1 A. 651 (655).

(11) *Jaganath* v. *Madulal*, 16 A. 231 (233), followed in *Ram Dayal* v. *Moti Ram*, 10 N.L.R. 74 (76); *Jagannath* v. *Kanhialal*, 6 I.C. (A.) 123; *Pulliah* v. *Varadarajulu*, 31 M. 474 (compromise by reversioner).

applies equally to a manager other than the father; and it is immaterial that some of the members were minors, provided the reference was to their benefit.[1] But, of course, where a reference is made to arbitration during the pendency of the suit to which any party is a minor, then the provisions of the Civil Procedure Code relating to minors must be adhered to. Consequently, where a suit was compromised by the father as the guardian *ad litem* of his son and the court had not expressly sanctioned it as required by O. XXXII, R. 7 of the Code of Civil Procedure, no decree passed thereon was held to be of any force against the minor who was entitled to avoid it,[2] though the compromise would be binding upon other parties.

A compromise otherwise good, cannot be impugned by a party on the ground that he had made it under a misapprehension as to his rights[3] since it is of the essence of a compromise that the dispute is settled without examining its merits.[4]

The manager may settle a dispute by the special oath of his adversary administered under the provisions of the Oaths Act.[5]

Cannot Start New Business.

1186. While the manager, as such, is entitled to carry on an ancestral family business, he cannot start a new business. If he wishes to start one, he can only do so with the consent of the adult coparceners.[6] But even then his liability to the minor members remains. If the venture was successful it will stand supported on the ground of "benefit." But if it fails the minors may call upon the manager to bear the losses of his own enterprise if it proved too speculative and hazardous. The question in this and similar cases is not what the manager did; but whether it was justified as a prudent act of management (**§ 144.**).

Acknowledge Debts Not Barred.

1187. The power of the manager to contract debts carries with it the necessary power to acknowledge them. As such, it has been held that the manager is an agent for the purpose of S. 19 of the Limitation Act, and may, as such, acknowledge debts on behalf of the joint family whether consisting of adult or minor members;[7] and any payment by a manager would be a payment by an agent duly authorized within the meaning of S. 20 of the Limitation Act.[8] But, of course, the manager can only enlarge

(1) *Balaji* v. *Nana*, 27 B. 287; *Chinna* v. *Ganga*, 9 M.L.T. 34; *Romon* v. *Hurrolal*, 19 C. 334; *Jai Nath* v. *Kamala*, 7 I.C. (C.) 31.

(2) O. 32, R. 7, C.P.C.; *Jamna Bai* v. *Vasanta*, 39 M. 409 P.C.; *Ganesh Row* v. *Tulja Ram*, 36 M. 295 P.C.

(3) *Venkatagiri* v. *Subharayadu*, 34 I. C. (M.) 491.

(4) *Pulliah* v. *Varadarajulu*, 31 M. 474.

(5) *Samu* v. *Swaminatha*, 16 M.L.J. 163; 25 I.C. 221, followed in *Jijimba* v. *Saginram*, 22 M.L.J. 45: 14 I.C. 374, holding *Thimappaya* v. *Lakshminarayana*, 6 M. 284, as no longer good law.

(6) *Tammireddi* v. *Gangireddi*, 45 M. 128 (190), following *Morrison* v. *Verschoyle*, 6 C.W.N. 429; *Abdur Rahman* v. *Hussain*, 37 M.L.J. 316.

(7) *See* S. 21, Cl. (1), added in Act IX of 1908; *Chennayya* v. *Gurunatham*, 5 M. 169 F.B.; *Sobhanadri* v. *Sriramulu*, 17 M. 221; *Kailasa* v. *Ponnukannu*, 18 M. 456; *Subramania* v. *Arumuga*, 26 M. 330; *Chidambaram* v. *Ramaswami*, 26 I.C. (M.) 911; *Bhasker* v. *Vijalal*, 17 B. 512; *Ranmalsinghji* v. *Vadilal*, 20 B. 61; *Annapagauda* v. *Sangadigyapa*, 26 B. 221 F.B. (acknowledgment by a certificated guardian); *Narendra* v. *Raicharan*, 29 C. 647; *Sarada Charan* v. *Durgaram*, 37 C. 461; *Har Prasad* v. *Bakshi*, 19 C.W.N. 860: 31 I.C. (C.) 30; *Hari Mohan* v. *Sourendra Nath*, 41 C.L.J. 535: 88 I.C. 1025: (1925) C. 1153; *Ramcharan* v. *Gaya Prasad*, 30 A. 422 F.B.; (*contra* in *Kumarasami* v. *Palanayappa*, 1 M. 385;) *Wajibun* v. *Kadir Baksh*, 13 C. 292; *Chhato* v. *Bilto*, 26 C. 53, is no longer good law, in view of the amended section.

(8) S. 21, Cl. (1), added in Act IX of 1908; *Sukhamoni* v. *Ishan Chunder*, 25 C.

limitation in respect of debts contracted by him for the joint family. He cannot do so in respect of the debts contracted by the members individually.[1]

Barred Debts.

1188. The manager has, however, no authority to acknowledge, except as against himself, a debt already barred by time.[2] This view is supported by the view that since the manager can only bind the family by his act which is necessary or beneficial to its interest and the acknowledgment of a barred debt cannot be so regarded, his acknowledgment of such a debt is beyond his power.

Father's Barred Debts.

1189. Though the manager, as such, may possess no power to revive a debt by an agreement to repay it after it has become barred by time,[3] such power is possessed by the father when he is the manager as against his sons, who are bound to pay their father's debts, only if they are not illegal or immoral, a liability which does not extend to any other relation beyond the point of necessity and benefit to the family.[4]

Manager can give discharge.

1190. The manager is competent to give a valid discharge, within the meaning of S. 7 of the Limitation Act, of a claim on behalf of himself and his coparceners, whether adults or minors, without the concurrence of the minor members so as to set limitation in motion against them.[5] He is held entitled to consent to an alienation by a coparcener's widow so as to bind his subsequently born son.[6] But he cannot forego a substantial portion of the family debt without cause; if he does so, it does not discharge the debtor, from whom the other coparceners may recover it.[7]

Clause (6).

1191. Manager's Right of Suit.—That the manager may possess the right to represent the family in a suit affecting the joint family has been now conceded by the Privy Council who said: "Is there any principle of law, or any custom applicable to a case like this, according to which the managing member of a Hindu joint family entrusted with the management of a business must be held incompetent to enforce at law the ordinary business contracts they are entitled to make or discharge in their own names. The defendant is, of course, entitled to insist on all the persons with whom he expressly contracted being made parties to the suit."[8]

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844 (852) P.C.; *Sarodacharan* v. *Durga Ram*, 37 C. 461; *Ramcharan* v. *Gaya Prasad*, 30 A. 422 F.B.; *Chidambaram* v. *Ramaswami*, 26 I.C. (M.) 911.

(1) *Narayana* v. *Venkataramana*, 25 M. 220 (234) F.B.

(2) *Ib.*

(3) *Gopal Narain* v. *Kuddomutty*, 14 B.L.R. 21; *Chinnaya* v. *Gurumatham*, 5 M. 169 F.B.; *Kumara* v. *Pala*, 5 M. 385; *Kondappa* v. *Subba*, 13 M. 189; *Dinkar* v. *Appaji*, 20 B. 155; *Naranji* v. *Bhagvandas*, (1881) B.P.J. 238; *Wajibun* v. *Kadir*, 13 C. 292; *Indar Singh* v. *Sarju Singh*, 8 A.L.J. 1099; *Dalip Singh* v. *Kundan Lal*, 35 A. 207; *Sadhu* v. *Brahmades*, 61 I.C. (Pat.) 20 *contra* in *Rama* v. *Viswanatha*, 41 M.L.J. 567 (he has the power).

(4) S. 159 Commen.; *Dalip Singh* v. *Kundan Lal*, 35 A. 207.

(5) *Surju Prasad* v. *Khwahish Ali*, 4 A. 512; *Vigneswara* v. *Bapayya*, 16 M. 436; *Sadulla* v. *Bhana Mal*, (1882) P.R. 58; *Harihar Pershad* v. *Bholi Pershad*, 6 C.L.J. 383 (393); *Banwarilal* v. *Sheo Shankar*, 8 I.C. (C.) 670.

(6) *Bhagwan* v. *Ujagar*, (1928) P.C. 20.

(7) *Dasratha* v. *Narasa*, 51 M. 484.

(8) *Kishen Prasad* v. *Har Narain*, 33 A. 272 (279) P.C.; *Sheo Shankar* v. *Jaddo*, 36 A. 363 P.C.; also *see* 2 Gour's Law of Transfer (6th Ed.), §§ 2680-2684.

And in another case, they said: "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound."[1]

1192. The question then arises: What are these occasions? It appears to be agreed that in respect of all contracts made by the manager he has unquestionably the right to sue by himself, though the contract may have been made by him in his capacity as manager of the joint family. In such a case there is a privity of contract between him and his obligee entitling him to sue. But though this is his right, it is equally the right of the defendant to insist upon the joinder of all persons who are entitled to enforce the contract and the court should then implead them. There is no question of limitation, since the manager alone is competent to act and other members are merely joined *ex majore cautela*.

1193. But if the defendant does not object, the decree will bind the joint family, and the junior members cannot complain that they were not parties to the suit, since they were sufficiently represented by the manager.[2] But in certain courts, *e.g.*, in Bombay, as a matter of practice, the manager joins all his coparceners in suits affecting the coparcenary,[3] and until recently there was a conflict of opinion as to the power of the manager to maintain a suit in his own name without impleading his coparceners, some courts holding such suits incompetent[4] while others holding them maintaintble.[5] In some cases, the courts seek to distinguish the case of the father and any other manager, holding that while the former may, the latter cannot, bind the family by any decree passed against him[6] but the Privy Council have held that apart from certain textual powers possessed by the father, such distinction has no legal support.[7] Since the manager alone can sue for the joint family debt, no coparcener can maintain a suit to obtain a refund of the money deposited by him to avert an attachment of his coparcenary share,[8] unless, of course, it was his self-acquisition.

1194. Manager De Facto Guardian.—It has already been seen that the manager of a joint family is the *de facto* guardian of all minor coparceners for the protection of whose interest no guardian can be appointed either under the Guardians and Wards Act,[9] or by the High Court in the

Clause (7).

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(1) *Kishan Prasad* v. *Har Narayan Singh*, 33 A. 272 (276, 277) P.C., overruling *Alagappa* v. *Vellianchetti*, 18 M. 33 (Form immaterial) *Ram Kishan* v. *Ganga Ram*, 12 L. 428.

(2) *Sheo Shankar* v. *Jaddo*, 36 A. 383 (386, 387) P.C., affirming O.A. *Jaddo* v. *Sheo Shankar*, 33 A. 71; *Jogendro* v. *Fumindro*, 14 M.I.A. 367 (376); *Bessesur* v. *Luchmessur Singh*, 5 C.L.R. 477 P.C.

(3) *Kashi Nath* v. *Chimnaji*, 30 B. 477 (486).

(4) *Kuttusheri* v. *Vallotill*, 3 M. 234; *Alagappa* v. *Vellian*, 18 M. 33 (36), overruled in *Kishan Prasad* v. *Har Narayan Singh*, 33 A. 272 P.C.; *Angamuthu* v. *Kolandavelu*, 23 M. 190; *Hari Gopal*, v. *Gokaldas*, 12 B. 158; *Balkrishna* v. *Moro*, 21 B. 154.

(5) *Arunachalla* v. *Vythialinga*, 6 M. 27; *Ramayya* v. *Venkataratnam*, 17 M. 122; *Girwar* v. *Makbunessa*, 1 Pat.L.J. 468.

(6) *Madusudan* v. *Bhau*, 15 Bom.L.R. 36 (40); *Laxman* v. *Vinayak*, 40 B. 329.

(7) *Suraj Bunsi* v. *Sheo Persad*, 5 C. 148 (165) P.C..

(8) *Muthusami* v. *Angayakannu*, 11 M.L.W. 115: 54 I.C. (M.) 807.

(9) *Gharibullah* v. *Khalak Singh*, 25 A. 407 P.C.; *Virupakshappa* v. *Nilgan-*

exercise of its inherent power.[1] The only cases in which the appointment of another guardian is possible have already been considered (§ 863).

In all other cases, the manager of the joint family is the *de facto* guardian of all minors and is as such entitled to all the rights as he is subject to all the liabilities of a guardian.

[For the manager's separate business, *see* §§ 1220-1222].

Coparcener's liability for Manager's debts.

133. A Coparcener is liable to the extent of his interest in the coparcenary property for all debts incurred and alienations of the coparcenary property made by the manager:—

(*a*) where the debt is incurred or the alienation made expressly or impliedly by him as such for legal necessity or benefit as defined in Sections 111-114.[2]

(*b*) where the creditor or alienee, after reasonable inquiry, in good faith believes that the debt was so incurred or the alienation was so made.[3]

Explanation 1.—If the debt was incurred or the alienation made for legal necessity or benefit, the fact that the transaction had been precipitated by the previous mismanagement of the manager does not affect the creditor or the alienee, unless he was himself a party to such mismanagement.[4]

Explanation 2.—There is no presumption that the debt incurred or the alienation made by the manager was just and proper so as to bind the coparceners.[5]

Explanation 3.—Nothing herein precludes a coparcener from making himself or being made otherwise liable, by his act or omission, conjointly with or apart from the manager.[6]

1195. Analogous Law.—This section is supported by case-law. The power of the manager to contract debts so as to bind the coparceners to the extent of their interest in the coparcenary property is limited, though it may be enlarged by their consent; otherwise his power cannot be exercised except in the case of necessity or for the benefit of the family or of its members. As the Privy Council observed in the leading case which settled the law on the subject: "It (the power) can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the preceding mismanagement of the estate, the danger to be averted, or the benefit to be conferred upon it, in the

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gava, 19 B. 309; *Bindaji* v. *Mothurabai*, 30 B. 152; *Shamkuar* v. *Mohanunda*, 19 C. 301; *Jhabbu Singh* v. *Ganga Bishan*, 17 A. 529.

(1) *Manilal, (In re)*, 25 B. 353; *Jairam, (In re)*, 16 B. 634; *Jagannath, (In re)*, 19 B. 96.

(2) *Hanooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393; *Lala Amarnath* v. *Achan Kuar*, 14 A. 420 P.C.; *Ram Krishna* v. *Ratan Chand*, 53 A. 190 P.C.; *Nowrutton* v. *Baboo Bonree*, 6 W.R. 193; *Chalamayya* v. *Varadayya*, 22 M. 166.

(3) *Ibid.*

(4) *Hanooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (423); *Mahabeer* v. *Joobha*, 16 W.R. 221; *Sheoraj* v. *Nuckchedi*, 14 W.R. 72; *Sikherchund* v. *Dulputty*, 5 C. 363.

(5) *Partab Bahadur* v. *Chitpal Singh*, 19 C. 174 P.C.; *Bhura* v. *Banarsi*, (1915) P.L.R. 174; *Mela Mal* v. *Gori*, 3 L. 288 (293); *Sotan Ram* v. *Parduman*, 8 L. 673.

(6) S. 41, Transfer of Property Act; *see* 1 Gour's Law of Transfer (6th Ed.), 754-765.

particular instance, is the thing to be regarded. Their Lordships think that the lender is bound to enquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance, for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity is not a condition precedent to the validity of the charge, and they do not think that under such circumstances he is bound to see to the application of the money."[1]

1196. All these principles are enunciated in the section which, however, applies only to a normal family, and not a trading family, the manager of which possesses necessarily large powers as stated in **S. 144.** So again, the powers of the manager may be implemented by the act or conduct of one or more of the coparceners who might be bound by it. But these are exceptional cases, and eliminating them for the present, the power of the manager is limited by necessity or benefit (§ **1043**). In some cases anything that constitutes a "necessity" would also constitute a "benefit," but it is obvious that the two concepts are different since the discharge of a legal, moral or spiritual obligation may be a pressing necessity though it cannot be described as necessarily beneficial to the family or the estate (**S. 116**).

Explanation 3.

1197. Personal Liability.—Where a manager professes to act as manager his liability is not personal. But where he makes representations both he[2] and his successor-in-office[3] are bound to make them good or they will be mulcted in damages. But where the manager makes an agreement to purchase immovable property and then dies, his agreement may[4] or may not[5] be specifically enforceable against the surviving coparceners according to whether it was or was not supported by legal necessity. Apart from legal necessity they might be liable under the general law, *e.g.*, Ss. 41 and 43 of the Transfer of Property Act, or under S. 115 of the Evidence Act or under some other principle of law, *e.g.*, S. 73 of the Contract Act[6] or S. 55 (2) of the Transfer of Property Act. It has accordingly been held that a manager who has agreed to sell immovable property of himself and the minor coparceners becomes personally liable for damages for failure to perform the contract when it is found not binding on the minors. The same liability attaches to the coparceners other than the manager who make or aid in the formation of a contract. Members of a coparcenary cannot retain the benefit and at the same time repudiate the transaction by means of which the benefit has been conferred.[7]

Decree against the father or the manager.

1198. It is now settled that where a father or other manager is sued as a representative of a family, the other members of the family must be held to be substantially parties to the suit through such manager. The fact that they are not parties *eo nomine* will not render them any the less parties to the suit.[8]

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(1) *Hanooman Persaud Panday* v. *Mt. Babooee*, 6 M.I.A. 393 (423).

(2) *Adikesawan* v. *Gurunath*, 40 M. 388 F.B.

(3) *Girwar Narain* v. *Makbunissa*, 1 Pat. L.J. 468: 36 I.C. 542.

(4) *Bappu* v. *Annamalai*, 44 M.L.J. 226: (1923) M. 313.

(5) *Shunmugam* v. *Subha Reddi*, 31 I. C. (M.) 1.

(6) *Adikesawan* v. *Gurunatha*, 40 M. 338 (348) F.B.; *Nabin Chandra* v. *Krishna Barana*, 38 C. 458; *Ranchhod* v. *Manmohandas*, 32 B. 165.

(7) *Jado Singh* v. *Nathu Singh*, 48 A. 592.

(8) *Venkatanarayana* v. *Somaraju*, (1937) M. 880 (903) F.B.

134. An alienation by the manager of joint property without legal necessity is not void, but only voidable at the instance of the coparceners affected thereby.[1]

Manager's alienation, voidable only.

1199. Analogous Law.—Since the manager represents the joint property and can alienate it with the consent of the other coparceners,[2] it follows that his alienation is ordinarily presumed to be made on behalf of all the coparceners, who may affirm or repudiate it if not otherwise valid,[3] which means that such alienation is not void, but only voidable at the instance of coparceners whose interests are affected thereby.[4] It was so held in a case in which the father had made a gift of some coparcenary property to his wife, constituting her an absolute owner. His only coparcener was his son, who died without challenging it during the father's lifetime. On his death the donee (his mother) mortgaged it to the defendant, whereupon the plaintiffs who were her next reversioners sued for a declaration that the gift was not binding on them after the mortgagor's death, but the court dismissed their suit holding that the mortgagor's title if defective could only have been attacked by the coparcener who died without challenging it. "The interests of the plaintiffs were in no way affected by the deed of gift when it took place. They had no right in the property whatever during the lifetime of either Mahabir (the father, or, his son). It would be giving a great and unwarranted extension of the rights of reversioners as hitherto understood to allow them the right to challenge an alienation under the circumstances found in the present case."[5]

From the fact that the manager's alienation without necessity is voidable and not void, it follows that the coparcener repudiating such alienation becomes entitled to mesne profits only from the date of his repudiation of the alienation and not from the date it was made,[6] and the purchaser's suit for refund of the price paid by him for such sale would be subject to Article 97 of the Limitation Act, the starting point for which is not the date of the decree for his ouster but the date of his actual dispossession.[7]

An improper alienation by one coparcener may be set aside by another, but strictly speaking, this is all he is entitled to;[8] but if his suit is a representative suit, and he impleads or represents the other coparceners, the court may set aside the alienation, subject to such equity as the alienee may be found entitled to.[9]

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(1) *Jagesar* v. *Deo Dat*, 45 A. 654, following *Subba Goundan* v. *Krishnamachari*, 45 M. 449; *Sankara* v. *Ummer*, 46 M. 449; *Sheo Ghulam* v. *Badri Narain*, 11 A.L.J. 798; *Madan Lal* v. *Chidda*, 53 A. 21.

(2) *Sheo Ghulam* v. *Badri Narain Lal*, 11 A.L.J. 798.

(3) *Subramania* v. *Padmanaba*, 19 M. 267; *Iburamisa* v. *Thervenkatasami*, 34 M. 269; *Subba Goundan* v. *Krishnamachari*, 45 M. 449 (460).

(4) *Jagesar* v. *Deo Dat*, 45 A. 654, following *Subba Goundan* v. *Krishnamachari*, 45 M. 449; *Sankara* v. *Ummer*, 46 M. 449; *Sheo Ghulam* v. *Badri Narain*, 11 A.L.J. 798; *Madan Lal* v. *Chidda*, 53 A. 21.

(5) *Jagesar* v. *Deo Dat*, 45 A. 654 (656).

(6) *Subba Goundan* v. *Krishnamachari*, 45 M. 449 (465, 466), dissenting from *contra* in *Kandasami* v. *Somaskanda*, 35 M. 177, following *Bhirgu Nath* v. *Narsingh*, 39 A. 61.

(7) *Sankara* v. *Ummer*, 46 M. 40, distinguishing *Jusouru* v. *Pirthichand*, 46 C. 670 (687) P.C., following *Sukmoy* v. *Shashi Bhushan*, 10 I.C. (C.) 486; *Meenakshi* v. *Krishna*, 32 I.C. (M.) 176; *Ramchander* v. *Tohfah Bharti*, 26 A. 519; *Subbaroya* v. *Rajagopala*, 38 M. 887.

(8) *Shyam Sunder* v. *Jaganath*, 2 Pat. 925.

(9) *Bunwari Lal* v. *Daya Sunkar*, 13 C.W.N. 815; *Mahanath* v. *Barhamdeo*, 14 C.W.N. 532, explained in *Shyam Sunder* v. *Jaganath*, 2 Pat. 925 (927, 928).

135. Where an alienation is found to be in excess of the requirements of legal necessity or benefit, or in the case of the father's alienation also of an antecedent debt, it may, except as otherwise provided, be set aside or upheld in accordance with the following rules:—

Equity arising on partial necessity.

(*a*) Where it is justified by all but an inconsiderable part of the consideration, the court may uphold the whole alienation presuming it as so justified, or place the alienee upon term;[1]

(*b*) Where it is only partially so justified, the alienation will be set aside upon the alienee being reimbursed the consideration found supported by legal necessity or benefit, and the cost of improvements, if any, made by him:

Provided that no person, who is not a *bona fide* alienee for valuable consideration without notice, can claim such equity to compensation.[2]

(*c*) But before impeaching a transaction, the court will pay due regard to the lapse of time and all attendant circumstances.[3]

1200. Analogous Law.—This section is now supported by the under noted cases.[4] It is necessarily subject to other provisions. For instance, the reversioner who had consented to the alienation cannot afterwards claim to set it aside. And similarly, where the alienee was a privy to the transfer being made without legal necessity, he cannot claim the equitable relief by way of restitution. If, however, the alienee is a *bona fide* transferee without notice and the reversioner has not by his consent or acquiescence, encouraged or ratified his transfer, then the rules set out in this section apply. They have no application when the transfer is wholly supported[5] or unsupported by consideration.[6]

1201. But they apply to an excessive sale for necessity, in which case the question whether the sale should be affirmed or its consideration refunded depends upon the excess. The question what failure of consideration, as warranted by necessity, justifies the cancellation of a sale cannot be treated as a matter of arithmetical calculation as several considerations have to be taken into account. One thing is certain that the mere fact that a small faction, say ten, fifteen or twenty per cent. of the consideration is found unsupported by necessity, is not necessarily decisive of the question. On this point, the conflict between Indian cases has now been set at rest by a series of decisions of the Privy Council, affirming the principle embodied in clause (*a*) of this section. In one of the cases, the Privy Council have reviewed the Indian case-law on the subject.[7] In this case the defendant had purchased a share in a zemindari of Rs. 3,500 of which Rs. 3,000 was found supported by necessity. The Allahad Court had cancelled the sale on payment to the defend-

(1) *Girdhari Lal* v. *Kantoo Lal*, 14 B.L.R. 187 P.C.: 6 W.R. 56; *Nadai* v. *Nainar*, 27 C.W.N. 365 P.C.: 74 I.C. 604; *Sri Krishna* v. *Nathu Ram*, 49 A. 149 P.C., overruling *Dwarka Ram* v. *Jhulai Pande*, 45 A. 429; *Daulat* v. *Sankatha Prasad*, 47 A. 355; *Niamat Rai* v. *Din Dayal*, 8 L. 597 P.C.; *V. E. A. E. M. Firm* v. *Mg. Ba*, (1927) P.C. 237; *Suraj Bhan Singh* v. *Shah Chain Sukh*, 53 M.L.J. 300 P.C.: 32 C.W.N. 117; *Ulfat Rai* v. *Tej Narayan*, 8 L. 362; *Durgaprasad* v. *Jewdhari*, 62 C. 733.

(2) *Deputy Commissioner* v. *Khanjan Singh*, 29 A. 331 (338) P.C. *See* S. 51, Transfer of Property Act.

(3) § 1578.

(4) *Vide* f.n. (1) to (3).

(5) *Raghubar* v. *Akhtar*, 6 A.L.J. 366.

(6) *Vijbhukhan* v. *Dayaram*, 32 B. 32; *Janki* v. *Madhu*, 9 Bom. L.R. 710; *Hari* v. *Bajrang*, 13 C.W.N. 544: 11 I.C. 434.

(7) *Sri Krishna Das* v. *Nathu*, 49 A. 149 (161) P.C.

ant of Rs. 3,000 within 6 months. The defendant appealed to the Privy Council, who reversed the order of the High Court, holding that the sale was for an adequate consideration. In so holding their Lordships followed an earlier decision of their Board in which a Hindu widow had sold property for Rs. 5,300 in order to pay off only Rs. 4,588 due on two mortgages executed by her husband.[1] In other cases their Lordships upheld sales for Rs. 43,500 and Rs. 20,000, to satisfy pre-existing debts for the amount of Rs. 38,000[2] and Rs. 17,000 respectively.[3] They, however, set aside the sale where the widow had sold her heritage for Rs. 7,080 due under a decree and interest thereon and for a first advance of Rs. 7,280 of which there was no proof of either payment or necessity. In cancelling the sale their Lordships ordered the refund of Rs. 7,080 which alone was found paid for necessity.[4] In another case, they set aside a sale by a dissipated and extravagant manager, worth Rs. 1,10,000, for only Rs. 84,257, in addition to which the purchaser paid the vendor a sum of Rs. 25,000. The High Court upheld the sale, but the Privy Council held that the High Court had no power to make a fresh contract for the parties and set aside the sale ordering refund of Rs. 85,000 with 9% simple interest.[5] Of course, in considering this question the court cannot overlook the fact that it would be manifestly impossible and possibly prejudicial to the interest of the estate if the manager were to be held bound, in every instance, to sell property for exactly the sum required for necessity. So where the widow permanently leased a tank for a premium of Rs. 174, reserving the annual rent of 8 annas only to pay off the debt of Rs. 100 the court upheld the lease holding it as supported by necessity.[6] Even where the necessity did not exceed Rs. 7,775, the court upheld the sale of a house for Rs. 19,500 on the ground that it was not saleable piecemeal.[7] Again, proof that the bulk of the consideration was supported by legal necessity may be evidence that the remainder was also presumably so supported. A mere failure to prove any part of the consideration as supported by necessity, is not necessarily tantamount to proof that it was unsupported by it.[8]

1202. Alienation for Partial Necessity.—Where, however, an alienation is found to be not justified by substantial necessity as already indicated the relief to be awarded to the party would depend upon the question of necessity and the equity to which the alienee may be entitled. The several questions which enter into the consideration of this question are (*a*) the nature of the alienation made,[9] (*b*) time, (*c*) the sex and the status of the alienor, (*d*) the nature of necessity, (*e*) the enquiries made by

(1) *Medai* v. *Nainar*, 27 C.W.N. 365 P.C.: 74 I.C. 604.

(2) *Niamat Rai* v. *Din Dayal*, 8 L. 597 P.C.

(3) *V. E. A. E. M. Firm* v. *Mg. Ba*, (1927) P.C. 237; *Suraj Bhan Singh* v. *Shah Chain Sukh*, 53 M.L.J. 300 P.C., (consideration Rs. 19,000, legal necessity Rs. 17,378).

(4) *Deputy Commissioner* v. *Khanjan Singh*, 29 A. 331 (338) P.C.; *Jai Singh* v. *Darbara Singh*, 6 L. 137 (three-fourths supported by legal necessity and transfer challenged after twenty years); *Durga Prasad* v. *Jewdhari*, 62 C. 733.

(5) *Nagappa* v. *Brahadambal*, 58 M. 350 P.C.

(6) *Felaram* v. *Pragalanand*, 14 C.W.N. 895: 6 I.C. 207.

(7) *Balkrishna* v. *Hiralal*, 41 A. 338; *Gokharam* v. *Sham Lal*, 3 L. 426; following *Chatranarayan* v. *Uma Kunwari*, 1 B.L.R. 201; *Felaram* v. *Pragalanand*, 6 I.C. (L.) 207; *Namankal* v. *Har Bhagwan*, 2 L. 357; *Kannu* v. *Amrithammal*, 26 I.C. (M.) 418.

(8) *Jai Singh* v. *Darbara Singh*, 6 L. 137 (three-fourths supported by legal necessity and transfer challenged after 20 years); *Durgaprasad* v. *Jewdhari*, 62 C. 733.

(9) *Jai Indra* v. *Khairati Lal*, 4 Luck. 107; *Dwarka Ram* v. *Bakshi*, 14

the alienee, (*f*) the price paid, and (*g*) the improvements, if any, made by him.

Case for Terms.

1203. A case for terms may arise under S. 51 of the Transfer of Property Act, to which reference must be made for further information.[1] It may also arise where the alienee, whether a purchaser or not, has advanced money which, though supported by necessity, has been alienated for a grossly inadequate consideration, or the transaction cannot be upheld or set aside without awarding compensation. The cases on the point present infinite variety, and though they cannot all be reduced to a principle, they are nevertheless, all intended to thwart transparent injustice.

1204. No Mesne Profits.—Where the alienation is partially supported by legal necessity, the alienee cannot be held to be wrongfully in possession, and consequently, he cannot be mulcted in mesne profits,[2] and in any case, even if allowed, the court should set them off against interest on the outlay to which the alienee, on his transfer, is entitled. The latter is equally entitled to a claim of reasonable compensation for improvements of the property which enhance its value.[3]

As to proof of legal necessity *see* S. 150.

Manager's customary gifts.

136. The manager is entitled to make such gifts or presents either to the members of the family or strangers as are usual or customary;[4]

(2) And the father,[5] and in his absence, the mother[6] has in this respect even a larger discretion, being entitled to make it at any time to a reasonable extent.[7]

1205. Analogous Law.—This section is supported by the following texts:—

Brihaspati.—"Even a single individual may include a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes."

Mitakshara.—"Therefore, it is a settled point that property in the paternal or ancestral estate is by birth; although the father have independent power in the disposal of effects other than immovables for indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth, he is subject to the control of the sons and the rest in regard to the immovable estate whether acquired by himself or inherited from his father or other predecessor."[8]

"The meaning of this text is this: While the sons and grandsons are minors and incapable of giving their consent to a gift or the like; or while brothers are so and continue unseparated, even one person who is capable may conclude a gift, hypothecation or sale, of immovable property if a calamity affecting the whole family require it or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like make it unavoidable."[9]

Viramitroday.—"Gifts by the parents out of favour of affection should be guided by propriety but not by caprice."[10]

Pat. 595 (609) (a mortgage may be justified, though not a sale) Distg. *Hitendra* v. *Sukhdev*, 8 Pat. 558.

(1) *See* 1 Gour's Law of Transfer (6th Ed.), §§ 891-914.

(2) *Banwari Lal* v. *Mahesh*, 41 A. 61 (68) P.C.

(3) *Bhagwat Dayal* v. *Ram Ratan*, 20 A.L.J. 26 P.C.: 65 I.C. 69 P.C.

(4) Mit., I-I-27, 28, 29.

(5) *Bacho* v. *Mankorabai*, 31 B. 373 P. C.; *Ramalinga* v. *Narayana*, 45 M. 489 P.C.; *Sundararamayya* v. *Sitamma*, 35 M. 459.

(6) *Churaman* v. *Gopi*, 37 C. 1.

(7) *Bachoo* v. *Mankorebai*, 31 B. 373 P.C.; *Ramalinga* v. *Narayana*, 45 M. 489 (495) P.C.

(8) Brihaspati, cited in Ratnakar and Mitakshara, I-I-28.

(9) Mit., I-I-27, 28, 29; Mayukh, IV-VII, §§ 11-13.

(10) Ch. VII, S. 5.

Clause (1).

1206. Manager's Gift.—The manager's power to make a gift is necessarily limited and circumscribed by the requirements of religious or customary necessity. Though he has the power to make ordinary gifts or presents on suitable occasions either to the members of the family or to strangers, this power must be confined to such occasions as are usual and to such presents as are customary.[1] For example, though a gift may be justified, if made at the time of the marriage, the same gift cannot be upheld if its making is deferred for so long a time as to suggest that it was merely an excuse.[2] No gift can be made unless it is justified by necessity or the performance of any pious duty obligatory on the family or its coparceners. If it is so justified, the fact that the members were minors, or that it was made without their consent, or in spite of their objection,[3] would be no ground for invalidating it.[4] But, of course, the gift must be commensurate with the object and purpose of the gift and the means of the family. So where the father as head of the joint family owning property worth about ten to fifteen lakhs made a gift of Rs. 20,000 to his only daughter out of the income of the property as her marriage dowry two years after the marriage, Tyabji, J., disallowed it on the ground that it should have been made at the time of the marriage, but on appeal, it was held that as the gift was comparatively small and made out of the income, it should be upheld as a parential gift made through affection, such a gift being allowed by the texts, and this view was upheld by the Privy Council.[5]

But no coparcener is bound to submit to a gift made for an illegal purpose, as where the father gave Rs. 8,000 to the mother of the adopted boy to induce her consent to his adoption.[6] Nor can the manager (even though he be the father) make a will in respect of any part of joint property.[7]

Clause (2).

1207. Parent's Gift.—The father, as the senior head of the family, possesses larger powers of gift than any other manager. He is entitled to make "gifts through affection" to his children, or to the son-in-law[8] and where such gifts are inconsiderable, or reasonable in the circumstances of the case,[9] the courts uphold them even though they might consist of ancestral immovable property. On this ground gifts of land made to the daughter[10] or the son-in-law on the occasion of the daughter's marriage, by the father[11] or the mother[12] have been upheld as in consonance with the spirit of Hindu Law. In one of these cases it was argued that the gift of land was opposed

(1) *Bachoo* v. *Kushaldas*, 4 Bom. L. R. 883 (890), reversed O.A. *Bachoo* v. *Mankorebai*, 29 B. 51, affirmed O.A. 31 B. 373 P.C.

(2) *Ganga* v. *Prithi Pal*, 2 A. 635 (638); *Bachoo* v. *Kushaldas*, 4 Bom. L. R. 883 (889, 890); *Perumal* v. *Ramalinga*, 3 M.H.C.R. 76 (81) (gift made five years after the marriage).

(3) *Imperial Bank* v. *Maya Devi*, 16 L. 714.

(4) *Kalu* v. *Barsu*, 15 B. 803; *Imperial Bank* v. *Maya Devi*, 16 L. 714.

(5) *Bachoo* v. *Kushaldas*, 4 Bom. L. R. 883, reversed O.A. *Bachoo* v. *Mankorebai*, 29 B. 51 affirmed O.A. 31 B. 373 (380) P.C.

(6) *Sita Ram* v. *Harihar*, 35 B. 169.

(7) *Lalta Prasad* v. *Mahadea*, 42 A. 461.

(8) *Ramasami* v. *Vengidusami*, 22 M. 113; *Sundram* v. *Krishnasami*, 28 I.C. 992.

(9) *Ramalinga* v. *Narayana*, 45 M. 489 (495) P.C.

(10) *Ramalinga* v. *Narayana*, 45 M. 489 (494, 495) P.C., (in which a gift to the daughter worth Rs. 8,000 was upheld but its proportion to the entire estate is not stated); *Haridas* v. *Devkuarbai*, 50 B. 443; contra *Junnappa* v. *Chimmava*, 59 B. 459.

(11) *Sundararamayya* v. *Sitamma*, 35 M. 628, approved in *Ramalinga* v. *Narayana*, 45 M. 489 (491) P.C.; *Kudatamma* v. *Narasimha*, 17 M.L.J. 528.

(12) *Churaman* v. *Gopi*, 37 C. 1.

to the express texts, to which the court replied: "When the necessity of the gift is recognized, it seems unreasonable in these days to make its validity depend upon the nature of the property, upon the question whether it is movable or immovable."[1] This case was followed in another case in which the court upheld the father's alienation not only upon the ground that it was reasonable but further on the ground that as the daughter was living with her father in old age taking care of him, it was an alienation supported by consideration.[2] But there is no such consideration necessary to uphold the father's gift, since both the father and the manager unquestionably possess the right of making a gift of moveable[3] or immovable property within reasonable limits to the daughter or other near female members of the family.

1208. A gift by a father, of all his interest in the family property, in favour of his only son, being supported by natural love and affection, may be upheld as a relinquishment which may be effective, though it may not be in favour of all coparceners. It need not, of course, be supported by any consideration.[4] he gift of family property with the consent of the then existing coparceners, of course, stands on an altogether different footing. So where the undivided parternal grandfather of a minor gave a portion of the family property (about 30 per cent. in value of the whole) to his third wife and daughters with the consent of his grandson's widowed mother, the court held the gift binding on the grandson, adding: "It is clear that it was open to the grandfather if he had chosen and without any one's consent, to effect a partition and leave the whole of his half share to his third wife and her daughters, and it was, in our opinion, clearly for the benefit of the minor and his guardian to avoid an eventuality so injurious to his interests by consenting to the alienation effected by Exhibit I."[5]

Gifts by other Coparceners.

1209. Gifts to female relations on the occasion of their marriage are supported even when made by a coparcener other than the father. Such was the case of a gift made by the brother to his sister who had been married during the lifetime of the father who gave her or her husband no property at the time of marriage. The father had made no promise of any gift. It was held however, that there was a strong moral obligation on the father to make a gift out of the joint family property on the occasion of the marriage either to the daughter or son-in-law as a provision for them, and the gift which in the circumstances of the case was an eminently reasonable one, was not in excess of the power of the brother, though he was not even the managing member at the time of the marriage.[6]

1210. Gift or Maintenance.—Though the section deals with religious and ceremonious gifts, it would not be amiss to mention that the manager may equally transfer a small portion of the joint estate for the mainten-

(1) *Sundararamayya* v. *Sitamma*, 35 M. 628 (630); *Narayana* v. *Ramalinga*, 39 M. 587 (591); *contra* in *Kamakshi* v. *Chakrapany*, 30 M. 452.

(2) *Narayana* v. *Ramalinga*, 39 M. 587 (590, 591), affirmed O.A. 45 M. 489 P.C.; *Kilambi* v. *Tirumala*, 5 M.L.T. 40: 4 I.C. 1094.

(3) *Ramalinga* v. *Narayana*, 45 M. 489 P.C.

(4) *Thangavelu* v. *Doraisami*, 27 M.L.J. 272: 26 I.C. 211.

(5) *Arunachala* v. *Sumpurnathachi*, 27 M.L.J. 485, followed in *Patra* v. *Srinivasa*, 40 M. 1122 (1126).

(6) Mit., I-VII-6-14, cited and followed in *Ramaswami* v. *Venguduswami*, 22 M. 213; *Kudatamma* v. *Narasimha*, 17 M. L.T. 528; followed in *Sundararamayya* v. *Sitamma*, 35 M. 628 (630); *Churaman* v. *Gopi*, 37 C. 1; *Kilambi* v. *Tirumala*, 5 M.L.T. 40: 4 I.C. 1094.

ance and marriage of a female relation. So where the manager transferred land measuring 3.22 acres of land valued at Rs. 1,000 to his step-sister for her maintenance and marriage and it was contended that such an alienation was beyond the capacity of the manager, the court overruled the contention holding that it was within the competence of the manager to transfer by an outright gift a small portion of the family property by way of a provision for maintenance.[1]

1211. Gift to Charity.—Hindu Law commends the making of gifts "for pious purposes,"[2] and where such gifts are customary, they will be upheld. So the court upheld the gift of a small piece of land on the occasion of the father's funeral.[3] It was held that such gift being in the nature of a dedication did not require to be made by a registered deed, nor was it necessary that it should be made to a definite donee, real or ideal, since its object is to benefit the public in whom the spirit of God reposes.[4]

1212. Quantum of Gift.—Though Hindu Law allows religious and charitable gifts, it also takes care to prescribe that the giver must be just to his people while he is generous to the donee.

As a matter of fact, the gift the court allows, must be small and reasonable and it must not cripple the coparcenary estate. In a Calcutta case, the court upheld the gift of about a third of the father's estate by his widow to her daughter on the occasion of her *gowna* ceremony.[5] But this is probably an extreme limit. Ordinarily, such gifts relate to much smaller properties. The question cannot be reduced to a set formula as it must necessarily depend on the nature and extent of the *corpus;* the nature and extent of the gift, and whether it is made out of the *corpus* or only out of the current income. Where it is made out of the income, it is strong ground for upholding it. But even where it is carved out of the *corpus,* the court will only uphold it, if due regard being had to all the circumstances of the family, it is not unreasonable. So the court in one case upheld a grant of 3.22 acres of land valued at Rs. 1000 out of 22 acres of the family lands and no debts[6] in the circumstances already stated. In another case the managing father had increased the family estate out of his own acquisitions valued at Rs. 17,000 and a business which yielded Rs. 2,000 annually. Finding great difficulty in getting his daughters married, he negotiated for the marriage of one of them to his sister's son and conveyed to his daughter and his sister two shops and a house worth Rs. 1,500. The court upheld the gift as inconsiderable in view of his own additions to the family estate and the necessity which promoted the gift.[7]

1213. In another case the court upheld the gift of 8 acres of ancestral land to the daughter after her marriage, out of 200 acres possessed by the family,[8] while the manager's gift of a tenth of the family lands to the daughter of a coparcener was upheld by the same court as binding

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(1) *Seeni* v. *Angamuthu,* (1912) 1 M. W.N. 99: 13 I.C. 802; *Seethaiah* v. *Mutyalu,* (1931) M. 106 (Gift to the brother's widow.)

(2) Mit., I-I § 28.

(3) *Pallayya* v. *Ramavadhanulu,* 13 M. L.J. 364; *Ramalinga* v. *Sivachidambara,* 42 M. 440 (445); *Tammireddy* v. *Gangireddy,* 45 M. 281; *Narasimha* v. *Venkatalingum,* 50 M. 687 F.B.

(4) *Ibid.,* p. 448.

(5) *Churaman* v. *Gopi,* 37 C. 12.

(6) *Seeni* v. *Angamuthu,* 13 I.C. (M.) 802.

(7) *Sabapathy* v. *Ponnusamy,* 28 I.C. 365.

(8) *Sundararamayya* v. *Sitamma,* 35 M. 628, followed in *Patra* v. *Srinivasa,* 40 M. 1122 (1126); *Subba Naicker,* (In re), 2 M.L.W. 754: 30 I.C. 781.

upon all the coparceners. It was contended that the gift was unduly large and that, however justifiable when made by the father, it could not be made by any other manager, but the court overruled both contentions.[1]

1214. Where Gift Set Aside.—It must be remembered that the manager's power to make customary gifts is a curtailment of the coparcenary rights which is only tolerated because such gifts besides being usual and customary, are inconsiderable. The manager cannot in the guise of such a gift transfer a considerable portion of the joint estate to his wife and daughters. Such a transfer would be a serious encroachment on the rights of other coparceners and an abuse of power which may be impeached by any coparceners.[2] Such was the gift by the two brothers of their land to the plantiff as worshipper of the god "Sri Satguru" which the court set aside in its entirety because the gift was invalid and unsupported by the purpose for which joint family property may be alienated, and as to the alienors, they were incompetent to alienate their shares without consideration.[3]

Of course, a gift of immovable property must be made in writing registered in conformity with the requirements of S. 123 of the Transfer of Property Act; otherwise, it might be set aside as invalid in law.[4]

Manager's fraud.

137. No manager can exercise his power in fraud of the co-parceners.[5]

1215. Analogous Law.—This principle is deducible from the texts already cited (§ **1205**). Even the father cannot defraud his son under the mask of a pious gift to an idol.[6]

(1) *Subba Naicker*, (In re), 2 M.L.W. 754: 30 I.C. 78.
(2) *Kamakshi* v. *Chakrapany*, 30 M. 452; *Chinnaya* v. *Collector*, 8 M.L.T. 290.
(3) *Kalu* v. *Barsu*, 19 B. 803.
(4) *Ibid.*
(5) *Raghunath* v. *Govind*, 8 A. 76.
(6) *Ibid.*

CHAPTER IX.

(THE TRADING JOINT FAMILY.)

138. (1) Where a joint Hindu family carries on an ancestral trade, it becomes a trading family and is then governed—not by the rules of co-parcenership, but by the co-parcenary rules as modified by the incidents and exigencies of trade.[1]

Ancestral Trading family.

(2) In particular and without prejudice to the generality of the foregoing provision, such incidents are as follows:—

(*a*) An ancestral family trade devolves upon members of a joint undivided family[2] and the partnership is not dissolved by the death of any of the members, nor can any one of the partners, when severing his connection with the business, demand an account of past profits and losses:[3]

(*b*) Any member may be appointed the accredited manager and agent of the firm;[4]

(*c*) Such manager or agent may carry on the trading business of the firm;

(*d*) And for that purpose, he may pledge the credit of the joint family;[5]

(*e*) He is not accountable to them for past profits and losses;[6]

(*f*) He is entitled to contract debts and alienate property so as to bind the other members in the circumstances and to the extent provided in section 140.[7]

1216. Analogous Law.—A joint Hindu family, carrying on an ancestral trade may be regarded as a trading firm, and as such, is subject to the ordinary law of partnership, or it may still continue to possess all the rights and incidents of a joint Hindu family. It may again be that such a family may carry on its trading business in partnership with a stranger, or that only some of its members might with capital, which is not family property, embark upon such an enterprise on their own account, or in partnership with others. But it is clear that in such cases, the rules of

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(1) *Vedilal* v. *Shah Kushal*, 27 B. 157 (160); *Gangayya* v. *Venkatarayaliah*, 41 M. 454.
(2) *Sacrabai* v. *Maganlal*, 26 B. 206 (218) F.B. citing Mit.
(3) *Ganpat* v. *Annaji*, 23 B. 144.
(4) *Ramsebuk* v. *Ramlal*, 6 C. 815.
(5) *Raghunathji* v. *Bank of Bombay*, 34 B. 72.
(6) *Ganpat* v. *Annaji*, 23 B. 144.
(7) *Ramlal* v. *Lakshichand*, 1 B.H.C. R. (App). 51.

joint family cannot apply to the exclusion of the law of partnership.[1] It is only when the family as a whole or through any of its members, continues an ancestral trade out of its joint family funds, that it is subject to the law of joint family, necessarily accommodated to that of partnership.[2]

If the law were otherwise, the birth of a son[3] or the death of any member of the family[4] would have had the effect of dissolving the partnership, and if it was to continue, it could only be by a fresh agreement made each time that there was a birth or death in the family.

1217. But the very contrary is expressly laid down in the Mitakshara as applicable to trading partnerships:

Clause (a). "When one of those who trade in partnership goes abroad and dies, then his share shall be taken by his descendents, such as sons, etc., bhandhus and sapindas, and in default of them, all by the King."[5] Then again, while partners as such are mutually accountable to one another for past profits and losses[6] partners under the rule are not so accountable.[7] Under the Hindu Law, a joint family which carries on its trade handed down from its ancestors, becomes a trading family, trade being one of its *kulachars* or family practice, which attracts to itself all the necessary incidents of trade,[8] without which the trade may not be able to continue. It is indeed evident that a trading business must enter into many transactions, purchase and sell property and borrow money which cannot all conform to the narrower rules applicable to the management of a joint family. They cannot possess all the facilities of a trader and yet be not subject to the rules which make those facilities possible. They cannot be permitted to contract with the outside public in the course of that trade and then refer to their personal laws for evading their liabilities. Where, therefore, a minor was the sole survivor of such partnership, his guardian is entitled to carry on an ancestral trade on behalf of the minor who will be bound by all acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade.[9] So while in the case of a normal family, the managing member can only contract debts for the necessity or benefit of the joint family and the creditor is bound to enquire into the purpose of the loan,[10] no such limit can be placed on the borrowing power of the managing member of a family trade, and the rule is, that he possesses an implied authority to contract debts for its purpose and the creditor is not bound to enquire into the

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(1) *Vedilal* v. *Shah Kushlal*, 27 B. 157 (160); *Sawammal* v. *Punnammal*, 2 S.L.R. 13; *Rupchand* v. *Basanta*, (1889) P.R. 102; *Honda Ram* v. *Desu Ram*, (1888) P.R. 162; *Ram Prasad* v. *Rattan Chand*, 10 P.L.R. 321.

(2) *Ramanatham* v. *Yegappa*, 30 M.L. J. 241: 32 I.C. 427; *Gangayya* v. *Venkatarayaliah*, 41 M. 454.

(3) *Cf.* S. 31, Partnership Act (IX of 1932).

(4) S. 42 (c), Partnership Act (IX of 1932).

(5) Mit. cited in *Sakrabai* v. *Manganlal*, 26 B. 206 (218) F.B. This fact was overlooked in *Latchmanen* v. *Sivaprakasa*, 26 C. 349 (354) which was, moreover, decided on the question whether an infant member should not join as a co-plaintiff; *Narain Das* v. *Ralli Bros.*, (1915) P.R. 61: 31 I.C. 45.

(6) S. 13 (*b*), Partnership Act (IX of 1932).

(7) *Ganpat* v. *Annaji*, 23 B. 144.

(8) *Raghunathji* v. *Bank of Bombay*, 34 B. 72.

(9) *Raghunathji* v. *Bank of Bombay*, 34 B. 72 (79); *Ram Partab* v. *Foolibai*, 22 B. 767 (778); *Ramlal* v. *Lakmichand*, 1 B.H.C.R. (App.) 51; *Jaykisto* v. *Nittyanund*, 3 C. 738.

(10) *Humooman Pershad* v. *Babooee*, 6 M.I.A. 398; distinguished in *Raghunathji* v. *Bank of Bombay*, 34 B. 72 (75, 76).

purpose of the debt in order to bind the whole family thereby, because that power is incidental to and is necessary for, the very existence of the family trade.

1218. Where any coparcener is a minor the ordinary rule is that his share in the family property is liable for debts contracted by his managing coparcener for any family purpose or any purpose incidental to it. If the family is a trading firm, that rule is varied and his share becomes liable for debts incurred for trading purposes and any purpose incidental to it. Consequently, where the manager drew *hundis* in the name of his firm without the knowledge of other members of the firm and without any advantage to the firm, it was held that the drawee and his endorsee were entitled to hold the firm liable and bind its minor member's share without proof of any necessity or benefit to the minor.[1] Persons dealing with the manager of a trading firm are not affected by his dishonesty and the fact that the coparcener affected is a minor, is immaterial.[2]

1219. It is not even necessary that the junior member should be impleaded in the suit,[3] but of course, a suit on behalf of the firm must be instituted by or against its manager. Any other member cannot sue without impleading all the members.[4] In the ordinary joint family, the father, and in his absence, the senior member is the manager. But in a trading partnership, this is unnecessary, since the family may authorize any one of its members to act as their agent in any business transaction, subject to the same rule that when a joint family or any members of it carry on trade in partnership and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules for enforcing their contracts in courts of law as the members of any other partnership.[5]

These general principles may now be examined and illustrated in detail.

1220. Ancestral and new trade.—It has been held in Madras that, since the father is an "ancestor" of his son, trade started by him becomes an ancestral trade in the hands of the son.[6] A trade may be "ancestral", though it may have ceased for a time and restarted under a different name and in partnership with a stranger, and speculative business added.[7]

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(1) *Bank of Bombay* v. *Raghunathji*, 10 Bom. L.R. 668, affirmed O.A. *Raganathji* v. *Bank of Bombay*, 34 B. 72 (81); *Ramlal* v. *Lakhmichand*, 1 B.H.C.R. (App.) 51 (61, 62); *Johurra* v. *Sri Gopal*, 1 C. 470; *Joykisto* v. *Nittyanund*, 3 C. 738; *Bemola* v. *Mohun*, 5 C. 792; *Ramsebuk* v. *Ramlal*, 6 C. 815; *Sheoprasad* v. *Saheblal*, 20 C. 453; *Luchmanen* v. *Siva Prakasa*, 26 B. 349; *Morrison* v. *Verchoyel*, 6 C.W.N. 429; *Pulukkavandey* v. *Periyakaruppa*, 2 I.C. (M.) 203; *Sankakrishnamurthi* v. *Bank of Burma*, 21 M. L.J. 620: 11 I.C. 79.

(2) *Mulchand* v. *Sadhu Singh*, (1893) P.R. 59.

(3) *Lutchmanen* v. *Sivaprakasa*, 26 C. 349; *Shamrathi* v. *Kishanpershad*, 29 A. 311; *contra* in *Damodhardass* v. *Vishendass*, 4 S.L.R. 2: 7 I.C. 584.

(4) *Jugal Kishore* v. *Tudasi Ram*, 8 A. 264.

(5) *Ramsebuk* v. *Ramlal*, 6 C. 815 (826, 827). But taken as a statement of law as to the necessity of impleading all partners, this case is superseded by Order XXX, C.P.C.

(6) *Venkatasami* v. *Palaniappa*, 52 M. 227 (231); *contra Motisahu* v. *Dwarka*, 150 I.C. (Pat.) 881; *Jagdishprasad* v. *Ambashankar*, (1934) B. 324 (alienation supported as for an antecedent debt.)

(7) *Sri Thakur Ramkrishna* v. *Ratanchand*, 53 A. 190 (201) P.C.; *Damodaran* v. *Bansilal*, 51 M. 711 P.C.

The manager, and indeed, any member of a coparcenary may start a new business either in partnership with another coparcener, or an outsider, in which case the business so started will be his own and subject to the general law of partnership, and not a joint family business, much less an ancient business, unless such business was financed by the family funds or sustained by the family credit. The question whether a business is ancient or joint or an ordinary partnership is then a question of fact which must be determined on the facts of each case. In the case of Vaishya families, whose caste is in itself an index of their vocation, little or no evidence would be probably needed to show that the family is a trader by profession and its trade ancestral. But in other cases evidence is necessary.

1221. A family carrying on an ancient trade need not necessarily carry on the same trade, since a trading family is nonetheless a trading family, even though it may have changed its trade and may have changed it from time to time. The essence of the question lies in that it is a family which has trade as one of its occupations not necessarily its sole occupation. If the ostensible partner be the manager, the other coparceners are as to the stranger partners in the position of strangers and cannot call for dissolution of the partnership or the taking of partnership accounts, since there is no contract or priority between them, even though the entire assets of the joint family might be available to the creditors of the firm. "The managing member of an undivided family though he has the power of representing the interests of the other members is not their agent in the strict sense of the term so as to clothe the other members of the family with all the rights of principals in respect of contracts entered into by their agent."[1] But as to the manager they are like sub-partners, and the manager is as to them in the position of a trustee.[2]

1222. The manager of a joint family is not bound to expend all his energies in the management of the joint property; like any other coparcener he is free to start a trade on his own account, whether alone or in partnership with another, whether a coparcener or a stranger, and so long as he does not use the family funds or credit for that purpose, he is not accountable to it for his profit so made, as indeed, the family is not liable.[3] But upon his insolvency, if he is the father, not only his own share but that of his son whether, major or minor, will pass to the Official Assignee or the Receiver, as the case may be,[4] though the Assignee or the Receiver is in no better position than the father regarding the sale of the son's interest.[5]

Female Manager.

1223. While the right of a woman, who has inherited as a limited owner the estate of the deceased male owner, to continue the trade, whether his ancestral or

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(1) *Gangayya* v. *Venkataramiah*, 41 M. 454 (456); *Sokkanadha* v. *Sokkanadha*, 28 M. 344; *Ramanathan* v. *Yegappa*, 32 I.C. (M.) 427; *Vedilal* v. *Shah Khushal*, 27 B. 157; *Kharidar* v. *Daya Kishan*, 43 A. 116; *Gokalchand* v. *Hukam Chand*, 2 L. 40 (49) P.C.

(2) *Annamalai* v. *Murugesa*, 26 M. 554 (553) P.C.

(3) *Kharidar* v. *Dayakishan*, 43 A. 116.

(4) *Official Receiver* v. *Ramachandrappa*, 52 M. 246; *Official Receiver* v. *Chaiman Lal*, (1930) L. 645.

(5) *Sat Narain* v. *Beharilal*, 6 L. 1 (22) P.C.; *Gopalkrishnayya* v. *Gopalan*, 51 M. 342; *Official Assignee* v. *Ramchandra, Ib.*, 417; *Official Receiver* v. *Ramchandrappa*, 52 M. 246; *Sankaran* v. *Narasimhulu*, 50 M. 135; *Om Prakash* v. *Moti Ram*, 48 A. 400 (contra *Allahabad Bank* v. *Bhagwandas, ib.*, 343, submitted unsound); *Sitaram* v. *Beniprasad*, 47 A. 263; *Bhawani* v. *Om Chiena*, 44 A. 316.

one started by him, is undoubted, her sex and the condition of her perpetual dependence preclude her from starting a new trade or even continuing an old one, if it involves personal attention, which she is unable to give or risks which her estate is unable to bear, since if she mismanages the business, the reversioner may restrain her for waste and may even dispossess her. But within these limits she is entitled to continue the business which she has inherited and may acquire and dispose of property which she has acquired in the ordinary course of business.[1] Of course, as the income from such estate is her own she is free to invest it in a business of her own, provided she does not blend the two estates or their income or offer security of one to finance the other. But this apart, as she is generally entitled to alienate her heritage for "necessity"; any alienation made and moneys borrowed would have to be put to the touchstone of trade necessity, and any such debts, left unpaid by her, will on her death be payable by the reversioner even though they be uncharged on the estate.[2] But in such case, the onus is on the transferee or the creditor to show that the alienation of the inherited estate was justified by prudence and the debt was such as any prudent business man might have incurred, failing which he must prove *bona fide* inquiry as he is required to do when dealing with a limited owner.[3]

Minor Manager.

1224. The same rule applies where an ancestral trade descends upon a minor as the sole member of the family and the ancestral trade is carried on under the minor's natural guardian for the benefit of the minor. The minor will be bound by all the acts of the guardian necessarily incidental to or flowing out of the carrying out of the trade.[4] In such case, the rule that a guardian cannot bind his ward's estate except by a document purporting to bind it cannot apply.[5]

Cl. (b). Manager.

1225. In an ordinary joint family, the office of the manager is determined by his age and hereditary rights and not necessary by his competency. In a trading family, such a course, if permitted, might lead to disastrous results. Consequently, it is settled that the manager of a trading family may be such person as the family appoints or holds out as its accredited representative.[6] He need not be the conventional *karta* of the Hindu household. It may be that such *karta* may regulate the internal management of his household but in its trade relations with the outside world, the manager might be quite a different person. This is a question of fact to be decided upon the facts of each case.

Cl. (c). His Powers.

1226. Such manager has all the powers necessary for the purpose of carrying on a family trade. But he must professedly act in that capacity. Where he borrows money on promissory notes, executed in his own name, and not in the name of the firm, there is no presumption that the borrowing was for

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(1) *Pahalwan Singh* v. *Jiwan Das*, 42 A. 109.

(2) *Sakhrabhai* v. *Maganlal*, 26 B. 206 (213, 214, 219) F.B.; explaining *Sham Sundar* v. *Achhan Kunwar*, 21 A. 471 P.C.; *Lala Amarnath* v. *Rani Achan Kuar*, 14 A. 420 (428, 429) P.C.

(3) *See* Ch. on "widow's estate."

(4) *Rampratab* v. *Foolibai*, 20 B. 767; *Jhilibai* v. *Tejmal*, 13 N. 109.

(5) *Ibid.*

(6) *Ramsebuk* v. *Ramlal*, 6 C. 815; *Ramgopal* v. *Luchminarain*, (1937) C. 396.

the purpose of joint family business and the lender must prove that the money was required for the family business.[1] When, therefore, the manager of a family firm mortgaged certain family properties by a mortgage deed, which showed that the debt was to be recovered from him personally, from all kinds of goods and property belonging to him, but the manager signed the mortgage as owner of the firm, in a suit by the mortgagee against the manager and his minor coparceners, it was held that the mortgage did not bind the undivided property of the family and nothing could pass beyond the property specifically mortgaged.[2] It was further held (it is submitted wrongly) that even as regards the mortgaged property, the interest of the minors therein was not liable for the debt unless the plaintiff proved that when he lent the money, he reasonably believed that it was required for the family business. That this is by no means necessary was decided by the same court in a later case in which it was held that a minor was liable to the extent of his share in the firm on bills or notes drawn by the manager in the name of the firm, but in fraud of it, and for purposes unconnected with it.[3] In so holding, Chandavarkar, J., said: "In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager (or the adult member acting as the manager) which are necessarily incidental to or flowing out of the carrying on of that trade. . . . The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purpose of the trade."[4] So Sausse, C.J., observed in another case: "Third parties in the ordinary course of *bona fide* trade dealings, should not be held bound to investigate the status of the family, whilst dealing with him on the credit of the family property."[5]

1227. But of course the family firm is only liable for the debts incurred by the manager acting for the family. It will not be liable for the manager's debts, incurred under circumstances which would not bind any other partnership. Consequently, while the firm is liable for all acts done by the manager in the ordinary course of his duties and within the scope of his authority, it cannot be held liable for a fraud committed by the manager outside the scope of his authority and wholly unconnected with his business.[6] As Wiles, J., observed: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of his servant or agent as is committed in the course of his service

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(1) *Abdul Majid* v. *Saraswati*, (1934) P.C. 4.

(2) *Nathabai* v. *Ranchoddas*, (1893) B. P.J. 297; *Khasidar* v. *Dayakishan*, 18 A. L.J. 937: 58 I.C. 765.

(3) *Raghunathji* v. *Bank of Bombay*, 34 B. 72.

(4) *Ib.*, In *Vithal* v. *Shivappa*, 47 B. 637 (641), Macleod, C.J., thought Chandavarkar, J.'s statement as to the liability of minors on a negotiable instrument executed by the manager "far too wide" though he justified the judgment on the facts of the case. *Krishnanand* v. *Rajaram*, 20 A.L.J. 233: 66 I.C. 150.

(5) *Ramlal* v. *Lakmichand*, 1 B.H.C. R. (App.) 51. To the same effect *Johurra* v. *Sri Gopal*, 1 C. 470 (475); *Sakrabai* v. *Maganlal*, 26 B. 206; *Niamat Rai* v. *Din Dayal*, 8 L. 597 P.C.; *Kishen Pershad* v. *Har Narain*, 33 A. 272 P.C.; *Lakshmichand* v. *Khushaldas*, 18 S.L.R. 230: 88 I.C. 116: (1925) S. 330.

(6) *Morrison* v. *Verschoyle*, 6 C.W.N. 429.

and for the master's benefit, though no express command or privity of the master be proved."[1]

Cl. (d). He may Pledge the Family Credit.

1228. As such, the manager may pledge the credit of joint family to its uttermost and it is immaterial that there are minor[2] and widow[3] to be maintained. Neither the one nor the other has any precedence over his trade debts which may be realized out of the family assets without reference to the doctrine of necessity or benefit in the one case, and of the duty of maintenance and residence in the other. As Sausse, C.J., put it: "Were such a power not implied, property in a family trade, which is recognized by the Hindu Law to be a valuable inheritance, would become practically valueless to the other members of an undivided family wherever an infant was concerned. For no one would deal with a manager if the minor were to be at liberty, on coming of age, to challenge as against third parties, trade transactions which took place during his minority."[4]

1229. But, of course, the debts must be debts, incurred by the manager, for his firm and ostensibly for its benefit, though the creditor cannot be called upon to prove it,[5] since there is no presumption that money borrowed by the manager on a promissory note, executed in his own name, is on behalf of the family, or for the purposes of the joint family business, which the creditor is bound to prove.[6]

1230. The family is not liable for losses incurred by the manager in a speculative business of his own. His powers are to carry on the ancestral trade of the family and not to embark upon speculative transactions unconnected with the family and entainling great risk.[7] So where the manager borrowed money on a promissory note for the business of a toddy shop, carried on by him as agent of a third party, for which he was paid a fixed monthly salary, it was held, that the mere fact that the family may have benefited by the monthly salary allowed to the manager, or that the loan enabled the agency of the manager to continue, did not make it a loan for the benefit of the family so as to make the members of the family liable.[8] The debt here was not incurred even professedly for the family, nor was the toddy shop a family business. If however, in such a case the manager had professed to borrow for the family and misapplied the proceeds to his toddy business, then the result would have been different.[9] But of course, where a person acts as a manager of two firms, it is upon persons dealing with him to ascertain for which firm he was at the moment acting. And while, under the Hindu Law, it is open to the members of a

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(1) *Barwick* v. *English Joint Stock Bank*, L.R. 2 Exch. 259.

(2) *Shri Thakur Ramkrishna* v. *Ratanchand*, 53 A. 190 (205) P.C.; *Joykisto* v. *Nityanund*, 3 C. 738; *Sheo Pershad* v. *Saheblal*, 20 C. 453; *Niamat Rai* v. *Din Dayal*, 8 L. 597 P.C.

(3) *Johurra* v. *Sree Gopal*, 1 C. 470; *Bishni* v. *U. Hamchand*, (1935) L. 533.

(4) *Ramlal* v. *Lakhmichand*, 1 B.H.C. R. (App.) 15; *Morrison* v. *Verschoyle*, 6 C.W.N. 429 (458).

(5) *Mahabir* v. *Amla Prasad*, 46 A. 364; *Niamat Rai* v. *Din Dayal*, 8 L. 597 (603) P.C.; *Abdul Majid* v. *Saraswati*, 61 I.A. 90: (1934) P.C. 4.

(6) *Mahabir* v. *Amla Prasad*, 46 A. 364.

(7) *Benares Bank* v. *Hari Narain*, 54 A. 564 P.C.; *Morrison* v. *Verschoyle*, 6 C.W.N. 429; *Ramnath* v. *Chiranji Lal*, 57 A. 605, F.B.

(8) *Pullukavandy* v. *Periyakaruppa*, 2 I.C. (M.) 203.

(9) *Raghunathji* v. *Bank of Bombay*, 34 B. 72.

family to claim under certain circumstances the benefits arising from a business carried on by one of the members, still, until this is done, or until the business is in some way adopted as an asset of the family, no liability can be imposed on the other members for the debts of the business.[1]

Cl. (e). Not Accountable for Past Profits.

1231. The manager of a family firm is not accountable to the family for past profits and losses[2] though he would so in a case of pure partnership.[3] The reason of this rule is that a joint family still remains a joint family and in its internal management the rights and liabilities of the members remain unaffected by reason of the fact that it carries on a family trade. As there is ordinarily, no right to call for past accounts in a joint family *inter se,* so the right of the members is not enlarged by the nature of the business of the family.

Cl. (f). Major and Minor Members Equally Liable.

1232. On the other hand, from the very nature of the business, there can be no discrimination between the adult and minor members of the family. They share alike the profits and bear alike the losses incident to the joint trade not to the extent of their share in the business but to the extent of their share in the whole family property including the assets of the business.[4]

Transactions incidental to Business.

1233. The question then arises: What are the actual necessities of the case and by what tests are they to be decided? It was admitted that "it is not easy to draw a well defined line between what is, and what is not incidental to the carrying on of a trade."[5] In the case from which these extracts are quoted, the surviving partners of a firm, in the absence of a representative of a deceased partner, had adjusted the partnership accounts and had agreed to hand over a portion of the partnership property to one of the partners in compromise of his claim. The property so delivered was ancestral, and the court held that the transfer of partnership property was not an act necessarily incidental to the carrying on of a trade but should be left to be governed by the law applicable to the ordinary dealings with the manager of an undivided family when the interests of an infant memfiber are concerned.[6]

Bound by Manager's Fraud.

1234. Apart, however, from such re-adjustment of rights and liabilities *inter se,* no member of a trading firm, whether adult or minor, can repudiate a debt incurred by the manager, acting on behalf of the firm, even though it be done with intent to defraud it. It was so held in a case in which the manager of a coparcenary trading firm of a joint Hindu family had signed some promissory notes in the name of his ancestral firm to accommodate his friend with funds without consulting his *munim* and without any advantage to his own firm. In short, he saddled upon his firm a gratuitous liability from which the firm could gain nothing

(1) *Macleod* v. *Manikchand,* 3 Bom.L.R. 144.

(2) *Ganpat* v. *Annaji,* 23 B. 144.

(3) S. 13 (*e*), Partnership Act (IX of 1932).

(4) *Ramlal* v. *Lakhmichand,* 1 B.H.C. R. (App.) 51; *Samalbai* v. *Someshur,* 5 B. 38; *Rampartab* v. *Foolibai,* 20 B. 767 (778, 779); *Sakrabai* v. *Maganlal,* 25 B. 206 (and cases there cited); *Topanmal* v. *Menghomal,* 4 S.L.R. 260: 10 I.C. 978; *Morrison* v. *Verschoyle,* 6 C.W.N. 420; *Thamanna* v. *Akarapu,* 38 M.L.J. 55: 55 I.C. 64.

(5) *Ramlal* v. *Lakhmichand,* 1 B.H.C. R. (App.) 51 (62), followed in *Raghunathji* v. *Bank of Bombay,* 34 B. 72.

(6) *Ibid.*

and still it was held that the firm was liable, though as regards the minor, his liability was restricted to the extent of his share.[1] A similar question arose in Madras when it was further pointed out that the liability must be restricted to the minor's share in the business but could not be extended to his other property.[2] As was observed in another case: "As regards the other property in the hands of a coparcener, no other coparcener, whether he be the manager or not, has any title whatever. The legal individuality of a coparcener is not merged in the manager so far as the coparcener's self-acquired or other separate property is concerned."[3] Of course, the case would have been different, if in such a case, the manager had himself defrauded the firm, as where he had entered into a transaction with himself with intent to defraud the firm, of which he was a member.[4]

1235. In the cases decided under the old Code of Civil Procedure of 1882 there was a conflict of views as to who were necessary or proper plaintiffs in a suit instituted on behalf of a trading partnership. In some cases, the managing partner was held competent to sue,[5] while in others his competency was questioned.[6] The subject has now been much simplified by the addition of O. XXX in the Code of Civil Procedure, 1908, which prescribes a special procedure for the institution of such suits. The right of suit would now seem to be subject to the following[7] rules: (*i*) a person who enters into a contract in his own personal name is entitled to sue alone.[8] (*ii*) where it is entered into the name of a trading firm, all members must ordinarily join, but (*iii*) where such firm is a joint family, then the rule of Hindu Law permits the manager to sue in his representative capacity on behalf of the family as regards its property.[9]

Cannot Start New Business, when a Family Business.

1236. It has already been stated that while the manager, as such, is entitled to carry on an ancestral family business, he cannot start a new business. If he wishes to start one, he can only do so with the consent,[10] or at least acquiescence,[11] of the adult coparceners. But even then his liability to the minor members remains. If the venture was successful, it will stand supported on the ground of

(1) *Raghunathji* v. *Bank of Bambay*, 34 B. 72; *Jai Narain* v. *Prag Narain*, 85 I.C. 2: 29 C.W.N. 755: (1925) P.C. 11; *Jhiti Bai* v. *Tejmal*, 13 N. 109.

(2) *Sanka* v. *Bank of Burmah*, 21 M.L.J. 620: 11 I.C. 79; *Johurra* v. *Sree Gopal*, 1 C. 470; *Joykisto* v. *Nittyanund*, 3 C. 738; *Chalamayya* v. *Varadayya*, 22 M. 167; *Bishambhar* v. *Fateh Lal*, 29 A. 176 (183); *Chalamayya* v. *Varadayya*, 22 M. 166.

(3) *Chalamayya* v. *Varadayya*, 22 M. 166 (168).

(4) *Sanka* v. *Bank of Burmah*, 21 M.L.J. 620: 11 I.C. 79.

(5) *Lutchmanen* v. *Siva Prakasa*, 26 C. 349; *Gansavani* v. *Narayan*, 7 B. 467; *Jagabhai* v. *Vijbhukandas*, 11 B. 37 (41); *Hari* v. *Gokuldas*, 12 B. 158; *Guruvayya* v. *Dattatraya*, 28 B. 11 (19); *Kashinath* v. *Chimnaji*, 30 B. 477 (486).

(6) *Kalidos* v. *Nathu*, 7 B. 217; *Balkrishna* v. *Municipality of Mahad*, 10 B. 32; *Imamuddin* v. *Liladhar*, 14 A. 524; *Shamrathisingh* v. *Kishen Pershad*, 29 A. 311; *Damodhar Doss* v. *Vishen Doss*, 4 S.L.R. 2: 7 I.C. 584; *Kottusheri* v. *Vallotil*, 3 M. 234; *Alagappa* v. *Vellion*, 18 M. 33; *Angamuthu* v. *Kolandavelu*, 23 M. 190; *Seshan* v. *Veera*, 32 M. 284; *Ramsebuk* v. *Ramlal*, 6 C. 815.

(7) *Kisan Prasad* v. *Harnarain*, 33 A. 272 (278) P.C.; *Jahabhai* v. *Bustomji*, 9 B. 311; *Anant Ram* v. *Channulal*, 25 A. 378 (383); *Ganput* v. *Balmakund*, 13 I.C. (C.) 206.

(8) *Damodhar Das* v. *Vishen Das*, 4 S.L.R. 2: 7 I.C. 584 (587).

(9) *Sawanmal* v. *Pinnumal*, 2 S.L.R. 13; *Rupchand* v. *Basanta*, (1889) P.R. 102; *Macleod* v. *Manikchand*, 3 Bom.L.R. 144; *Vadilal* v. *Sheikhushal*, 27 B. 257.

(10) *Tammireddi* v. *Gangi Reddi*, 45 M. 281 (290) following *Morrison* v. *Verschoyle*, 6 C.W.N. 429; *Abdur Rahman* v. *Hussain*, 37 M.L.J. 316.

(11) *Tarrireddi* v. *Gangi, Reddi*, 45 M. 281 (290, 291); *Inspector Singh* v. *Kharak Singh*, 50 A. 776 (790); *Tada Bulli* v. *Gangireddy*, 42 M.L.J. 570.

"benefit." But if it fails, the minors may call upon the manager to bear the losses of his own enterprise if it proved too speculative and hazardous. The question in this and similar cases is not what the manager did; but whether it was justified as a prudent act of management, and consented to by the other coparceners. As the Privy Council observed: "The distinction between an ancestral business and one started like the present, after the death of the ancestor as a source of partnership relations, is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and obligations. In the other, they rest ultimately on the contractual arrangement between the parties."[1] (§§ **1257, 1258**).

1237. Exceptional Cases.—It has already been postulated that the special rules modifying the generel law of joint family property only apply to a trading family. They have no application to cases where there is no joint family, or where only some members of the family enter into a trading partnership to the exclusion of others,[2] or in partnership with outsiders[3] which must be subject to the ordinary law of partnership. Such was held to be the case of a partnership between the uncle and his nephew who did not form members of a joint family or continue its business but had started one on their own account.[4] Of course, one or more members of a joint family may start a trading business and afterwards admit his other coparcener into the business impressing upon it the character of a joint family business.[5] Even then it would fail to be an ancestral trade to which the peculiar incidents, before set out, apply. Even where the family starts a new trade it is presumed to be with the consent of all adult coparceners who are liable to the same extent as if the trade were ancestral; the only difference being as regards the minors whose shares cannot be held liable without reference to legal necessity or benefit. Where, however, the new business has developed out[6] of the old or is on the same lines, it is scarcely distinguishable from an ancient business for which all are equally bound. Two or more groups separate for the profitable carrying on of a joint business may each pledge the family credit.[7]

Except where only certain members trade.

1238. Rules Applicable to Kutchi Memons.—The special rules and incidents applicable to Hindu family firms have been held to apply equally to Kutchi Memons who, like the Hindus, possess therein the right of survivorship and the death of a member has not the effect of dissolving the firm.[8]

139 (1) In a joint family, comprising the father and his sons, the father may alienate the family property, whether ancestral or joint, for a business, whether new or old, so as to bind the sons' interest therein, whether they be adults or minors.[9]

Father's alienation for family business.

(1) *Sanyasi* v. *Krishnadhan*, 49 C. 560 (567, 568) P.C.; *Benares Bank* v. *Hari Narain*, 54 A. 564 P.C. explained in *Ram Nath* v. *Chiranji Lal*, 57 A. 605 (610, 611) F.B.; *Amraj* v. *Shambhu*, 55 A. 1 F.B.

(2) *Ram Prasad* v. *Rattan Chand*, 10 P.L.R. 321; *Sokhanadha* v. *Sokhanadha*, 28 M. 344.

(3) *Macleod* v. *Manickchand*, 3 Bom. L.R. 144.

(4) *Nihal Devi* v. *Kishore Chand*, (1910) P.R. 97; 8 I.C. 999.

(5) *Haji Noor Mahomed* v. *Macleod*, 9 Bom.L.R. 274; *Haroon Mahomed*, (In re), 14 B. 189.

(6) *Krishnadhan* v. *Sanyasi*, 23 C.W.N. 500 (504).

(7) *Ram Gopal* v. *Luchminarain*, (1937) C. 396.

(8) *Haroon Mahomed* (In re), 14 B. 189.

(9) *Achuteramayya* v. *Ratnajee*, 49 M. 211; *Venkatasami* v. *Palaniappa*, 52 M. 227; *Annabhat* v. *Shivappa*, 52 B. 376.

(2) But an alienation of joint property by the manager for the purpose of a new business binds only him and the other adult members who have assented or acquiesced in the new business. In such case, the share of the minor coparceners are not liable unless they have ratified the act on their attaining majority.[1]

Effect of an alienation by the Manager.

140. (1) Where a business old or new is continued by the manager acting on behalf of the family, his relation with an outsider, whether an alienee partner or credit dealing with him in the ordinary course of business, being contractual, both the manager and the outsider are entitled to the same rights and are subject to the same obligations as flow from their contractual relationship.[2]

Trade in partnership with an outsider.

(2) As such, even where the manager takes in an outside partner in a family business, it does not suffice to create any contract or privity between the other members and the outsider subjecting either to any rights or obligations as flow from the relationship of partners:[3]

No privity with an outsider.

(3) As such, the relationship of the manager and the other members of the family is akin to that of a partner and the sub-partners under him, though, as such, they do not acquire any rights *inter se* apart from their membership of the joint family.[4]

Relation of members *inter se*.

(4) As such, on the death of the manager the partnership with the outsider is *ipso facto* dissolved; since the manager succeeding to the deceased cannot take his place and continue the partnership without the assent of the outside partner.[5]

Effect of death of the Manager.

(5) On the other hand, the outsider cannot recover from them losses out of their estate apart from their interest in the joint family.[6]

Recovery of losses.

1239. Manager's Partnership.—The law relating to trading families is akin to the general law of corporations. But while the former is subject to the personal law, the latter is subject to the memorandum and the articles of associations. In their dealings with an outsider, their relation is mainly contractual, only varied to the extent that the outsider is aware that he is dealing with a person acting under his delegated authority, and as such, he must inquire into his authority and be satisfied that his act is *intra vires*. As the outsider has no contractual relation with the junior coparceners, they cannot

Nls. (1)—(2).

(1) *Sanyasi* v. *Krishnadhan*, 49 C. 560 P.C.; (Dayabhag case), applied to Mitakshara cases in *Tammireddi* v. *Gangi Reddi*, 45 M. 281; *Mahabir Prasad* v. *Amla Prasad*, 46 A. 364 (consent presumed if family maintained out of the profits); *Vithol* v. *Shivappa*, 47 B. 637; *Inspector Singh* v. *Kharak Singh*, 50 A. 776; *Jagat Narain* v. *Mathuradas*, 50 A. 969; *Biswanath Singh* v. *Kayastha Trading Corporation*, 8 Pat. 450; c.f. *Ramkrishna* v. *Ratan Chand*, 53 A. 190 P.C., (non-committal as to the Mitakshara law).

(2) *Sokhandha* v. *Sokhandha*, 28 M. 344; *Gangayya* v. *Venkataramiah*, 41 M. 454.

(3) S. 5, Partnership Act (IX of 1932); *Pichappa* v. *Chokalingam*, (1934) P.C. 192 (195); *Sokhandha* v. *Sokhandha*, 28 M. 344; *Ramnathan* v. *Yegappa*, 32 I.C. (M.) 427; *Gangayya* v. *Venkataramiah*, 41 M. 454 (456); *Vadilal* v. *Shah Khushal*, 27 B. 157.

(4) S. 5, Partnership Act (IX of 1932); *Ramlal* v. *Lakmichand*, 1 B.H.C.R. (App.) 51.

(5) *Ib.*, Ss. 35, 42 (*c*), Partnership Act (IX of 1932).

(6) *Ib.*, Ss. 35, 45.

sue him for the dissolution of the partnership or call for an account. Nor can the outsider sue them on the basis of that relationship.

1240. The general principle stated in this section is the net result of numerous decisions given *ad hoc*. For example, it is now settled that a joint family, as such, cannot enter into a partnership with an outsider since its members fluctuate from time to time adding and decreasing its strength with each successive birth and death of members in the family. Such a fluctuating body cannot be designated a "person" with whom any partnership is possible within the meaning of S. 4 of the Partnership Act.[1] Where, therefore, the manager enters into a partnership with an outsider, his relation with his other coparceners is governed by the joint family law, but so far as the outside partner is concerned, he alone is entitled to the rights as he would be subject to the liabilities of a partner. It is true that if he professes to act on behalf of the family, he is entitled to pledge its credit and so long as there is no conflict between the general law and the Hindu Law, the rights and obligations flowing from each can be enforced; but on a conflict arising, the general law prevails, since business would become impossible if, in the course of day to day business men had to inquire into the credentials beyond a certain point of every person they had to deal with.

1241. The position of the junior members of a joint family, *vis a vis* the manager, is described to be no higher than of sub-partners,[2] which means that they are not entitled to any of the rights, nor are they subject to any of the disabilities as flow from the general law of partnership. But their position is at the most akin to, but not quite that of sub-partners, since a sub-partnership is a partnership within a partnership and the junior members cannot enforce their rights as sub-partners since their relationship is still subject to Hindu Law, which, as before observed, treats such partnerships as one heritable item of the joint property. As such, the coparceners are not liable to pay the debts of the firm by reason of their participation in the profits thereof.[3] But being members of a joint family, they cannot demand partition or separate account of the partnership, which they would have been entitled to demand, if they had been mere sub-partners and nothing more.[4] The fact is that Hindu Law regards a family business as one item of joint property, and there cannot be partition or accounting of a single item without a general partition and a general accounting of the whole.[5] On the other hand, the creditor of the partnership, being bound only by the provisions of the general law, is entitled to proceed against the assets of the joint family for the recovery of his debts, though he need not implead all its members as parties to his suit. In any case, if he does implead them, their liability is necessarily limited to the extent of their interest in the joint family, whatever might be the extent of the manager's liability to the creditor of the firm and to the other partner.[6]

Cl. (3).

(1) Act IX of 1932 (S. 4, S. 239 of Contract Act 1872); *Sokhandha* v. *Sokhandha*, 28 M. 344; *Ramnathan* v. *Yeggappa*, 32 I.C. (M.) 427, distinguishing *Joopooday* v. *Pulavarti*, 36 M. 185 (192) P.C.; *Kharidar* v. *Dayakishan*, 43 A. 116, contra *Maharaj Kishen* v. *Hargobind*, 27 I.C. (L.) 69; *Narain Das* v. *Ram Ram*, 31 I.C. (L.) 45 dissenting from in *supra*.

(2) *Gangayya* v. *Venkatramiah*, 41 M. 454 (456).

(3) *Cox* v. *Hickman*, 8 H.L.C. 268.

(4) *Bray* v. *Fromont*, 6 M. 5; Ex parte *Dodgson*, Mont and M. Ar. 446. Lindley, Partnership (9th Ed.), pp. 71, 72, 564.

(5) *Gangayya* v. *Venkataramiah*, 41 M. 454 (457); *Ramlal* v. *Lakmichand*, 1 B. H.C.R. (App.) 51.

(6) S. 144, *Post*.

1242. That the partnership between the manager and the outsider is merely contractual and subject to the general law of partnership[1] carries with it the two corollaries stated in clauses (4) and (5) of the section.

Cls. (4), (5).

141. (1) Where the manager enters into partnership with an outsider, the question whether he had entered into the partnership in his individual right or on behalf of the joint family is a question of fact dependent upon the acts and conduct of the manager and the other members, the use of the family funds or credit, or their participation in the profits and losses, and management of the business and other circumstances relevant to the decision of the question.[2]

Family interest matter of evidence.

(2) Save as above, there is no presumption that a business started or carried on by a member of a joint family is a joint family business.

1243. **Proof of family partnership.**—Since all members of a joint family are free to trade on their own account, whether singly or jointly with others, it follows that the manager is equally entitled to do the same, and the question whether his partnership with an outsider is in his individual capacity or on behalf of the joint family must depend not only upon his intention, but upon the contribution the family assets or credit have made to the firm. The question is in each case one of fact to be decided on consideration of all relevant facts taken together.[3] Amongst these the sharing of profits is a strong *prima facie* evidence of partnership[4] which is greatly strengthened by sharing in the lossess, though it is not necessary to constitute a partnership, since it is merely consequential.[5]

The subject is one of general law to which reference is invited.

142. (1) An ancestral business, continued or resumed by the manager will be presumed to be an ancestral joint family business, but the manager may show that he had continued or resumed the business as his own.[6]

No Presumption of Jointness.

(2) There is no presumption that a business started or carried on by members of a joint family is a joint family business; much less where they start or carry it on in partnership with an outsider.[7]

(3) Notwithstanding anything in Hindu Law to the contrary, any business started or carried on and any acquisition of property made by a member of a joint family, even though its manager, shall not be treated as joint property, merely by reason of—

(*a*) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family; or with the aid of the joint funds of his family, or with the aid of the funds of any member thereof, or

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(1) Act IX of 1932.
(2) S. 6, Partnership Act (IX of 1932); *Abdul Majid Khan* v. *Saraswati Bai*, (1934) P.C. 4.
(3) S. 6, Partnership Act (IX of 1932).
(4) S. 4, Partnership Act (IX of 1932); *Cox* v. *Hickman*, 8 H.L.C. 268, followed in *Mollou* v. *Court of Wards*, L. R. 3 P.C. 419.
(5) *Ib.*; *Raghunandhan* v. *Hormasji*, 51 B. 342.
(6) *Ramkrishna* v. *Ramchand*, 53 A. 190 P.C.; *Damodaram* v. *Bansilal*, 51 M. 711.
(7) Ss. 4, 5, 14, Partnership Act (IX of 1932); *Abdul Majid Khan* v. *Saraswati Bai*, (1934) P.C. 4; *Sanyasi* v. *Krishnadhan*, 49 C. 560 (567, 568) P.C.; *Gangayya* v. *Venkataramiah*, 41 M. 454; *Vadilal* v. *Shah Khushal*, 27 B. 157, *contra Grey* v. *Walker*, 40 C. 523 (529).

(*b*) **himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.**[1]

1244. Presumptions.—After some conflict due to the general presumption of jointness both in status and property, the cases have come round to the view, favoured by the Privy Council, that the presumption of jointness cannot extend to a business started or carried on by a member of the joint family.[2] Such a presumption, even if otherwise possible, would have exposed the joint family to risks which would have cut at the very root of its jointness and the authority of its manager. The Hindu Gains of Learning Act[3] was intended to strengthen this principle, and the Partnership Act[4] has made it clear that a contract and not mere status is necessary to create a partnership. Where a coparcener starts a new business, the presumption is obviously in favour of its being his own concern. Even where such business is started by two or more coparceners, it does not become impressed with the attribute of jointness within the meaning of Hindu Law. (**S. 114 §§ 1005-1012**). Where a coparcener starts a new business, the mere fact that the firm name included his brother's name as well does not suffice to show that the business was jointly owned by the two brothers. Especially when there is other evidence to show that their accounts were separate;[5] nor does the fact that the two brothers live together and have acquired property by a joint sale deed, unless it is also proved that they had thrown their acquisitions into a joint stock so as to constitute a joint family;[6] or that there was a nucleus of ancestral property;[7] or the blending of the two properties which cannot be presumed from the mere fact that one member had made regular remittances to meet the expenses of the family.[8] (This subject has already been exhaustively dealt with before. *See* **S. 114, §§ 1005-1012.**

143. Conflict of laws. **In a conflict of rights and obligations arising under the law of the joint family and the general law, the general law shall prevail.**[9]

144. Liability of coparcener for family business debts. **(1) A debt incurred and an alienation of coparcenary property made by the manager of an ancestral joint family business in the ordinary course of that business is binding on a coparcener to the extent of the coparcener's interest in the coparcenary property.**[10]

(1) S. 3, Hindu Gains of Learning Act (XXX of 1930); *Pichappa* v. *Chockalingam*, (1934) P.C. 192; *Nanilal* v. *Nutbehari*, 38 C.W.N. 861; *Krishna* v. *Gopaldas*, (1934) O. 475.

(2) *Annamalai* v. *Subramanian*, (1929) P.C. 1; *Asutosh* v. *Tarapada*, (1934) C. 308 (317).

(3) *Cf.* S. 3, Act XXX of 1930.

(4) *Cf.* Ss. 4, 5, 14, Act IX of 1932.

(5) *Bansidhar* v. *Lalta Prasad*, (1934) A. 543 (544), contra *Kalu Singh* v. *Ram Lal*, (1935) 36 P.L.R. 492 (joint names of father and son).

(6) *Gaurishankar* v. *Gopaldas*, (1934) A. 701.

(7) *Nanilal* v. *Nutbehari*, 38 C.W.N. 861.

(8) *Ashutosh* v. *Tarapada*, (1934) C. 308 (317).

(9) S. 5, Partnership Act (IX of 1932).

(10) *Niamat Rai* v. *Din Dayal*, 8 L. 597 (603, 604) P.C.; *Kesarsingh* v. *Santansingh*, 17 L. 824; *Ramlal* v. *Lakmichand*, 1 B.H.C.R. (App.) 51; *Sumatbhai* v. *Someshvar*, 5 B. 38; *Raghunathji* v. *Bank of Bombay*, 34 B. 72 (minor coparceners equally liable); *Morrison* v. *Verachoyle*, 6 C.W.N. 429 (458); *Bishambhar Nath* v. *Sheo Narain*, 29 A. 166: *Ramnath* v. *Chiranji Lal*, 57 A. 605 F.B.; *Sheo Pershad* v. *Saheb Lal*, 20 C. 453 (*de facto* manager possesses the same powers): *Bishen Singh* v. *Kidar Nath*, 2 L. 159.

(2) A debt incurred and an alienation of coparcenary property made by the manager of a joint family business, which is not ancestral, in the ordinary cource of that business, is binding on an adult coparcener to the extent of the coparcener's interest in the coparcenary property, where the business has been undertaken or carried on with the express or implied consent of the coparcener.[1]

(3) Where any liability is incurred by the manager of a joint family business in the ordinary course of that business, the creditor or the alienee is not bound to inquire whether the liability is incurred for legal necessity or for the benefit of the family.[2]

Explanation.—**In this section "an ancestral joint family business" means, in respect of any coparcener, a joint family business, an interest in which accrued to the coparcener by survivorship.**[3]

1245. Analogous Law.—This section must be treated as explanatory of section 134, to which the ensuing commentary is merely supplementary. It is a well-known principle of equity that he who receives the benefit must also bear the burden. And under Hindu Law, the heir is expressly made liable for the debts of his predecessor[4] as declared in the following texts.[5]

1246. This section deals with the liability of coparceners in a business which is ancestral, and in that which, though a joint family business, is not ancestral. In the one case, the liability of all coparceners, whether adult or minors, is unqualified and limited only to the extent of their interest in the business. In this respect their liability is identical with that of the shareholders of a limited company. Where, however, the business is non-ancestral, the liability of the coparceners depends upon their express or implied consent, the rule being that while the manager is entitled to carry on an ancestral trade, he is not entitled to embark upon the hazards of a new one, unless he is duly authorised in that behalf by the coparceners whose credit he may have to hypothecate for its success.[6] But this is only as between the members of the coparcenary and those dealing with it with notice. Strangers dealing with it are subject to the protection of clause (3).[7]

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(1) *Sanyasicharan* v. *Krishnadhan*, 49 C. 560 (567, 568) P.C.; *Ramlal* v. *Lakhmichand*, 1 B.H.C.R. (App.) 51; *Sakhrabhai* v. *Maganlal*, 26 B. 206; *Raghunathji* v. *Bank of Bombay*, 34 B. 72 (86); *Johurra* v. *Sree Gopal*, 1 C. 470 (475); *Bemola Dossee* v. *Mohun Dossee*, 5 C. 792; *Mahabir* v. *Ambika Prasad*, 46 A. 364; *Biswanath* v. *Kayasth Trading Co.*, 8 Pat. 450 (456, 457); *Baba Din* v. *Bansraj*, 27 I.C. (O.) 567.

(2) *Niamat Rai* v. *Din Dayal*, 8 L. 597 (603, 604) P.C.; *Ramlal* v. *Lakhmichand*, 1 B.H.C.R. (App.) 51 (71, 72); *Raghunathji* v. *Bank of Bombay*, 34 B. 72 (85), followed in *Guruswami* v. *Gopalasami*, 42 M. 629 (631), dissenting from *contra* in *Nagendra* v. *Amarchandra*, 7 C.W.N. 725; *Ganpat Rai* v. *Munnilal*, 34 A. 135, now overruled by the first-cited case.

(3) *Tammireddi* v. *Gangi Reddi*, 45 M. 281.

(4) *Karimuddin* v. *Gobind*, 31 A. 497 (506) P.C.

(5) Narad, I-17; 33 S.B.E. 46, 47; Vishnu, VI-29; Yad. II-51 (Mandlik), p. 206, cited in Gour's Hindu Code (3rd. Ed.) at p. 779 § 1559.

(6) *Tamireddi* v. *Gangi Reddi*, 45 M. 281; *Morrison* v. *Verachoyle*, 6 C.W.N. 429 (458); *Ramlal* v. *Lakhmichand*, 1 B. H.C.R. (App.) 51; *Raghunathji* v. *Bank of Bombay*, 34 B. 72.

(7) *Ramlal* v. *Lakhmichand*, 1 B. H. C. R. (App.) 51; *Niamat Rai* v. *Din*

1247. As survivorship is an integral incident of coparcenership, such business is here designated ancestral, though it may not answer the test prescribed in section 113.

1248. It has already been stated that a joint family trading partnership differs from partnerships in that it is not dissolved by the death of a member, that new members come in and go out not by agreement with the remaining members but by the operation of law, and those who go out of the partnership are not entitled to call for an account of back profits and losses but receive a share of the assets then available and are subject to the liability then existing.[1]

1249. The rights and liabilities of coparceners in a trading business are not those of partners of a firm or shareholders in a company, and they cannot be determined by exclusive reference to the Partnership Act, since the assets of a joint family may as much comprise a trading business as any other property.[2] In that case, the management of the two may not be in the same hands, since the manager by right may not possess successfully the special knowledge required to carry on a trade. The manager of such business possesses certain powers which are not those of the manager of a purely business firm, and his rights and liabilities cannot therefore, be determined by exclusive reference to the Partnership Act.[3] The correlative rights and liabilities of such manager depend upon whether the business is an ancient family business or one which is merely joint without being ancient; while the extent of the coparceners liability depends not only upon those facts, but also upon the fact whether the coparcener held liable is a major or minor.

1250. It will be observed that the first two clauses deal with two classes of trade—ancient and a new one. An ancestral joint family business is defined in the Explanation as a business in which the interest has accrued by survivorship. As such, an ancient trade is indistinguishable from any other ancestral property defined in section 113.

Clause (1).

It must be remembered that an ancestral trade does not lose its character by a change in the class of business. A firm dealing in country goods may alter its business to English piecegoods,[4] and indeed, if the business is large with several branches and managers, it may be that the goods handled by the firm may vary from time to time and in its several branches according to the exigency of the trade or the enterprise of the manager, but the firm would still retain its character of ancient family business, so long as it is not converted into an entirely new business.[5] It is possible that strangers are admitted into partnership, in which case the interest of the family would retain its character, though as between the family and the stranger, it would be treated as an ordinary trading partnership subject to the general law.

Dayal, 8 L. 597 (603, 604) P.C.; *Ramnath* v. *Chiranji Lal*, 57 A. 605 F.B.; *Kesarsingh* v. *Santansingh*, 17 L. 824.

(1) *Samalbhai* v. *Someshvar*, 5 B. 38 (40).

(2) S. 138.

(3) *Samalbhai* v. *Someshvar*, 5 B. 38.

(4) *Rajagopala* v. *Raman*, (1927) M. W.N. 879.

(5) *Krishnadhan* v. *Sanyasi*, 23 C.W. N. 500: 51 I.C. 597, overruled on a different point in *Sanyasi* v. *Krishnadhan*, 49 C. 560 P.C.

1251. In any case, so far as the members of the family are concerened, their rights and liabilities are subject to Hindu Law. And as regards their liability for debts contracted and alienations made by the manager the rule is stated in clause (1), *viz.*, that all coparceners, whether major or minor,[1] become subject to the payment of such debts, their liability being, however, limited to the extent of their interest in the coparcenary property—not necessarily their interest in the firm but their interest in the ancestral joint property, of which the firm may be only an item.[2]

It is said that in the case of a minor the share liable for the debt is his share in the firm and not in the joint family property[3] but where the firm is only an item of the family property, the two are indistinguishable so long as its credit depends upon the credit of the family. Father's insolvency does not vest the son's interest, or deprive the son of his right of pre-emption under the Punjab Pre-emption Act, 1913.[4]

1252. It is, of course, possible that the debt was borrowed on the credit of the business in which case it would be recoverable from the business. If the business was in partnership with a stranger, it would be subject to contribution. It is said that even in the case of ancestral business, if there be a minor member, the only share liable for the debt is his share in the firm and not in the joint property. It was so held on the analogy of S. 247 of the Contract Act, which while permitting the admission of a minor partner limits his liability to his share in the property of the firm.[5] But as remarked by the Madras court: "The position of a member of a joint family is not changed by the fact of the manager carrying on trade... In the case of a minor in whose behalf the borrowing is made by a person who, under the Hindu Law, is competent to pledge the credit of the family, the additional obligation which that law imposes is not rendered inefficacious by the fact that the debt was incurred in the course of the trade."[6] The fact is that the manager in the one case could only contract debts for necessity, while here his power is wider, but it is so because, otherwise, the carry-

(1) *Ram Lal* v. *Lakshmichand*, 1 B. H.C.R. (App.) 51; *Samalbhai* v. *Someshvar*, 5 B. 38; *Thammanina* v. *Akarapu*, 38 M.L.J. 55: 55 I.C. 64; *Ratan Lal* v. *Jaideo*, (1924) N. 123.

(2) *Joharmal* v. *Chetram*, 39 B. 715; *Ram Lal* v. *Lakshmichand*, 1 B.H.C.R. (App.) 51 (71, 72); *Samalbhai* v. *Someshvar*, 5 B. 38; *Raghunathji* v. *Bank of Bombay*, 34 B. 72; *Dhulipalla* v. *Nadipalli*, 43 I.C. (M.) 76, following *Ramachandra* v. *Kondayya*, 24 M. 555, and distinguishing *Krishnamurthi* v. *Bank of Burmah*, 35 M. 692; *Muthaya* v. *Tinnevelly S.I. Bank*, 37 I.C. (M.) 230; *Palaniappa* v. *Official Assignee*, 36 I.C. (M.) 787; *Chala Ram* v. *Kishen Chand*, (1923) L. 462; *Wadhawa Shah* v. *Rattan Chand*, 30 I.C. (L.) 813; *contra* in *Joy Kisto* v. *Nittyanand*, 3 C. 738; *Sanyasi* v. *Asutosh*, 42 C. 225 (233); *Khetra* v. *Aswini Kumar*, 22 C.W.N. 488: 45 I.C. 667; *Anath* v. *Bipin*, 19 I.C. (C.) 6 O.A.; *O. A. M. K. Chetty* v. *K. O. Chetty*, 31 I.C. (R.) 271; *Jwala Pershad* v. *Bhuda Ram*, 10 Pat. 503.

(3) *Ram Lal* v. *Lakshmichand*, 1 B. H.C.R. (App.), 51 (71, 72); *Thammanna* v. *Akarapu*, 38 M.L.J. 55; *Muthaya* v. *Tinnevelly S. I. Bank*, 37 I.C. (M.) 230; *Palaniappa* v. *Official Assignee*, 36 I.C. (M.) 787; *contra* in *O. A. M. K. Chetty* v. *K. P. Chetty*, 31 I.C. (R.) 271; *Khetra* v. *Aswini Kumar*, 22 C.W.N. 488: 45 I.C. 667; *Anath* v. *Bipin*, 19 I.C. (C.) 6; *Joy Kisto* v. *Nittyanund*, 3 C. 738; *Samalbhai* v. *Someshwar*, 5 B. 38; *Sakrabhai*, v. *Magan Lal*, 26 B. 206; but in most of these cases the creditor did not press for the seizure of the joint property other than the joint business.

(4) *Sat Narain* v. *Behari Lal*, 6 L. 1 P.C.

(5) *Joy Kisto* v. *Nittyanund*, 3 C. 738 (740, 741); *Sanyasi* v. *Asutosh*, 42 C. 225 (233) (case of insolvency); *Narain Das* v. *Ralli Brothers*, (1915) P.R. 61: 31 I.C. 45 (point conceded).

(6) *Dhulipalla* v. *Nadipalli*, 43 I.C. (M.) 76, following *Ramachandra* v. *Kondayya*, 24 M. 555, distinguishing *Krishnamurthi* v. *Bank of Burma*, 35 M. 692.

ing on of the trade might become impossible, but it can have no effect upon the liability of the minor. It was so held by Sausse, C. J., in the leading case,[1] which has been invariably followed.

1253. This liability is the minimum, though it might be enlarged, by the adult coparceners, if they become or are liable to be treated as contracting parties by reason of their previous consent or subsequent ratification, and in the case of minor coparceners, if the contract has been ratified by them on attaining majority.[2]

The manager may be any member of the family, a male or a female,[3] though he must necessarily be an adult otherwise he is incapable of entering into a contract. And it is possible to have several managers who would, in the absence of notice of the limitations on their power, be deemed to wield equal authority, by whose acts the coparcenary would be equally bound.[4] A *de facto* manager has the same authority as a *de jure* manager. At any rate, strangers dealing with the one are protected if they have dealt with him on the assumption that he is the authorised manager.[5]

In fact, the authority of the manager is not so material as the fact that the debt was borrowed for the ordinary course of the business. As Pontifix, J., observed: "All persons carrying on a family business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family property and credit for the ordinary purposes of the business, and, therefore, debts honestly incurred in carrying on such business must override the right of all members of the joint family in property acquired with funds derived from the joint business."[6]

1254. Since all coparceners are *prima facie* bound by the act of the manager it follows that a decree against him is sufficient to bind their interest though they may not have been impleaded in the suit.[7]

Where an ancestral business devolves on a sole-minor coparcener, or all the coparceners are minors, it must be managed by their guardian, who has no power to bind his wards by a personal covenant. In that case the creditors have no right of direct recourse against the minor, but as the guardian will be entitled to indemnity for liabilities properly incurred out of the assets of such business, creditors of the business can proceed directly against such assets for liabilities properly incurred by the guardian. A guardian may appoint an agent to carry on the business, but he cannot invest him with powers larger than are reasonably proper for carrying on the business; and where, as a consequence of giving such powers, the guardian has become involved in liability for the fraud of the agent, the guardian has no right of indemnity against the assets of the minor nor are the cretitors entitled to claim such right through the guardian.[8]

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(1) *Ram Lal* v. *Lakshmichand*, 1 B. H.C.R. (App.) 51 (71, 72).

(2) S. 169; *Bishen Singh* v. *Kidar Nath*, 2 L. 159.

(3) *Sakrabhai* v. *Magan Lal*, 26 B. 206 (220) F.B.; *S. I. Export Co.*, v. *Subbier*, 28 M.L.J. 696: 29 I.C. 957.

(4) *Bissessur Lall* v. *Luchmessur*, 5 C.L.R. 477 P.C.: 6 I.A. 233; *Lutchmanen* v. *Siva Prokass*, 26 C. 349 (355).

(5) *Sheo Pershad* v. *Saheb Lal*, 20 C. 453.

(6) *Johurra Bibi* v. *Sreegopal*, 1 C. 470, followed in *Sheo Pershad* v. *Saheb Lal*, 20 C. 453 (461).

(7) *Kishen Prasad* v. *Har Narain*, 33 A. 272 P.C.; *Lalji* v. *Keshowji*, 37 B. 340; *Daulat Ram* v. *Mehrchand*, 15 C. 70 P.C.; *Bissessur Lall* v. *Luchmessur*, 5 C. L.R. 477 P.C., 6 I.A. 233; *Sheo Pershad* v. *Saheb Lal*, 20 C. 453 (463).

(8) *Sanka Krishnamurthi* v. *Bank of Burma*, 35 M. 692 (696, 697), following *Raghunathji* v. *Bank of Bombay*, 34 B. 72; *Sanyasicharan* v. *Asutosh*, 42 C. 225 (233).

1255. "**In the ordinary course.**"—It is scarcely necessary to add that a creditor is entitled to the protection of the section only in respect of a debt incurred and an alienation made by the manager of an ancestral business in the ordinary course of that business. These words imply that the transaction must have been entered into in good faith and without negligence and under circumstances which do not afford a reasonable ground for believing that the manager was not entitled to enter into it. The same precautions are enjoined on one who pays a negotiable instrument in due course.[1] A transaction takes place in the ordinary course of business, where *hundis* are issued and paid or advances made against a consignment of goods for the business, while the sale of land obtained by foreclosure by a money-lending business would be such a transaction. The creditor has of course to give *prima facie* evidence to establish the ordinary course. He is not called upon to prove anything more. The fact that a sum borrowed for a business was misappropriated by the manager is nothing to him. The fact that the loan was secured by a misrepresentation does not affect the creditor, so long as he acts in good faith and without notice (§ **1324**). Where, therefore, the manager had misappropriated a sum of money which he employed in his trade, both he and all his coparceners were held jointly and severally liable to make good the sum misappropriated, with interest.[2]

1256. Though, as stated in the clause, a minor member is not liable for the debt incurred or the alienation made by the manager of a new business, it must not be forgotten that this is the rule to which exceptions are furnished by the general Hindu Law, which makes the interest of a minor liable if the debt or the alienation is proved to be for legal necessity or benefit. In other words, the special rule here stated is still subject to the more general rule in which the family business may be regarded as the family property and the manager's act judged by the test applicable to a general manager.[3] In any case, in such a case the minor could not be permitted to repudiate the debt and retain the benefit.

1257. New Trade.—But the case of a non-ancestral business is different. As observed by the Privy Council: "The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business. In the other, they rest ultimately in contractual arrangement between the parties."[4] It is not competent to the *karta*, be he even the father,[5] to impose on a minor coparcener the risks and liabilities of a new business started by himself: consequently, a creditor of the new business cannot make the minor's share of the family properties or the ancestral business liable for the debts of the new business.[6] A minor whose interest is not liable for debts contracted

Clause (2).

(1) S. 10, Negotiable Instruments Act (XXVI of 1881).

(2) *Jai Narain* v. *Prag Narain*, 85 I. C. 2: 29 C.W.N. 755: (1925) P.C. 11.

(3) *Chalam Ram* v. *Kishen Chand*, (1923) L. 462; *Ram Dhan* v. *Ramji Das*, 50 I.C. (L.) 215; *Dhulipallah* v. *Nandipalli*, 49 I.C. (M.) 76.

(4) *Sanyasi Charan* v. *Krishnadhan*, 49 C. 560 (567, 568) P.C. reversing O.A. *Krishnadhan* v. *Sanyasi Charan*, 23 C.W.N. 500: 51 I.C. 537; *Chhoti Ram* v. *Narayan Das*, 11 B. 605 (608).

(5) *Official Assignee* v. *Palaniappa*, 41 M. 824; *contra*, where the coparcener is a son; *Annabhat* v. *Shivappa*, 52 B. 376; and *See* Ss. 159-160, *post*.

(6) *Krishnadhan* v. *Sanyasi*, 23 C.W.N. 500: 51 I.C. 597.

in a newly started business is equally not entitled to a share of its profits. He is not a member of it, though he may become one on his attaining majority. But till then the business is owned by those who started it. But if they financed it out of the joint family funds then it is only fair that the minor should receive his share of the profits and if the business fails he will suffer to the extent of his share in the family estate.[1] In other words, a business, though not ancient may still become joint by its continuance for a length of time and the enjoyment of its profits by the family.[2]

The members of a joint family cannot profit from a concern started by the father without taking the risk incidental to that business. Where, therefore, the father had acquired a coal mine which he worked and which, on his death, his sons continued to do so, and while so doing, the mine subsided, the plaintiff, as owner of the surface, sued them for damages. It was proved that the subsidence was due to the negligence of the father in not providing proper support, though the subsidence occurred seven years after his death. The sons pleaded that they were not liable for their father's negligence, but the court decreed the claim on the ground that they had continued to work the mine, and were, therefore, liable to the plaintiff, though not personally, because the subsidence had occurred during their working it. The court further decreed by way of damages the cost of the building erected by the plaintiff, as it was not proved that their erection had contributed to the subsidence.[3]

1258. The manager of a joint Hindu family has no power to commence a new trade or business without the concurrence of the adult coparceners living at the time; and such trade or business is not binding on them in the absence of evidence of their acquiescence.[4]

Where an ancient business is converted into an entirely new business, the conversion, must, it is apprehended, be with the like consent.[5]

1259. It is an ordinary rule that he who deals with a limited owner must inquire into the circumstances which entitle him to pledge the credit which he professes to do: in dealings with the manager of a Hindu family such is the rule. There is no presumption that a debt contracted by a manager is contracted for legal necessity or benefit so as to be binding on the other coparceners.[6] But the case of a trade manager is different: the test to be applied here is rather the apparent authority of the manager than the actual necessity of the family.[7] The creditor or alienee is not bound to inquire into the necessity of the loan or alienation, nor is he liable to see that the transaction he enters into is in the interest

Clause (3).

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(1) *Lutchmanen* v. *Siva Prokasa*, 26 C. 349 (353, 354); *Bishambher* v. *Fateh Lal*, 29 A. 176; *Padamraj* v. *Gopikisan*, 56 I.C. (N.) 129.

(2) *Ram Nath* v. *Chiranji Lal*, 57 A. 605, F.B.

(3) *Ambalal* v. *Bihar Hosiery Mills*, 16 Pat. 545.

(4) *Tammireddi* v. *Gangi Reddi*, 45 M. 281 (290, 291); *Abdur Rahman* v. *Hussain*, 37 M.L.J. 316.

(5) *Krishnadhan* v. *Sanyasi*, 23 C.W. N. 500: 51 I.C. 597.

(6) S. 130, Expl. 2.

(7) *Niamat Rai* v. *Din Dayal*, 8 L. 597 (603, 604) P.C.; *Kesar Singh* v. *Santon Singh*, 17 L. 824; *Sadasiva* v. *Hajee Faker*, 27 C.W.N. 677: (1922) P.C. 397; *Raghunathjee* v. *Bank of Bombay*, 34 B. 72; *Baba Din* v. *Hansraj*, 18 O.C. 84: 27 I.C. 567; *Ghanshyam Das* v. *Hardei*, 2 O.L.J. 562: 32 I.C. 380; *Ayyasawmi* v. *Guruswami*, 32 I.C. (M.) 691; *contra* in *Ganput Rai* v. *Munni Lal*, 34 A. 135; *Guruswami* v. *Gopalasami*, 42 M. 629; *Nagendra* v. *Amarchandra*, 7 C.W.N. 725, must be deemed overruled by the first-cited case.

of the business. Such an inquiry if insisted upon would make the carrying on of many trades impossible. It is entirely at the discretion of the manager to see whether he would raise the funds necessary for his business by mortgage or sale and it is for him to decide whether sale would not be preferable to a mortgage at a high rate of interest. It was equally a question for the manager whether it would be better to raise more money or to close down the business; and the lender or purchaser cannot go into a question of this kind, and it is rarely that he would be in a position to form a sound opinion.[1] Where a person passes a promissory note in his own name, it is on the creditor to show that it was given *qua* manager of a joint family on which it was liable.[2]

1260. It has already been seen that this explanation accords with the general law stated in section 113. One test whether a business is ancestral or otherwise is whether it is subject to the law of survivorship. But before that test can be applied that given in section 113 should suffice. But it may happen that the business inherited was inconsiderable, but it was enlarged by the ability or enterprise of its manager, who may have invested in it his self-acquired property. In that case it would have to be considered whether it does not fall under any of the clauses of the next section for in that event the business may be only joint without being ancestral to which the second clause would apply. If the manager starts a new business, singly or in partnership with another, whether coparcener or a stranger, there is no presumption that all members become partners, therein. The fact that they do so must be proved like any other fact.[3] On the other hand, given an ancestral business, it does not cease to be so by reason of the fact that it was carried on by the manager singly, or in partnership with a stranger.[4]

Explanation.

It is a rule common to an ancient partnership governed by Hindu Law,[5] as one governed by the Partnership Act that no coparcener can sell his share, so as to introduce a stranger into the firm without the consent of his coparceners, though the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.[6] In this respect this rule supersedes that stated in section 126 (4).

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(1) *Niamat Rai* v. *Din Dayal*, 8 L. 597 (603, 604) P.C.

(2) *Abdul Majid* v. *Saraswati*, (1934) P.C. 4.

(3) *Pichppa* v. *Chockalingam*, (1934) P.C. 192. *Hemraj* v. *Topen*, 86 I.C. 950: (1925) S. 300; *Hamandas* v. *Mayadas*, 87 I.C. 905: (1925) S. 310; *Sheonarain* v. *Babulal*, 85 I.C. 775: (1925) N. 268.

(4) *Ram Lal* v. *Lakshmichand*, 1 B. H.C.R. (App.) 51 (71), cited in *Sakrabhai* v. *Magnilal*, 26 B. 206 (211) F.B.

(5) *Suraj Bansi* v. *Sheo Prasad*, 5 C. 148 P.C.; *Deen Dyal* v. *Jugdeep Narain*, 3 C. 198 (209) P.C.; *Shiva Nath* v. *Tulsi Ram*, 48 A. 1 (3).

(6) *Deen Dayal* v. *Jugdeep Narain*, 3 C. 198 (209) P.C.

CHAPTER X.

DEBTS AND ALIENATIONS.

1261. Topical Introduction.—In a previous chapter, the right of the manager and of the father to contract debts and make alienations of joint property has been already set out. And in discussing the right of coparcener against the manager, his right to challenge the former's invalid transfers has also been alluded to. But the rights of the family against strangers and *vice versa* still remain. They are of sufficient importance to deserve a separate chapter. As will be presently seen, the equity in favour of the alienee is entirely a modern graft upon the archaic Hindu Law where it finds no place. The protection of the creditor or the alienee who advances a loan or receives a transfer for valuable consideration after due enquiry without notice, is an equitable rule of the civil law which has found a place in the jurisprudence of all nations. It has equally become embedded as an integral rule of Hindu Law. In some other respects also Hindu Law has been overshadowed by the statute law, the combined effect of which will be found set out in the ensuing sections, some of which deal with the burden of proof, a subject which occupies no inconspicuous a place in Hindu Law, where in the conflict of evidence, onus is often the determining factor. It is not, however, a subject which is easy of generalization. And it has created a considerable conflict of views, as noticed by the Privy Council, who said: "The conflict of authorities cited to the Board is a conflict which occurs, not merely between the courts of one district in India and another, but also between decisions pronounced in Calcutta itself, in Allahabad itself, and in Madras itself."[1] This was clearly apparent to the Full Bench of the Allahabad High Court who had to consider the question of onus.[2] The ensuing sections enunciate a few leading principles on the subject, and they are practically all upon which the reports are more or less agreed. On other points they teem with conflicting cases, which have been relegated to the notes.

145. Unless there is anything repugnant in the subject of context—

"Debt" and other terms defined.

(*a*) "Debt" includes a liability arising out of contract, express or implied, or a breach of civil duty for which a suit would lie;[3]

(*b*) "Creditor" means any person in respect of whom a debt is incurred;[4]

(*c*) The terms "father" and "son," wherever they occur, are used in the sense defined in section 112;

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(1) *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (448) P.C.

(2) *Chandra Deo* v. *Mata Prasad*, 31 A. 176 F.B.

(3) *Chhakauri* v. *Ganga*, 39 C. 862; *Hanmant* v. *Ganesh*, 43 B. 612; *Chandrika Ram* v. *Narain Prasad*, 46 A. 617.

(4) *See* 1 Gour's Law of Transfer (6th Ed.), §§ 985, 986.

(*d*) A person is said to have "notice" of a fact when he actually knows that fact or when, but for wilful abstention from inquiry or search, which he ought to have made or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent in the circumstances mentioned in section 229 of the Indian Contract Act, 1872;[1]

(*e*) A person is said to "believe in good faith" when, after using reasonable care to ascertain the existence or non-existence of any circumstances, he believes in the existence or non-existence of such circumstances.[2]

1262. Analogous Law.—The term debt (*rin*) is used in Hindu Law in its primary sense as denoting a loan, that is, a liquidated money obligation arising out of contract and recoverable by suit. But the texts show that the contract might be express or implied: "What has been spent for the household by a pupil, apprentice, slave woman, menial, or agent, must be paid by the head of the household."[3] But modern law classes as debt other obligations *ex contractu*, though they are not strictly within the comprehension of the archaic law. It is not proposed to discuss these in detail in this work which is confined to Hindu Law, especially as they have been already so discussed elsewhere by the present writer.[4] It may, however, be added that the term no longer retains its primitive import and has begun to be used in the sense in which it is understood in the secular law, as comprising not only a debt properly so called, but also those pecuniary obligations which arise out of a breach of civil duty independent of a contract[5] even if their amount was not ascertained at the time of the obligee's death.[6] This is in accordance with the English Law where "although no action for a tort could be revived or commenced against the representative of the person who committed it; yet the case was different where the act was not a mere tort but was a breach of a *quasi*-contract, where the claim was founded on breach of a fiduciary relation or failure to perform a duty."[7]

Clauses (a), (b).

1263. Debt.—In its large sense, a debt means a sum of money due from one person to another. Under old English Law the term was used in a narrower sense as implying a monetary obligation resulting from a contract, express or implied. The term is here used in a wider sense as embracing not only a contractual debt, but a legal obligation resulting from a matter of fact independent of contract, *e.g.*, a tort or a delict. In this sense, a sum of money for which a claim is compromised amounts to a debt;[8] and so a sum of money claimable by way of compensation or damages would fall

Clause (a).

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(1) *Cf.* S. 3, Transfer of Property Act; S. 3, Trusts Act.
(2) 1 Gour's Law of Transfer, (6th Ed.), § 902.
(3) Narad Sut. 1; 33 S.B.E. 41 *et seq.*
(4) 1 Gour's Law of Transfer (6th Ed.), §§ 104-107.
(5) *Chhakauri* v. *Ganga Prasad*, 39 C. 862 (871), following *Pareman* v. *Bhattu*, 24 C. 672 (676); *Kuneda* v. *Asutosh*, 17 C.W.N. 5.
(6) *Venkatalakshmamma* v. *Mohan*, 44 M. 214; *Garuda* v. *Nerella*, 35 M.L.J. 661.
(7) *Per* Cotton, C.J., in *Coucha* v. *Coucha*, 40 Ch. D. 543, followed in *Venkatalakshmamma* v. *Mohan*, 44 M. 214.
(8) *Ram Kuber* v. *Ram Dasi*, 35 A. 428.

into that category;[1] while all money decrees against a defendant convert him into a judgment-debtor, against whom execution might be had as for the recovery of a debt; while if the obligee gives a security for the discharge of his obligation, his liability takes the course provided in the terms of the security. An optional liability, such as is created by a pre-emption decree is not a debt.[2] A fine is not a debt but a penalty for which the son is not liable.[3] Such was held to be the amount of the deficiency due from the father who had failed to pay the price of the property which had to be resold for a smaller price.[4] A liability incurred by the father while his estate was under the Court of Wards and so incompetent to contract does not create a legal obligation amounting to a debt enforceable against the son.[5]

1264. A debt creates a present liability and must be distinguished from a mere agreement creating a future liability which is not a debt within the meaning of law. So where a creditor promised the father a sum of money to pay off a mortgage, which was otherwise discharged, after which the money was received and squandered by the father, the Privy Council held the promise to fall short of a debt and the subsequent payment of the money did not make it an antecedent debt.[6] Similarly, where the father had agreed to pay in perpetuity the sum of Rs. 10-8-0 to plaintiffs for use of a temple, the court held the contract not binding on the son; *first,* because it did not amount to a debt, and *secondly,* taken as a contract, the son is not bound by every contract of the father, certainly not such a contract which created a perpetual liability to pay.[7] So their Lordships held the son not bound by his father's contract to sell his property if it was imprudent and oppressive.[8] The distinction between a debt and a contract is, therefore, important, since while the son is bound by his father's debts, however imprudent, he is not bound by such agreement.

The terms "antecedent debt" and "an illegal and immoral debt" form the subject of the next chapter where they are fully explained.

1265. Creditor. The term creditor is here used in a generic sense, as including both secured and unsecured creditors by whatever name called. A *Zur-e-Peshgi* lessee, though nominally a lessee is in reality a creditor, and so is of course, the mortgagee, while a purchaser of property subject to resale may conceivably fall into the same class.[9]

Clause (b).

1266. The terms defined here call for no notice. Clause (*c*) is merely explanatory of S. 112, while Clause (*d*) is taken from S. 3 of the Trusts Act and the Transfer of Property Act, while the last clause is common to the general law and will be found explained in the writer's work on Transfer.[10]

Clauses (c), (d), (e).

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(1) *Chhakauri* v. *Ganga,* 39 C. 862; *Venugopala* v. *Ramanadhan,* 37 M. 458.

(2) *Chatarbhuj* v. *Govind Ram,* 45 A. 407; *contra* in *Nathu* v. *Kundan Lal,* 33 A. 242, dissented from.

(3) *Nhanee* v. *Hureeram,* 1 Borr. 90 (101).

(4) *Ratan Lal* v. *Birjbhukan,* 61 I.C. (A.) 774.

(5) *Chaubey* v. *Bindeshri,* 20 A.L.J. 24: (1922) A. 215.

(6) *Jawahir Singh* v. *Udai Parkash,* 48 A. 152 P.C.

(7) *Balkrishna* v. *Janardana,* 6 Bom. L.R. 642.

(8) *Ramcharan* v. *Bhagwan Das,* 48 A. 443 P.C.

(9) 1 Gour's Law of Transfer, (6th Ed.), §§ 985-988.

(10) 1 Gour's Law of Transfer, (6th Ed.), §§ 112-902.

146. (1) Save as hereinafter provided, the debts of a person must be paid by himself, and on his death, out of his separate property in whosesoever hands it might be, whether of the executor, administrator or the heir, except that alienated for value.[1]

Liability for personal debt.

(2) No heir, executor, or administrator is bound to pay a debt of the deceased which, by reason of its illegality, immorality or otherwise, he would not have himself been bound to pay.[2]

(3) A coparcener is liable to pay his own debt personally and out of his separate property, or coparcenary interest so long as he is alive, but on his death, it cannot be recovered out of his coparcenary interest, unless it had been attached during his lifetime:[3]

Provided that where the debt was due from the father, and is not illegal or immoral, his son is liable to pay it, to the extent of the assets inherited by him as hereinafter provided.[4]

(4) The universal donee is personally liable to pay all debts of the donor due at the time of the gift, to the extent of the property comprised therein; while other donees are liable to pay his debts to the same extent if the said gift was made with intent to defeat or delay any creditor, or has resulted in defrauding, defeating or delaying him, or the debtor was adjudged an insolvent within two years of the said gift.[5]

Explanation 1.—The terms heir, executor, or administrator in this section include any person so claiming as also one who intermeddles with the estate of the deceased.[6]

Explanation 2.—The heir of an impartible estate is, upon succession, liable to pay all the lawful debts of his predecessor out of the estate.[7]

Explanation 3.—The liability to pay a debt does not cease merely because the remedy for its recovery is barred.[8]

Explanation 4.—A gift includes an alienation made for a grossly inadequate consideration.[9]

1267. Analogous Law.—This section is supported by the following texts:—

Narad.—"17. A sonless widow, and one who has been enjoined by her dying husband to pay his debts must pay it—or (it must be paid) by him who inherits the estate. (For) the liability for the debts goes together with the right of succession."[10]

Vishnu.—"A widowed woman who has no son is bound to pay the debt of her husband, if he has commissioned her to do so on his death-bed, or if his property has escheated to her. If she is unfit to take the estate, her husband's debt must be re-paid by those who have inherited the estate. The property and the liabilities go together."[11]

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(1) *Kanakamma* v. *Venkataratnam*, 7 M. 586; *Narayanasami* v. *Esa*, 28 M. 351; *Ram* v. *Lachman*, 30 A. 460.

(2) S. 23, Contract Act.

(3) *Deen Dyal* v. *Jugdeep Narain*, 41 A. 247 P.C.; *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 P.C.; *Jagannath* v. *Sita Ram*, 11 A. 302; *Subrao* v. *Mahadevi*, 38 B. 105 (107).

(4) S. 160 and cases cited.

(5) *Abdul Hye* v. *M. Muzaffar*, 10 C. 616 P.C.; *Guanabhai* v. *Srinivasa*, 4 M.H. C.R. 84 (86, 87); Ss. 128, 53, Transfer of Property Act, S. 55, Presidency Town Insolvency Act 1903, Provincial Insolvency Act.

(6) *Cf.* S. 2 (*ii*), Civil Procedure Code.

(7) *Ram Das* v. *Braja Behari*, 6 C.W.N. 879 and cases *post*.

(8) *Ganpat* v. *Munnilal*, 34 A. 135; *Mahesh Lal* v. *Busunt*, 6 C. 340.

(9) S. 53, Transfer of Property Act (IV of 1882).

(10) Narad I-17; 33 S.B.E. 46, 47.

(11) Vishnu VI-29.

Yadnavalkya.—"He who has received the estate or the wife of the deceased should be made to pay his debts, or failing either, the son who has not received an inheritance. In the case of a sonless deceased those who take the heritage should be made to pay."[1]

1268. The liability of a person to repay his own debts is subject to the general law. That law would not lend its aid to the recovery of a debt which is illegal or immoral within the meaning of S. 23 of the Indian Contract Act. In this respect, the statutory provisions to a certain extent agree with those of Hindu Law, which exempts the son from his liability to pay his father's debt, if it is illegal or immoral.

Apart from the illegality or immorality of a debt, the debtor may be absolved from repayment if the suit for its recovery has become barred by time, or there is merger, waiver or release, all of which cases furnish sufficient grounds for exoneration from the liability.

Apart from the debtor himself whose liability is not subject to Hindu Law, there remains the liability of his heir and legal representative, who is bound to pay all his debts, which the deceased was himself liable to pay, when he died. Even if the debt be barred, the heir is entitled, though not bound to pay it. The liability of a person to pay for the debt of another follows from the fact that the debt is generally, though erroneously, spoken of as a first charge on the inheritance and "they who share the inheritance must be pay the debts.[2]

1269. Liability of Heirs.—It is the rule of Hindu Law that a man's property is liable for his debts, and property descends to an heir burdened with the debts of the ancestor which must be all satisfied before the heir can be said to have any interest in the property at all.[3] The debts of the deceased must be paid out of his estate in whosoever's hands it might be, whether the rightful heir or the wrongful interloper. The same duty of paying his debts is equally obligatory on the executor or administrator, whether rightful or *de son tort*. Any person charged with the administration of the estate of the deceased becomes liable for the payment of his debts. It does not matter whether he is the heir, legatee, or a mere claimant. The fact that he is in possession of the estate entitles him to discharge its monetary obligations.[4] So where two widows of a person's pre-deceased sons laid claim to his estate on the strength of an alleged will, they were held liable to pay the debt of the deceased whether the will be genuine or not. If it was genuine they were the heirs and legal representatives of the deceased, and therefore, liable for his debt. If on the other hand, the will was not genuine, then being persons in possession of the property left by the deceased, they became liable for his debts to the extent of the property in their possession.[5]

Clause (1).

1270. Such was also the case of the plaintiff who contested succession to the estate against his brother's widow and obtained possession. While his suit was pending, a creditor of the deceased sued both the plaintiff and the widow and obtained a decree for repayment of the debt out of

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(1) Yad. II-51 (Mandlik), p. 206.

(2) Gautam XII-40; cited in Mit., II-XI. § 24: Narad I-17, 33 S.B.E. 46, 47; *Bhala* v. *Parbhu*, 2 B. 67 (73): *Mallan* v. *Paramatma Das*, 17 L. 588; Karimuddin v. *Govind*, 31 A. 497 (506) P.C.

(3) *Gunga Narain* v. *Umesh Chunder*, (1864) W.R. 277.

(4) *Kanakamma* v. *Venkataratnam*, 7 M. 586 (588).

(5) *Gulabi* v. *Asaram*, (1881) A.W.N. 50.

the estate. The plaintiff satisfied the decree out of his own monies before the widow obtained her decree. He sued her for recovery of the amount which the court decreed holding that since the property of a deceased person is, under Hindu Law, liable for his debts, in whosoever hands it may be found, the plaintiff, having the estate in his hands, was bound to pay the sum, and having done so, to save the estate he became entitled to recover it from the widow.[1] A person may be liable to pay the debt as an executor *de son tort*, with the possible right of its recovery from the estate, unless the debt he had paid off was his own for, otherwise the creditors of the deceased would be running a race to take possession of his goods without administration to him.[2]

1271. And of course, the debt which such person may discharge must be a debt legally recoverable from the estate of the deceased. In this respect the legal executor or administrator possesses larger powers than a mere intermeddler, since it has been held that both the executors[3] and administrator may pay a debt even though its recovery was barred by time.[4] A *fortiori*, the heir, whether the son,[5] the widow[6] or any other heir[7] may pay off such debt, and they must, where the debt is renewed, as for example, by an agreement made under S. 25 (3) of the Contract Act.[8] The son's liability to pay his father's debt, arises during the father's lifetime, as soon as the debt is contracted, it being immaterial whether he was or was not then born. But the liability of other relations, *e.g.*, the wife, only arises on the death of the husband, so that if she makes any payment of the husband's debt during his lifetime, it will ordinarily be regarded as a voluntary payment, and will not support an alienation by her after her husband's death, of the estate which has descended to her from him.[9]

Clause (2).

1272. Though the debts of the deceased are not a charge on the inheritance, they have a priority over the widow's right of residence. It was so held in a case in which the creditor had himself purchased a house belonging to his deceased debtor in execution of his decree against his widow, whereupon she set up her right of residence against his claim for possession, but the court rejected it, holding that the debt bound the widow and defeated her right of maintenance including her right of residence.[10]

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(1) *Kanakamma* v. *Venkataratnam*, 7 M. 586.

(2) *Narayanasami* v. *Esa*, 28 M. 351 (354).

(3) *Alaimuri* v. *Raghava*, 42 M.L.J. 559; 67 I.C. 104.

(4) *Administrator-General* v. *Hawkins*, 1 M. 267; *Talakchand* v. *Jitammal*, 10 B. H.C.R. 206; *Rownson*, (Re), 29 Ch. D. 362; *Norton* v. *Frecker*, 1 Atk. 526; *Briggs* v. *Wilson*, 5 De. G. M. & G. 12.

(5) *Per* Westropp, C.J., and West, J., in *Bhala* v. *Parbhu*, 2 B. 67 (73); *Gajadhar* v. *Jagannath*, 22 A.L.J. 601 F.B.; 80 I.C. 684 (689) (overruling *contra* in *Indar Singh* v. *Sarju Singh*, 8 A.L.J. 1099; 11 I.C. 737; *Dalip Singh* v. *Kundan Lal*, 35 A. 207); *Dalip Singh Kar* v. *Sheonandan*, 46 A. 384 (388).

(6) *Bhala* v. *Parbhu*, 2 B. 67 (73, 74); *Chimnaji* v. *Dinkar*, 11 B. 320; *Bhau* v. *Gopala*, *ib.* 325; (*obiter* in) *Bhagwat* v. *Nivrutti*, 39 B. 113; *Konolappa* v. *Subha*, 13 M. 189; *Udai Chunder* v. *Ashutosh*, 21 C. 190; *Khojendra Narain* v. *Santo Lal*, 22 I.C. (C.) 669 (672); *Sheoram* v. *Sheoratan*, 43 A. 604 (606); *Ram Kisan* v. *Chedi Rai*, 44 A. 628; *Gajadhar* v. *Jagannath*, 22 A.L.J. 601 F.B.: 80 I.C. 684 (689); *Gauri Shankar* v. *Sheonandan*, 46 A. 384 (388).

(7) *Bhagwat* v. *Nivrutti*, 39 B. 113; *Chimnaji* v. *Dinkar*, 11 B. 320; *Udai Chundar* v. *Ashutosh*, 21 C. 190; *Tarini Prasad* v. *Bhola Nath*, 21 C.W.N. 190 (191).

(8) *Kandan* v. *Sree Narayan*, 11 C.W. N. 135; *Karamchund* v. *Baisant Kuar*, (1911) P.R. 31; *Ram Ratan* v. *Basant Bai*, 2 L. 263 (268, 269).

(9) *Himmat* v. *Bhawani*, 30 A. 352.

(10) *Jayanti* v. *Alamelu*, 27 M. 45.

1273. It seems that any intermeddling under a claim real or pretended exposes a person to the liability of an executor *de son tort*,[1] but it does not thence follow that he, who becomes liable to pay a debt, becomes necessarily entitled to reimbursement, since the liability to pay and the right of reimbursement, are not reciprocal; for while any one in possession of property may be called upon to pay a debt due therefrom, the right of reimbursement depends upon the fact, whether he was "interested" in the payment of that debt.[2] For as the Privy Council observed: "It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation express or implied to pay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B's* debts. Still less will the action lie where the money has been paid as here, against the will of the party for whose use it is supposed to have been paid.[3] Nor cant the case of *A* be better, because he made the payment not *ex mero motu*,[4] but in the course of a transaction which in one event, would have turned out highly profitable to himself and extremely detrimental to the person, whose debts the money went to pay."[5] These observations were made in a case in which the plaintiffs had purchased the defendant's interest in the sale proceeds of a Zemindari sold for arrears of revenue for Rs. 8,000 which was paid to the defendant's creditors. The sale being set aside, the plaintiff sued the defendant for reimbursement, but the Privy Council dismissed his suit, holding that the plaintiff had purchased an interest subject to a contingency which reduced his interest to nil, and that as the payment to the defendant's creditors had been made without his consent and in a coercive proceeding against him, plaintiff had no equity to compel the defendant to reimbursement.[6] A wrong-doer cannot claim reimbursement if he pays the debt for his own purpose, as for the purpose of manufacturing evidence of title to the land.[7] In such cases, the payment being in furtherance of the plaintiff's own wrongful purpose, he has no right of reimbursement though the owner may have benefited by it.[8] Only a payment made by a person who has some interest in the property, or who in good faith believes that he has such interest, can be recovered from the real owner. Such is, for example, a payment by a reversioner to avert the confirmation of sale of property made in execution of a decree for arrears of rent against the widow.[9]

1274. Limit of Liability.—Though Hindu Law prescribes a debt which is in its view illegal or immoral, it contains no provision for extinguishing the right of recovery by efflux of time. Indeed, such a notion is foreign to a Hindu lawyer who regards a debt as a perpetual incubus upon one and all one's descendants, till it is discharged either here or hereafter. But in this respect the provisions of the statute law have modi-

(1) *Mohamida* v. *Pitchey*, (1894) A. C. 437.

(2) S. 69, Contract Act.

(3) *Stokes* v. *Lewis*, 1 Term R. 20 cited *per* P.C. in *Ram Tuhul Singh* v. *Biseswar*, 23 W.R. 305 P.C.: 2 I.A. 131.

(4) "Out of mere will: of his own accord; voluntarily."

(5) *Ram Tuhul Singh* v. *Biseswar*, 23 W.R. 305 (308, 309) P.C.: 2 I.A. 131, reversing O.A. 19 W.R. 351.

(6) *Ibid.*, p. 309.

(7) *Desai Himatsingji* v. *Bhavabhai*, 4 B. 643; *Nand Kishore* v. *Paraoo*, 2 Pat. L.J. 676: 42 I.C. 839.

(8) *Tilukchand* v. *Soudamini*, 4 C. 566; *Binda Kuar* v. *Bhonda Dass*, 7 A. 660.

(9) *Punkhlati* v. *Nanihal*, 18 C.W.N. 778: 21 I.C. 207; *Narayan* v. *Pechiammal*, 35 M. 426; *Acha Ranganaik* v. *Acha Ramanuja*, 35 M. 728.

fied the rigour of that law, and its effect is that the debt which the heir, executor or the administrator is liable to pay, must be a debt legally recoverable from the debtor. As such, it must not be illegal or immoral within the meaning of S. 23 of the Contract Act, nor should its recovery be barred by time. But though the heir, executor or administrator is not bound to pay such debt, there is nothing to prevent their paying it. So it has been held that an executor or administrator may renew[1] or pay a barred debt, since a debt barred is still a debt, though its recovery is barred,[2] or as Westropp, C.J., said: "Limitation is a privilege of the debtor, which he is entitled to waive."[3] So far then the law of limitation does not preclude the son and the widow to discharge their pious obligation by paying off the barred debts of the father or the husband, as the case may be,[4] and the agent of the manager or the widow, as the case may be, may acknowledge a debt so as to bind the joint family or the reversioner.[5] The case of the father is different.[6] The son may then pay his father's barred debt, so as to support a suit for contribution.[7] Such payment must be treated as "lawful" within the meaning of S. 70 of the Contract Act, so as to support a claim for contribution. The case is, of course, stronger where the time-barred debt was renewed by the father, in which case, the new debt creates a fresh obligation equally binding on the son,[8] though it could not bind the other coparceners, because it is not for the family benefit.[9] In this respect the widow's liability seems to extend to paying even the barred debts of her husband. The subject will be found discussed in the sequel.[10]

1275. The trade debts properly incurred by a Hindu widow on the credit of the assets of the business to which she has succeeded as the heiress of her deceased husband are recoverable after her death out of the assets of the business as against the reversioners who succeed thereto, even in the absence of a specific charge.[11]

1276. A Hindu inheriting property from his mother is liable for debts to the extent of the property inherited.[12] But it is said that the mother inheriting to her son is not entitled to alienate a part of her estate in order to pay off her husband's debts not charged on the estate, the reason being that the pious obligation of the son is personal to him and does not descend to his heirs, and while the widow is liable to pay her husband's debts her liability does not enure when she does not inherit to her husband.[13] But Hindu Law regards all debts as burdened on the estate and it is the duty of the heir whoever he be to free the estate from that burden.[14]

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(1) *Alamuri* v. *Raghava*, 42 M.L.J. 559: 67 I.C. 104.

(2) *Administrator-General* v. *Hawkins*, 1 M. 267 (276).

(3) *Bhala* v. *Parbhu*, 2 B. 67 (73).

(4) *See* "Widow's Estate".

(5) S. 21, Limitation Act (as amended by Act I of 1927).

(6) *Gajadhar* v. *Jagannath*, 22 A.L.J. 601 F.B.: 80 I.C. 684; *Gouri Shankar* v. *Sheonandan*, 46 A. 384; *Shib Nath* v. *Alliance Bank*, (1915) P.R. 3: 25 I.C. 480; *Sitla Bux* v. *Jagat Pal*, 86 I.C. (O.) 693.

(7) *Bhala* v. *Parbhu*, 2 B. 67 (73); *Gajadhur* v. *Jagannath*, 22 A.L.J. 601 F.B.: 80 I.C. 604 (689); *Shankar* v. *Sheonandan*, 46 A. 384 (388) and cases cited *Supra*.

(8) *Narayanasami* v. *Samidas*, 6 M. 293; *Harihar Baksh* v. *Bharat*, 16 O.C. 185: 20 I.C. 590; *contra* in *Indar Singh* v. *Sarju Singh*, 8 A.L.J. 1099: 11 I.C. 737; *Girdhari Lal* v. *Gobind Ram*, 19 A. L.J. 456: 63 I.C. 25.

(9) *Hari Har Baksh* v. *Bharat*, 16 O. C. 185: 20 I.C. 590.

(10) *See* "Widow's Estate".

(11) *Sakrabhai* v. *Manganlal*, 26 B. 206.

(12) *Bishen Dass* v. *Sirdar Dial Singh*, (1873) P.R. 9.

(13) *Sheo Ram* v. *Sheoratan*, 43 A. 604 (606).

(14) *Bhala* v. *Parbhu*, 2 B. 67 (71, 72);

1277. Coparcener's Debts.—The coparcener is personally liable for his own debts. The fact that he is a coparcener does not, of course, clothe him with any special immunity. His separate property is equally liable. It is only when the creditor is unable to recover out of his person and separate property that his right of recovery comes in conflict with the law of coparcenary. It is no hardship to him that his rights are then limited since he must be presumed to know the law to which coparcenary interests are subject. These were at one time the subject of much uncertainty. But the courts are now agreed what they are in each case. In a Mitakshara family subject to the courts in Calcutta, Patna, Allahabad, Lucknow and Lahore, a coparcenary interest is untransferable. In the Central Provinces, Bombay and Madras it is transferable for value, but cannot be transferred by gift or devise. In Bengal, which is subject to the Dayabhag law, a coparcener possesses unlimited right of transfer and devise.

Clause (3).

1278. Leaving Bengal out of consideration for the present, the coparcener in the rest of India possesses only a qualified right of transfer. In Bombay, Madras and the Central Provinces he can transfer for value. Consequently, he is competent to mortgage his undivided interest, and the mortgagee is entitled to foreclose or sell it on foot of his mortgage. But since neither foreclosure nor sale can place him in possession of any specific property, all that he can so obtain is the right, title and interest of his mortgagor, that is a right to enforce a partition.[1] But until partition, he has no greater rights than his mortgagor. He cannot claim profits,[2] or disturb the undivided status.[3] So far all the courts outside Bengal agree. But there the agreement ends. In Bombay, Madras and the Central Provinces, where the co-parcener has the right of transfer for value, the mortgage creates a right *in rem*, and as such, the mortgagee has a priority over a money creditor who subsequently attaches the same interest in execution of his decree.[4] But though the mortgagee acquires an interest *in rem*, in his mortgagor's interest, he does not acquire an interest in any specific property, though as to this, he has an equity to that property which he can press upon the court in a suit for partition.[5] Accordingly, it has been held that where the plaintiff, as manager, had granted a lease to the defendant, to whom the manager's son, subsequently, sold his undivided half share, who in a suit for the manager's rent claimed to deduct the moiety of the rent, the court decreed the full claim, holding that the defendant could not claim to be in possession of any particular land until partition.[6]

1279. But in Bihar, the the United Provinces, Oudh and the Punjab where a coparcener is incompetent to transfer his coparcenary interest, a mortgage by a coparcener conveys no right *in rem*, and as such, it is indistinguishable from a simple money bond. The creditor's remedy in such cases is to sue on the mortgage or on the bond, and attach the debtor's interest in the joint property. He then acquires an equity to

Chimnaji v. *Dinkar*, 11 B. 320; *Bhau* v. *Gopala*, ib., 325; *Kondappa* v. *Subba*, 13 M. 189; *Udai* v. *Ashutosh*, 21 C. 190.

(1) *Soman Koeri* v. *Goshain*, (1917) Pat. 128: 38 I.C. 222; *Mohan Lal* v. *Tekchand*, 9 N.L.R. 18.

(2) *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265.

(3) *Venkata* v. *Tulja Ram*, (1917) M. W.N. 30: 38 I.C. 270; *Maharaja of Bobbili* v. *Venkataramanjulu*, 39 M. 265.

(4) *Joy Narain* v. *Girish Chander*, 4 C. 437 P.C.; *Chidambaram* v. *Gouri Nachiar*, 2 M. 83 P.C.

(5) *Nanjaya* v. *Shanmuga*, 38 M. 684; *Ramkishore* v. *Jainarayan*, 40 C. 966 P.C.

(6) *Padala* v. *Madavarapa*, (1911) 2 M.W.N. 382, following *Iburamsa* v. *Thiruvenkatasami*, 20 M.L.J. 743 F.B.: 7 I.C. 559.

recover his debt out of his debtor's interest by bringing it to sale in execution of his decree.[1]

But if the debtor dies before the creditor succeeds in attaching his interest, then, except in the case of the son and the grandson, his interest passes to his other relations by survivorship, and the creditor has no interest of the debtor left, from which he may recover his debt.[2]

1280. Non-liability of Other Coparceners.—On the death of an undivided coparcener the estate vests in the survivors and there is no estate belonging to a deceased person. Consequently, on the death of a coparcener the surviving coparceners take the estate free from his personal debts and obligations.[3] The only exception to this rule is the son who is bound under a pious obligation to discharge his father's debts or where the debt is borrowed for family necessity or for a family trade,[4] in which case it is presumably a debt due from all coparceners. The fact that the debt due by the deceased was secured by a decree of the court is immaterial,[5] since a decree creates no charge and does not alter or enlarge the obligation so as to make it executable against the survivors.[6] Nor even an attachment before judgment is held to have that effect, since an attachment creates no charge but merely prevents an alienation of property by the defendant,[7] and since the death of the latter extinguishes his right there is then no property upon which the attachment could operate.[8]

1281. But it is said that the survivors would be liable if such attachment is followed up by a decree,[9] and a *fortiori*, if the decree precedes the attachment.[10] But though neither an attachment nor a decree can independently create a charge upon the coparcenary share still the two combined are held sufficient to create it. In a Privy Council case the creditor had attached his debtor's coparcenary interest in execution and an order for sale was made, but the actual sale was postponed on the application of the judgment-debtor who died before it could be held, whereupon the survivors repudiated the claim, but their Lordships held that "the execution proceedings under which the *mouza* had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land" which could not be defeated by the debtor's death before the actual sale.[11] There is, of course, no statutory support for this view, and there seems no reason why a charge should spring into existence in the course of an execution when it was non-existent when the attach-

(1) *Balgobind* v. *Narain Lal*, 15 A. 339 (351) P.C.; *Deen Dayal* v. *Jugdeep Narain*, 41 A. 247 P.C.

(2) *Modho Prasad* v. *Mehrban*, 18 C. 157 P.C.; *Jagannath* v. *Shama Pandey*, 18 I.C. 157 (C.) 819.

(3) *Goor Persad* v. *Sheodeen*, 4 N.W. P.H.C.R. 137; *Pahalwan* v. *Janki*, 40 A. 17; *Krishna Ram* v. *Lakshmana*, 4 M. 302 (307); *Ramanayya* v. *Rangappayya*, 17 M. 144; *Ramaswami* v. *Veerappa*, 33 M. 423; *Muthusami* v. *Chanammal*, 26 M. L.J. 517: 24 I.C. 320; *Subrao* v. *Mahadevi*, 38 B. 105.

(4) *Pahalwan* v. *Janki*, 40 A. 17.

(5) *Raghunath* v. *Bank of Bombay*, 34 B. 72; *Gokalchand* v. *Hukamchand*, (1917) P.R. 71: 34 I.C. 714; *Ayyasami* v. *Gurusami*, 3 M.L.W. 463: 33 I.C. 691; *Venkataramiah* v. *Subramaniam*, 16 M.L.T. 489: 26 I.C. 393.

(6) *Ramasami* v. *Veerappa*, 33 M. 423.

(7) "An attachment prevents alienation, it does not confer title."—*Per* Lord Hobhouse in *Motilal* v. *Karrabuddin*, 25 C. 179 P.C.

(8) *Bailur* v. *Lakshmana*, 4 M. 302 (307); *Sadayappa* v. *Ponnama*, 8 M. 554; *Ramanayya* v. *Rangappayya*, 17 M. 145; *Subrao* v. *Mahadevi*, 38 B. 105.

(9) *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 P.C. explained in *Subrao* v. *Mahadevi*, 38 B. 105; *Udaram* v. *Rama*, 11 B.H.C.R. 76; *Muthusami* v. *Chunammal*, 26 M.L.J. 517: 24 I.C. 320.

(10) *Muthusami* v. *Chunammal*, 26 M. L.J. 517: 24 I.C. 320.

(11) *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 P.C.; *Jagannath* v. *Sita Ram*, 11 A. 302; *Subrao* v. *Mahadevi*, 38 B. 105 (107).

ment was made. Still such is the view of the cases. In one case the Calcutta High Court was, however, of opinion that the puchaser's equity is not lost even if his debtor dies after the institution of his suit but before attachment.[1]

1282. Father's Debts.—The liability of the son to pay his father's debts not illegal or immoral is now well established. (§ **159.**) The liability was at one time held limited to the son and the grandson but the Privy Council have held even the great-grandson equally liable.[2] The nature and extent of the issues' liability for the debts and alienation of their ancestor is set out in S. 159.

Again the textual liability which was unlimited, is now limited to the property inherited by them from that ancestor. Neither the son nor the grandson or the great-grandson is liable to discharge the debt out of his separate property. If he was joint with the father, his liability is limited to the extent of his coparcenary interest which might be seized, even during the father's lifetime, for he is equally liable for the debt during his father's lifetime and he is equally liable after his death if he has inherited to him, in which case, his liability is limited to the extent of the property which he has so inherited. It was at one time held,[3] that the liability of the son to pay his father's debts only arose on the father's death but this view is no longer tenable since his liability is held to be unqualified by that contingency.[4] As the son, the grandson and the great-grandson are liable, they cannot object to the attachment of their ancestor's interest after his death. The only case in which they may object to the attachment is when they repudiate their liability on the ground that the debts were tainted with illegality or immorality. In any other case the creditor is at liberty to proceed not only against the father's interest but also against that of his son and grandson in the coparcenary property.[5]

1283. But as has been pointed out before, the liability of the son to pay his father's debt is not co-extensive with the father's right to alien the joint property.[6] In other words, the fact that the creditor may seize the coparcenary estate for the payment of the father's debts does not justify the father in alienating it for the same purpose.

The subject will be more fully discussed under S. 159.

Father's Illegal and Immoral Debt.

1284. But since a coparcener is entitled to transfer his interest for value and such transfer by a Mitakshara coparcener in the North, raises an equity in favour of the transferee, it follows that even if the debt of the father was illegal or immoral, the creditor is entitled to obtain satisfaction from the coparcenary interest of the father. It may

(1) *Banwari* v. *Sheo Sankar*, 13 C.W.N. 815: 1 I.C. 670; *Suraj Bansi* v. *Sheo Prasad*, 5 C. 148 P.C.; *Vithal Das* v. *Nand Kishore*, 23 A. 106; *Udaram* v. *Rama*, 11 B.H.C.R. 76.

(2) S. 112.

(3) *Sahu Ram* v. *Bhup Singh*, 39 A. 437 P.C. overruled in *Brij Narain* v. *Mangal Prasad*, 46 A. 95 (103, 104); 1 Dig. 266; S. 107, Ev. A.; *Karuppan* v. *Veriyal*, 4 M.H.C.R. 1; *Pannappa* v. *Pappuviengar*, 4 M. 1 (18, 26); *Gurusami* v. *Chinna*, 5 M. 37 (46); *Nowrat* v. *Trimbuk*, Bom. L.R. 218.

(4) *Brij Narain* v. *Mangal Prasad*, 46 A. 95 (103, 104) P.C.; *Sripat Singh* v. *Prodayat Kumar*, 44 C. 524 P.C.; explained in *Hanmant* v. *Ganesh*, 43 B. 612 (619, 620) P.C.; *Mohanlal* v. *Bala Prasad*, 44 A. 649; *Madhusudan* v. *Ishwari Dayi*, 48 C. 341.

(5) *Girdharee Lall* v. *Kanto Lall*, 14 B.L.R. 187 P.C.; *Suraj Bansi* v. *Sheo Prasad*, 5 C. 148 P.C.; *Muttayan* v. *Sangili*, 6 M. 1 P.C.

(6) *Jogi Das* v. *Ganga Ram*, 21 C.W.N. 957 P.C.: 42 I.C. 791.

then be that where the character of the debt is determined after the sale, it will determine the quantum of interest available to the purchaser.[1] And similarly, where the father executes a mortgage of his right and share in certain villages, the quantum of interest available to the mortgagee must depend upon the character of the debt. If it was such as bound the joint family, all the interest which they possess in the property would pass, but the father's interest would pass in any case.[2]

1285. Position of the Assignee.—Assuming that the father's debt was irrecoverable out of the son by reason of its illegality or immorality the next question that arises is what is the position of the assignee of the debt or of the decree passed against the father. Has he any equity superior to that of the son? The question was considered by the Privy Council who have held that the assignee of the debt or of the money decree is bound to enquire as to the character of the father's liability and that he must be deemed to have had notice of the illegality or immorality of the debt if he could have ascertained it by enquiry.[3] Where however, the father mortgages the joint property for such debt whereupon a decree is passed, the purchaser stands upon surer ground, for he need not then enquire that the property sold to him was liable to satisfy the decree. But it is still open to the son to show that he had notice.[4] In other words, the question about the equity between the son and the father's assignee depends not so much upon the nature of the transaction, as upon his *bona fides* and notice. If the assignee is an assignee of the mere debt or decree and no property has passed out of the family to the purchaser, then, the assignee takes subject to the same equity to which his assignor was subject. But if on the other hand, in pursuance of such a decree or otherwise by contract or sale, the joint property had gone out of the family to a purchaser, then the son cannot recover it from him by mere proof that the consideration for the transfer was tainted with illegality or immorality unless he further shews that the purchaser had taken it not in good faith and with notice.[5]

1286. Limitation.—The limitation for a suit against the son for recovery of an unsecured debt of his father is six years from the date of the accrual of cause of action against the son, which was at one time held to be the father's death,[6] but it has been since pointed out that the cause of action against the son is not different from that against the father, and that the cause of action against one is consequently the cause of action against the other.[7] This may be the death of the father, but it is not invariably so, where for instance, the father as agent of his employer, withdrew money from the chest of his principal from time to time and placed in the chest of his own estate, doing so up to the day of his death and

(1) *Sripat Singh* v. *Prodyut Kumar*, 44 C. 524 (533) P.C.; *Deodhari* v. *Bhup Narain*, 3 Pat. L.W. 1: 42 I.C. 456.

(2) *Deodhari* v. *Bhup Narain*, 3 Pat. L. W. 1: 42 I.C. 456.

(3) *Muddun Thakur* v. *Kantoo Lall*, 40 C. 539 P.C.; *Girdharee Lall* v. *Kantoo Lall*, 14 B.L.R. 187 P.C.; *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 P.C., explained in *Mahabir* v. *Basdeo*, 6 A. 234 (239); *Maharaj Singh* v. *Balwant Singh*, 28 A. 508 (519, 528, 529).

(4) *Jannuk* v. *Raghunandan*, (1861) B. S.D.A. 213; *Maharaj Singh* v. *Balwant Sing*, 28 A. 508 (529).

(5) *Mahabir* v. *Basdeo*, 6 A. 234 (240, 241); *Maharaj Singh* v. *Balwant Singh*, 28 A. 508 (529).

(6) *Narsingh* v. *Lalji*, 23 A. 206; *Maharaj Singh* v. *Balwant Singh*, 28 A. 508 (616) (affirmed on a different point O.A. *Balwant Singh* v. *Clancy*, 34 A. 292 P.C.), following *Natasayyan* v. *Ponnusami*, 16 M. 99; *Ramayya* v. *Venkataratnam*, 17 M. 122.

(7) *Ramasami* v. *Ulaganatha*, 22 M. 49 F.B.; *Mallesam* v. *Jugala*, 23 M. 292 (297) F.B.

there was no adjustment of accounts. In a suit for the sums so withdrawn, by the principal against the son and grandson, limitation was held to start from the death of the father and the period of limitation was held to be 6 years as prescribed in Art. 120 of the Limitation Act.[1] The same view was taken by a Full Bench of the Calcutta High Court who had to decide the question whether a suit against the son on a mortgage effected by the father for a debt not binding on the family was governed by Art. 120 or Art. 132. It was held that as the mortgage was not binding on the son who was however only liable because of his pious obligation, the suit against him was subject to Art. 120 which allowed the creditor six years from the date when the cause of action accrues.[2] Now, this may accrue either (*i*) when the debt incurred by the father matures, or (*ii*) when the creditor, after exhausting his remedies against the father, finds that the debt or a portion thereof is still unsatisfied, or (*iii*) on the date of the death of the father. The Full Bench refused to decide the *terminus a quo,* but in an earlier case, li mitation was held to run from the first of these dates.[3]

1287. Donee's Liability.—The donee's liability to pay the donor's debt out of the property gifted to him is limited to the cases stated in the clause. A debt, as such, creates no charge on debtor's estate. Consequently, it creates no right *in rem* on any of his property which the debtor is free to transfer for or without consideration, passing to the transferee, whether donee or alienee for value all his interest therein,[4] subject only to this that he cannot be permitted to defraud his creditors by making an alienation so as to defraud, defeat or delay them in the recovery of their debt.[5] This has always been the law now enacted in S. 53 of the Transfer of Property Act. That section enacts that a gift (which term includes a transfer for a grossly inadequate consideration) may be presumed to be fraudulent if it has the effect of defeating or delaying the creditors. But this presumption is rebuttable and may be rebutted by the donee showing that at the time of his gift the donor was possessed of sufficient means for the discharge of his debts.

Clause (4).

1288. There is nothing in Hindu Law to conflict with this view. It contains general prohibitions against gifts so as to deprive a man of the means of fulfilling his sacred obligations to provide maintenance for the members of his family; but it only decrees such gifts void as are made in fraud of other claimants. So Manu says: "When the Judge discovers a fraudulent pledge or sale, a fraudulent gift and acceptance, or in whatever other case he detects fraud, let him annul the whole transaction."[6] The law regarding the liability of the donees to pay the donor's debt must then be found in the statute law, implemented by the rules of justice, equity and good conscience, the effect of which appears to be, "that a voluntary disposition of property may be valid although the person making it is, at the time, in debt, and that in each case the validity or

(1) *Girraj Singh* v. *Raghubir*, 3 I.A. 429, following *Chand Mal* v. *Kalyan Mal*, (1886) P.R. 96; *Kalee Kishen* v. *Juggat Tara*, 2 B.L.R. 189; *Brindaban* v. *Jumna*, 25 A. 55.

(2) *Brijnandan* v. *Bidya Prasad*, 42 C. 1068 (1093) F.B.

(3) *Sarja Prasad* v. *Gulab Chand*, 27 C. 762.

(4) S. 8, Transfer of Property Act (IV of 1882).

(5) *Gnanabhai* v. *Srinivasa*, 4 M.H.C. R. 84; *Abdul Hye* v. *Mozaffar Hossein*, 10 C. 616 P.C.; *Hormusji* v. *Cowasji*, 13 B. 297; *Mohanlal* v. *Balmakund*, 17 C.P. L.R. 24.

(6) Manu, VIII-165; To the same effect *Mayukh*, IV-X-6; Smriti Chandrika, IX-I-11, cited in *Gnanabhai* v. *Srinivas*, 4 M.H.C.R. 84 (86).

invalidity of the transaction depends upon the question, whether the circumstances connected with the debtor's state of indebtedness support the presumption that he had intent to deprive the objecting creditor of the means of recovering his debt—in effect the presumption of fraud."[1] In other words, while the donee, as such, is not charged with the liability of having to pay the donor's debt to the extent of the property gifted to him, he becomes so liable if the gift was not *bona fide* and that the real motive and intention of the transaction was to deprive the creditor of the means of obtaining payment of his debt from the debtor's property generally. If so, the disposition would be set aside to the extent of the debt due to the creditor by whom it is impeached.[2]

1289. The liability of the donee to pay the debt of his donor to the extent of the property gifted to him would then arise in a specific case where any creditor is defeated or delayed by the gift. That is a question of fact to be decided on a consideration of all the circumstances of each case. The case of a universal donee is exceptional, since, being in possession of all the property of the donor, he is naturally saddled with the liability of having to pay his donor's debts, then due. A donee may, again, have his gift cancelled under the provisions of the Insolvency Act, in which case there is no need of proving any intent to defeat or delay a creditor required by the Transfer Act, all that is necessary being that the gift is made within two years of the donor's insolvency, and the only gift excepted is that made in consideration of marriage. If the gift be older, it may still be set aside under the Transfer Act.[3]

1290. It is now settled that an impartible estate cannot be the subject of coparcenary rights of succession by survivorship.[4] The holder for the time being is its absolute owner, and in this respect he occupies the same position in regard to his estate as the Dayabhag father does in regard to his coparcenary estate. On the death of both, the heir becomes liable to pay all his debts irrespective of their origin and purpose if they are within time.[5] The successor of an impartible holder is his heir, and as such, he takes the estate subject to his pecuniary obligations. Between him and his successor there is the privity of estate, and as such the heir is liable to pay the holder's debts which could have been recovered out of his estate if he were alive.[6] As between the sons of a Zemindar, his impartible estate and his other property not being *regalia*, which is partible, should contribute in proportion to their value to the discharge of his debt.[7]

Explanations.

1291. Explanation 1 is supported by the definition of "legal representative" as given in S. 3 (11) of the Code of Civil Procedure, while Explanation 2 is supported by S. 195 (6) and is the subject of detailed discussion thereunder (§§ **1631-1642**).

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(1) *Gnanabhai* v. *Srinivasa*, 4 M.H.C. R. 84 (87).

(2) *See* the subject more fully discussed in 1 Gour's Law of Transfer (6th Ed.), §§ 1003, 1009, 1015-1021.

(3) S. 55, Presidency Towns Insolvency Act (III of 1909); S. 53, Provincial Insolvency Act (V of 1920).

(4) *Rama Rao* v. *Rajah of Pittapur*, 4 M. 778 P.C., approving *Bachoo* v. *Mankore Bai*, 20 B. 51 (58).

(5) *Ram Das* v. *Vria Behari*, 6 C.W. N. 879; *Shyamlal* v. *Bijay Narain*, (1917) Pat. 121; *Kalappa* v. *Akkappa* 8 M.L.T. 297; *contra* in *Jugalal* v. *Audh Behari*, 6 C.W.N. 223, and *Kali Krishna* v. *Raghunath*, 31 C. 224, proceed on the principle of survivorship, which is no longer correct.

(6) *Kalappa* v. *Akkappa*, 8 M.L.T. 297.

(7) *Dinagarasami* v. *Rabatgasami*, 24 M. 613.

Explanation 3 refers to the son's liability to pay his father's debt even though barred by time (§§ 1377, 1378), while Explanation 4 is drawn from S. 53 of the Transfer of Property Act.

147. The husband and wife are not liable for the debts contracted by each other except in the following cases:—

Debts of Husband and Wife.

(*a*) Where they were contracted by one as the agent of the other.[1]

(*b*) Where they were contracted for household necessaries.[2]

1292. Analogous Law.—The sacred texts on the subject of this section are in harmony with the present law:—

Narad.—"16. The wife must not pay a debt contracted by her husband, nor one contracted by her son, except if it had been promised by her, or contracted in common with her husband.

"18. A debt contracted by the wife shall never bind the husband, unless it had been contracted at a time when the husband was in distress. Household expenses are indispensably necessary."[3]

Vishnu.—"A debt contracted by the wife, for the purpose of saving from distress her husband, son, daughter, or other family members, must be discharged by the family."[4]

It has already been stated that, as regards their property, both the husband and the wife are absolutely free. The husband cannot, except perhaps in a case of great distress, use his wife's *stridhan*. Equally the wife has no right to use her husband's property. But since in the management of the household, one must at times act for the other, it follows that each may incur debts in circumstances when the other would become legally liable to discharge them.

The liability depends upon agency. So where the wife alone executed a mortgage deed to secure a debt due from both husband and wife and the husband by his conduct ratified or acquiesced in the mortgage, the wife was deemed to have acted as her husband's agent.[5]

The husband is not liable for sums misappropriated by the wife, though he approved of her taking service.[6]

1293. Such agency would be implied in purchases made by the wife for household necessaries suitable to his situation in life and position. Where goods were purchased by the wife from the plaintiff's firm up to a limit fixed by the husband, he was entitled to repudiate his wife's purchases made in excess secretly and with the plaintiff's connivance.[7]

Clause (b).

148. (1) Notwithstanding any contract to the contrary, no debtor is liable to pay at the same time interest which exceeds the principal.[8]

Rule of Damdupat.

(2) This rule extends only to the areas within the original jurisdiction of the Calcutta High Court, the Presidency of Bombay, Sindh and Berar.[9]

(1) *Mg. Sin* v. *Mg. Po*, 4 Bur.L.T. 212: 12 I.C. 28.
(2) *Ram Charan* v. *Van Haltaru*, 10 I.C. (A.) 9
(4) *Narad* I-16, 18; 33 S.B.E. 46 (47).
(4) Vishnu, VI-32.
(5) *Mg. Sin* v. *Mg. Po*, 4 Bur. L.T. 214: 12 I.C. 28.
(6) *Simpson* v. *Bachman*, 13 A.L.J. 55: 27 I.C. 622.
(7) *Ram Charan* v. *Van Haltaru*, 10 I.C. (A.) 9.
(8) 1 Dig. 63, *Nobin Chunder* v. *Bomesh Chunder*, 14 C. 781 F.B.
(9) *Ramchandra* v. *Radha*, 10 N.L.R. 96.

(3) It does not apply to the following cases:—

(*a*) Where the debtor is not a Hindu,[1]

(*b*) Where the Creditor is liable to account,[2]

(*c*) Where the debtor agrees to the capitalization of interest,

(*d*) Where the debt merges in a decree.[3]

1294. Analogous Law.—The rule of *damdupat* is thus stated:—

Manu.—"Interest on money recovered at once or month by month or day by day, as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time. On gram, on fruit, on wool or hair, on beasts of burden, but to be paid in the same kind of equal value, it must not be more than enough to make the debt quintuple.

"Stipulated interest beyond the legal rate, and different from the preceding rule is invalid and the wise call it an usurious way of lending and the lender is entitled at most to five in hundred."[4]

Gautam.—"If the loan remains outstanding for a long time, the principal may be doubled, (after which interest ceases),[5] The interest on produce, on animals, on wool, on the produce of a field, and on beasts of burden shall not increase more than the five-fold value of the object lent."[6]

1295. Rule of Damdupat.—*Damdupat* is the Hindu Law against usury. At one time it appears to have had a wider vogue than it has now, being merely confined to the Maharatta Provinces of Bombay and Berar[7] and the area subject to the original jurisdiction of the Calcutta High Court. It has been locally extended by the Ajmere Laws Act[8] only to cases where the mortgagee sues to enforce his mortgage being inapplicable when the mortgagor seeks to redeem.[9]

It is said that the rule is inapplicable to mortgages, having been abrogated by the Transfer of Property Act,[10] but there is no rule in that Act to repeal this rule of common law and the re-enactment of the Usurious Loans Act, 1917 leaves it intact.

1296. Hindu Law recognises no limitation for suits, but has imposed a restriction on the accumulation of interest.[11] As such, it equally served to correct the evils of usury, but has however, outlived its day except in the areas stated in the section.

1297. The rule as stated in the texts prescribed that the amount of interest shall not exceed that of the principal paid at the same time. It does not mean that the amount of interest shall never exceed the principal. All it means is that at the same time interest in amount greater than the principal cannot be recovered.[12] Hence, if the principal remain outstanding and the interest be paid in smaller sums than the amount of the principal money, there is no limit to the amount which may be received for interest.[13] All that the rule prohibits is that the creditor may not

Rule Stated.

(1) *Dawood* v. *Vallabhadas*, 18 B. 227.
(2) *Raja Ram* v. *Gopala*, (1876) B.P.J. 229.
(3) *Dhondshet* v. *Ravi*, 22 B. 86.
(4) Manu, VIII-151, 152.
(5) Gautam, XII-31; 2 S.B.E. 229.
(6) *Ibid.*, XII-36.
(7) *Ramachandra* v. *Radha*, 10 N.L.R. 96.
(8) Reg. III of 1877, S. 88.
(9) *Nemichand* v. *Radha Ballabh*, 26 A. 354.
(10) *Madhwa* v. *Venkataramanjulu*, 26 M. 662; *Narayan* v. *Ganga Ram*, 5 B.H.C.R. (A.C.) 157 (rule inapplicable to mortgages); *contra* in *Nathubhai* v. *Mulchand*, 5 B.H.C.R. (A. C.) 196.
(11) *Gajadhar* v. *Jagannath*, 46 A. 775 (782).
(12) 1 Dig. 63; *Nobin Chunder* v. *Romesh Chunder*, 14 C. 781 F.B.
(13) *Dhondu* v. *Narayan*, 1 B.H.C.R. (A.C.), 47 (49).

recover more than double of the amount at any time remaining due, as on the last balance struck. He is not prevented from recovering more than the double of what he has actually lent.[1] The rule does not forbid the conversion of interest into capital by subsequent agreement. Nor does it preclude recovery of interest because the principal sum lent has been paid off.[2] The rule is applicable equally to cases whether the interest was to be paid in cash or grain[3] or whether the debt was or was not secured by a mortgage.[4]

1298. It is, however, inapplicable unless there is only one account to be taken of principal and interest due on the mortgage, and no account of rents and profits on the other side.[5] If, therefore, the mortgagee in possession has to account for the rents and profits, the rule would be inapplicable unless there was an express stipulation that the rents and profits are to be taken in lieu of a fixed portion of the interest.[6]

1299. The rule though equally applicable to secured or unsecured debts does not apply to judgment-debts, after which, in the words of the Privy Council, the matters pass out of the domain of contract into one of law.[7] So the interest which the court may award under the Civil Procedure Code is not subject to the rule,[8] nor is it applicable to the amount recoverable in execution of a decree.[9] But since in a mortgage, interest at the contractual rate is to be calculated up to the date of the *dies datus* fixed, as required by O. XXXIV, Rr. 2 and 4 of the Civil Procedure Code, it follows that the decree is equally subject to the *Damdupat* rule up to that date after which it ceases to be operative.[10]

Then again the rule is inapplicable to cases in which there is a liability to account, though no account is in fact maintained or taken.[11] If the mortgagee is put in possession, he becomes liable to account, and the moment his accountability begins the rule of *Damdupat* ceases to apply. In such a case, then, the rule can only be let in by an express provision in the mortgage deed or otherwise against his liability to account.[12]

1300. **Only Applies to Hindu Debtor.**—The rule is a rule of Hindu Law and applies only to a Hindu debtor, though it does not matter whether he is the plaintiff or the defendant. So where the mortgagor, a

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(1) *Suklal* v. *Bapu*, 24 B. 305; *Karamchand* v. *Bulchand*, 2 S.L.R. 10.

(2) *Nusserwanji* v. *Laxman*, 30 B. 582.

(3) *Anand Rao* v. *Durgabai*, 22 B. 761.

(4) *Ramconnoy* v. *Johu Lall*, 5 C. 867; *Ram Kanye* v. *Collychurn*, 21 C. 840; *Nandalal* v. *Dhirendra*, 40 C. 710; *Kunjalal* v. *Narsamba*, 42 C. 826; *Sundarabai* v. *Jayavant*, 24 B. 113; *Jeevanbhai* v. *Manordas*, 35 B. 199 (203); *Asanand* v. *Tulsanbai*, 5 S.L.R. 245: 15 I.C. 824; *contra* in *Madhwa* v. *Venkataramanjulu*, 26 M. 662, in which S. 4 of the Transfer of Property Act, coupled with S. 37 of the Contract Act, was overlooked.

(5) *Narayan* v. *Satyaji*, 9 B.H.C.R. 83; *Daji* v. *Daji*, (1878) B.P.J. 74; *Vasudev* v. *Bhagwan*, (1878) B.P.J. 32.

(6) *Sankar* v. *Babaji*, (1881) B.P.J. 291; *Ranga* v. *Balaji*, (1886) B.P.J. 76.

(7) *Lall Behary* v. *Thacomonee*, 23 C. 899; *Kanaye* v. *Anund Lall*, 23 C. 903 *n*; *Buggoban* v. *Prancoomaree*, 23 C. 906 *n*.

(8) *Balakrishna* v. *Gopal*, 1 B. 73; *Ramchandra* v. *Bhimrao*, 1 B. 577; *Asanand* v. *Tulsanbi*, 5 S.L.R. 243.

(9) *Dhondshet* v. *Ravi*, 22 B. 86.

(10) *Dhondshet* v. *Ravi*, 22 B. 86; *Harilal Mallick*, (*In re*), 33 C. 1269; *Shanakrahawa* v. *Babaji*, (1881) B.P.J. 191; *Rengo* v. *Balaji*, (1886) B.P.J. 76; *Shah Balidas* v. *Chudasama*, (1891) B.P.J. 428; *Krishnaji* v. *Balaji*, (1895) B.P.J. 415; *Lal Behary* v. *Thacomonee*, 23 C. 899; *Kanaye* v. *Anund Lall*, 23 C. 903 *n.*; *Buggoban* v. *Prancoomaree*, 23 C. 906 *n*.

(11) *Raja Ram* v. *Gopal*, (1876) B.P.J. 229; *Bapuji* v. *Gangadhar*, (1877) B.P.J. 131.

(12) *Hari Lall Mallick*, (*In re*); 33 C. 1269.

Mahomedan sued his Hindu mortgagee for the redemption of his mortgage, and upon an account being taken, it was found that the amount of interest far exceeded the principal, whereupon the plaintiff claimed the benefit of *damdupat* but the court overruled his contention, holding that as the defendant was not a debtor, the rule was inapplicable to him.[1] A non-Hindu mortgagor cannot, by assigning his equity of redemption to a Hindu, let in the rule to the prejudice of the creditor,[2] nor can the Hindu debtor transfer his personal equity to a non-Hindu with his debt.[3] The rule of *damdupat* remains unaffected by the Transfer of Property[4] or the Interest Act,[5] or the provisions of the Usuary Act, their repeal[6] and re-enactment.[7]

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(1) *Dawood* v. *Vallubdas*, 18 B. 227.

(2) *Harilal* v. *Nagar*, 21 B. 38; *Abdul Gani* v. *Sheikh Nizam*, 23 N.L.R. 104: 102 I.C. 41 (1927) N. 249.

(3) *Jeewan Bai* v. *Manordas*, 35 B. 199.

(4) S. 4, Transfer of Property Act (IV of 1882) read with S. 37, Contract Act (IX of 1872); *Ambaidas* v. *Naraindas*, (1888) B.P.J. 317; *Ali Saheb* v. *Shabji*, 21 B. 85; *Sundarabai* v. *Jayavant*, 24 B. 114; *Jeevanbai* v. *Manordas*, 35 B. 199 (203); *Asanand* v. *Tulsan Bai*, 5 S.L.R. 245: 15 I.C. 824; *Janda Lal* v. *Dhirendra*, 40 C. 710; *Kunjlal* v. *Venkataramanjulu*, 26 M. 662, in which the effect of S. 74 of Act IV of 1882, read with S. 37 of the Contract Act, was not considered.

(5) *Hakma* v. *Meman*, 7 B.H.C.R. (O.C.) 19.

(6) *Ramlal* v. *Haran Chandra*, 12 W. R. 9 (11, 18); *Kushal Chand* v. *Ibrahim*, 3 B.H.C.R. (A.C.) 23; *Kedari* v. *Aimarambhat*, 3 B.H.C.R. (A.C.) 11.

(7) Act X of 1918.

CHAPTER X-A.

JOINT FAMILY DEBTS AND ALIENATIONS.

Joint family debts.

149. (1) All property of a joint family is liable for a debt incurred by the manager on its behalf for the legal necessity or benefit thereof or of any of its members in accordance with the rules hereinbefore provided.[1]

(2) Such property is liable even if the debt be incurred by a member other than the manager in the same circumstances in which a debt incurred by the manager would bind the family.[2]

(3) Save as above, the joint family property is not liable for a debt incurred by the manager or any of its members.

(4) A joint family debt is not payable otherwise than out of the joint family property.[3]

1301. **Analogous Law.**—The first two clauses declare that a joint family debt may be incurred by the manager, or even by a member other than the manager, but in order to be binding on the joint family, it must be supported by legal necessity or benefit. This is in accordance with an express text of the Mitakshara:—

Brihaspati.—(after defining the father's powers, proceeds).—"Even a single individual may conclude a donation, mortgage, or sale, of immovable property; during a season of distress, for the sake of the family and especially for pious purposes."[4]

Mitakshara.—"29. (Citing the last.) The meaning of that text is this: While the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father, or the like, make it unavoidable."[5]

The third clause makes it clear that unless a debt is shewn to be incurred for the family and for its necessity, it will not bind the family merely because it was incurred by the manager. The only exception to this rule is the family trade whose manager possesses larger powers as stated in the next section.

Lastly, whatever may be the necessity of the family or any of its members, a family debt is a charge on the assets of the entire family and not upon the assets of any of its members none of whom is personally liable for it. This is so even where the debt was incurred for his personal benefit *e.g.*, marriage or defence in a criminal prosecution. It does not matter if the member concerned had affluent means of his own and the family coffers were empty. But the fact that the debt is the debt of the family makes only its assets liable, since the members of a joint family are regarded, so far as concerns the dealings of the family with persons outside it as but one juristic person.[6]

(1) *See* S. 133; Mit. I-I §§ 28, 29.
(2) *Ib.*
(3) *Himmat* v. *Bhawani*, 30 A. 352 (359, 360).
(4) Brihaspati.
(5) Mit., I-I, §§ 28, 29.
(6) *Himmat* v. *Bhawani*, 30 A. 352 (359, 360).

1302. Hindu Law is less concerned with who takes the debt than the purpose for which it is taken. The borrowers must, in ordinary cases be all the members of the family, but where there are minors and the members numerous or scattered, it is not possible for all of them to consent to a loan. In that case, the authority of the manager is sufficient and even if the manager be unavailable, any member—may, even a servant or dependent, may take the loan and hold the family liable.[1]

Clauses (1), (2).

In the words of the Mitakshara: "Even a single member may conclude a donation, mortgage or sale of a whole family, during a season of distress for the sake of the family and specially for pious purposes."[2]

From this it is clear that though, ordinarily, the manager is the accredited agent of the family, and is, as such, empowered to raise a loan on behalf of the family, his authority is not even exclusive and may, in the case of necessity, be exercised even by a junior member of the family, and indeed, even by a stranger, if he is treated as a member of the family.[3] It may even be contracted by a servant or the dependent of the family and be still binding upon it, if it was supported by legal necessity.

1303. Members of a family have thus a dual capacity in relation to the family: (*i*) they may act on behalf of the family, and (*ii*) they may act on their own behalf. In the first case, their debts can only be recovered from the family property: in the second case, their coparcenary share is liable to be seized and sold in execution.[4] In this respect there is no difference between the practice of Mitakshara in Bengal and that in Madras and Bombay, since all are agreed that a coparcenary interest may be seized and sold in execution of a decree passed against a coparcener for his own debts, the only difference between the courts being on the question, whether the coparcener is entitled to voluntarily alienate his share in discharge of his debts or otherwise for value. (§ **126** (**6**).)

1304. The question whether a debt is incurred by a person for himself or for the family is a question of fact, the burden of proving which is on the creditor who has to establish that the debt was incurred by the manager or a member for a purpose binding upon the whole family. But in this respect, the question depends upon the fact whether the manager was the father or any other relation. If the former, the sons are bound to pay his debts, unless they can shew them to be illegal or immoral. But in order to bind other relations, the creditor has to prove legal necessity or benefit. It will thus be seen that in order to bind a coparcener two things are to be taken into consideration, the nature of the debt as also the relationship of the person bound to the debtor, and in the latter case, the burden would be on the son or on the creditor according to whether the debtor is the father or any other relation.

1305. The question whether the manager has power to revive a barred debt by acknowledgment, or pay it on behalf of the coparceners so as to make them liable therefor, is one upon which there are some conflicts. The courts are agreed that so far as the son and the widow are concerned, they are under a

Barred Debts.

(1) *Baldeo* v. *Somessur*, 7 W.R. 490 (492).
(2) Brihaspati, cited in Mit., I-28.
(3) *Baldeo* v. *Somessur*, 7 W.R. 490 (492).
(4) *Deen Dyal* v. *Jugdeep Narain*, 41 A. 247 P.C.

pious obligation to pay their predecessor's debts, whose estate they have inherited; but since the same pious obligation does not extend to the manager whose acts are judged by the touch-stone of necessity, it has been held that he lacks the power to revive a barred debt without special authority or pay it on behalf of the family[1] though, of course, he may acknowledge a debt before it is barred so as to give a fresh starting point to limitation.[2]

The guardian of a minor, though the mother, is similarly incompetent.[3] But of course the case of the father is exceptional, since he possesses the authority both to acknowledge and revive a barred debt against his son.[4]

Clauses (3), (4).

1306. It has already been stated that there is no presumption that a person taking a debt takes it for another. The fact that he is the manager makes no difference.[5] It is on the creditor who makes the family liable, to show that the debt was taken for its necessity or benefit, or at any rate, that the debtor had made representations to that effect which he, after due inquiry, believed. The liability thus created is vicarious and is, consequently, limited to the family property, leaving the members' separate property unaffected. In this respect, their position is not unlike that of a member of a limited corporation, in which they stand to lose their share in lieu of debts but nothing more. But though this is ordinarily the rule, it is not invariable, since the son, the manager or a coparcener may enlarge his own liability by his act or conduct, but in that case the question passes out of the domain of Hindu Law.

1307. Husband's Debts.—The widow is under the same pious obligation to pay her husband's debts as the son is to pay those of his father. But her liability is even greater since she is bound to pay his debts whether immoral or illegal, if the creditor was not an accessory, and she is entitled, though not bound, to pay them even if they be barred by time.[6] Unlike the case of the son, her obligation arises only on the death of her husband.[7] Any payment made by her during his lifetime would be a voluntary payment and will not support an alienation of her husband's estate which she inherits on his death.[8] The widow inherits her husband's estate after payment of her husband's debts. All debts which would bind the husband personally are necessarily binding upon the widow in respect of all the assets which have come to her hands as his legal representative. A debt incurred by a person as surety is binding as a family debt upon his undivided son, and *a fortiori*, his wife cannot impugn such debt. Where therefore, in execution of a decree obtained by the creditor against his debtor in respect of an obligation incurred by the latter as surety, the decree-holder attached a house and bought it himself in court auction and applied to be placed in possession and the debtor's representative, the widow claimed that she had a right of residence and that she should not be ejected,

(1) *Gopalnarain* v. *Kuddomutty*, 14 B. L.R. 21; *Kumara Sami* v. *Pala*, 1 M. 385; *Chinnaya* v. *Gurunathan*, 5 M. 169 F.B.; *Dinkar* v. *Appaji*, 20 B. 155; *Naranji* v. *Bhagvandas*, (1881) B.P.J. 238; *contra* per Westropp, C. J., in *Bhala* v. *Parbhu*, 2 B. 67 (72); *Sanual Das* v. *Saiyid Ali*, 22 A.L.J. 1018: (1925) A. 174.

(2) *Bhaskar* v. *Vijalal*, 17 B. 512.

(3) *Chinnaya* v. *Gurunathan*, 5 M. 169 F.B.; *Sobhanadri* v. *Sriramulu*, 17 M. 221 contra; *Wajibun* v. *Kadir Buksh*, 13 C. 292 (cannot acknowledge a debt even before it is barred—submitted unsound).

(4) S. 160, Comm.

(5) S. 133, Explanation 2.

(6) *Bhagwat* v. *Nivratti*, 39 B. 113.

(7) *Himmat* v. *Bhawani*, 30 A. 352.

(8) *Ibid.*

it was held that the widow had no right of residence, in priority to the right of her husband's creditors to be paid out of assets and to realize their dues out of the estate if not paid, and that the surety debt was a family debt which would bind the widow and defeat her right of maintenance including her right of residence.[1] The husband's debts recoverable from his widow may be set off against any debt due to her.[2]

150. (1) Save as provided in this section or in section 143, in an alienation made by the manager, he who relies upon the alienation must prove its validity.

(2) Provided that where the alienor was the father, his alienation will bind the son if the alienee can show that it was made for an antecedent debt;[3]

Bona fide transaction with the Manager.

(3) Provided further that where the manager or the heir contracts a debt or transfers property for consideration alleging the existence of justifying necessity or benefit, it will, as between the creditor or the transferee on the one part, and the manager or the heir and other persons (if any), affected by the debt or the transfer on the other part, be deemed to have existed, if the creditor or transferee, as the case may be, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith;[4]

(4) The same rule extends to the father contracting a debt or transferring property in consideration of an antecedent debt.[5]

Illustrations.

(*a*) *A*, the manager, represents to *B* that the joint family property was proclaimed for sale for non-payment of revenue. *B* enquires and learns that it is so. He advances money to *A*, *B* sues *A* and the other members for his debt when it appeared that *A* had deceived *B*. *B*, however, shows that he had made independent enquiries which corroborated *A's* statement. *B* may recover, on the basis of *A's* statement which binds the family.

(*b*) *A*, a Hindu widow, whose husband has left collateral heirs alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A's* maintenance and that the sale of the field is necessary, and, acting in good faith, buys the field from *A*. As between *B* on the one part, *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.[6]

1308. Analogous Law.—This section is adapted from S. 38 of the Transfer of Property Act. Illustration (*b*) is the illustration appended to that section, which, however, by reason of S. 2, last clause, does not of its own force apply to Hindus though it enacts a rule which the Privy Council had enunciated as both equitable and as a part of Hindu Law.[7]

1309. Proof of Legal Necessity.—The question what constitutes legal necessity has already been considered. The question of its proof must

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(1) *Jayanti* v. *Mangamma*, 27 M. 45; *Bhagwanti* v. *MacDonald & Co.*, (1909) P.W.R. 152.

(2) *Grish Chunder* v. *Dabea*, 1 W.R. (Mis.) 24.

(3) *Hanooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393.

(4) *Ib.*, *Cf.* S 38, T. P. Act.

(5) *See* S. 159.

(6) *Cf.* S. 38, T. P. Act; *Anant Ram* v. *Collector*, 40 A. 171 (175) P.C.

(7) *Hunooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393 (423, 424); *Ramkrishna* v. *Ratan Chand*, 53 A. 190 P.C.; *Chintamani* v. *Satyabadi*, 1 P. 715; *Radha Ram* v. *Amar Chand*, 4 L. 208; *Abala Kondama* v. *Kandasamy*, 51 I.A. 145.

largely depend upon the circumstanres of each case. But generally speaking, in considering this question regard must be had to the nature of the alienation made and the quantum of legal necessity by which it is supported. The nature of the alienation made has some bearing on the question, since if the alienation be a sale, the purchaser wants the property, or not all, whereas if it be a mortgage the mortgagee wants his money back and only failing that the property.

1310. Legal necessity may be proved by any evidence direct or indirect and it may, in certain cases, be even presumed. So where in an alienation for Rs. 5,000 the alienee had proved necessity for Rs. 4,400, but failed to prove it as regards the balance of Rs. 600, which the son equally failed to prove as contracted by the father for a purpose, either illegal or immoral, the court presumed it to have been equally supported by necessity.[1] So where the bulk of consideration of 3½ lacs was admitted, or proved, to be supported by legal necessity, it was presumed that the comparatively small sum of about Rs. 13,000, not specifically proved to be so supported was likewise so incurred.[2] Such presumption would be well justified where all adult members had joined in executing the sale, or where it was challenged after long lapse of time, *e.g.*, 20 years after its execution.[3] In another case of sale by the father for Rs. 3,500, only the sum of Rs. 1,000 was proved as supported by necessity, but it appeared that the sale was made after due enquiry, and challenged after a long time, whereupon the Privy Council upheld the sale, and further held that the vendee was not even bound to refund the consideration found unsupported by necessity.[4]

Where legal necessity of numerous items in single accounts is to be proved, it does not appear to be either necessary, or in many cases possible, that the creditor should prove the necessity of each item in a long series of borrowings. "If it were, it would be impossible for a Hindu Saokar, keeping a running account with the manager of a family, to succeed in proving his account against the family. It will, we apprehend, be sufficient for the creditor to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects. And if the fair inference to be drawn from all circumstances of the case leaves no doubt in the mind of the court that the moneys were borrowed for family reasons, the plaintiff is entitled to succeed, although he is not able to indicate the particular purpose for which each sum has been borrowed."[5]

There may be legal necessity to borrow money, but no urgency to borrow it at an onerous rate of interest. The two pleas are not distinct and the latter is implied from a mere denial of the former.[6] So Lord Dunedin, delivering the judgment of the Privy Council, held that a plea in general terms denying necessity opens the defence that there was no necessity to borrow at the high rate of interest, and the onus of justifying the loan with the interest charged lies on the vendor, which, however, he may discharge

(1) *Biswanath* v. *Jagdip*, 40 C. 342 (351, 355).

(2) *Hari Prasad* v. *Sourendra*, 1 Pat. 506 (527, 528). But *contra*, *Sallamat Khan* v. *Bhagwat*, 52 A. 499.

(3) *Hari Prasad* v. *Sourendra*, 1 Pat. 506 (533).

(4) *Sri Krishna Das* v. *Nathu Ram*, 49 A. 149 P.C.; *Balwant Singh* v. *Mt. Kesar Kuar*, 15 L. 236.

(5) *Hari Prasad* v. *Sourendra*, 1 Pat. 506 (527, 528).

(6) *Radhakishan* v. *Jug Shahu*, 4 Pat. 19 P.C., overruling *contra* in *Ainthu* v. *Khakhar*, 1 Pat. 612 (616, 617).

by showing that the loan could not, in the circumstances, have been raised at less interest. But the mere evidence that once on a previous occasion a similar interest had been paid is not conclusive, though, of course, it is relevant.[1] Where the bulk of the consideration received by the sale of ancestral property is shown to be supported by legal necessity, the court is justified in presuming that the residue was not otherwise misspent. Thus where the father was shown to have discharged an antecedent debt by payment of all but Rs. 2,000 out of the consideration of Rs. 18,000, for which he sold an ancestral estate, the court dismissed the suit of the son holding the alienation justified, the more so because the father was colluding with the son in arranging his own sale.[2]

1311. Creditor's or Alienee's Title.—The creditor or alienee dealing with the manager of a joint family knows that he is dealing with its representative whose authority to charge the joint property is limited. Consequently, if he advances money without enquiry into the purpose of the loan he takes the risk. If his loan was in fact advanced for a purpose binding on the joint family, then he, of course, runs no risk. But if, on the other hand, the manager had falsely pledged the credit of the family, then the creditor can recover nothing beyond what represents the manager's interest in the joint property, for the manager, being the immediate party to the contract, cannot repudiate his own liability. For the same reason, where he chooses to deal with all the members of the joint family, then they are all bound and the question of enquiry is immaterial.

Necessity for Enquiry.

1312. Inquiry is only necessary when the creditor deals with the manager as such, and he is anxious to safeguard his interests against the manager's misrepresentation as to the necessity for the loan. It may be that the object of the loan is legal but it does not thence follow that the loan itself was necessary. For it is not thereby necessary that the loan should be for a lawful purpose. It is perhaps even more necessary that it should be necessary. This was emphasized by the Privy Council in the passage already cited from the leading case, in which they observed: "The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded."[3]. In other words, the manager is not entitled to borrow money for a lawful purpose, but only if it is necessary. In what circumstances it is so necessary must depend upon the circumstances of each case. The income received from the estate, its normal expenditure and the savings made are all matters which a prudent lender is bound to enquire about. If he does so enquire and finds that the manager has been mismanaging the estate, and that with better management the loan might have been wholly unnecessary, he is on that account to refuse the loan, even if it is justified by the pressure of the moment. It will thus be seen that as a measure of caution it is always prudent to enquire, and the lender who omits this precaution, hazards his money which he may never see again.

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(1) *Radhakishun* v. *Jug Shahu*, 4 Pat. 19 (22, 23) P.C., following *Nazir Begum* v. *Rao Raghunath*, 41 A. 571 P.C.; *Ram Bhagwan* v. *Nathu Ram*, 2 Pat. 285 (292) P.C.; *Mahadeo* v. *Bessesswar*, 2 Pat. 488; *Parmeshwar* v. *Rai Kishan*, 3 Pat. 829; *Raghunath* v. *Sri Narain*, 45 A. 484; *Durga Prasad* v. *Jewdhari*, 62 C. 773.

(2) *Masitullah* v. *Damodar*, 48 A. 518 P.C.; *Jagannath* v. *Shri Nath*, 56 A. 123 P.C.

(3) *Hunooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (423).

1313. Nature and Extent of Inquiry.—Assuming, however, that the lender does inquire, the next question that arises is what should be the nature and extent of that inquiry. It is obvious that such inquiry must be made from one who is in a position to know. It is equally obvious that it must be made from an independent source, and not from one who is interested in upholding the manager. The question must, of course, depend upon the facts of each case, the nature of the necessity, and the avenues of information available to the lender. He is not bound to sit in a star chamber but at the same time, he owes a duty to himself and to his absent obligors whose estate he seeks to bind, that he should conduct his inquiry in a prudent and business like way.

Where the joint family comprises adult members, common prudence dictates that he should consult them all, or at least such as are accessible to him. If some of them be minors, their guardian should be consulted. If the borrower is the widow, her reversioners are the persons to inquire from; if the father, the sons should be consulted. In short, the lender must take pains to consult those whose interest would be affected by his act. Where all coparceners advise the loan, the creditor need not do more. His difficulty only arises when any or some of them are minors. He has then to be more circumspect. He must inquire into the purpose of the loan. If, for instance, any amount is due from the joint family for purposes mentioned in Ss. 98, 99, 100 or from the father his antecedent loan, it is his duty to inquire from those best qualified to supply him with correct information.[1]

Notice Presumed.

1314. In this connection it is well to note that the lender is deemed to have notice of a fact not only when he actually knows that fact, but also "when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to, or obtained by his agent under circumstances mentioned in the Indian Contract Act, 1878, S. 229."[2]

1315. Value of Recitals.—The results of the inquiry are often recited in the lender's security. The question arises what evidentiary value these recitals have. In the leading Privy Council case it was said: "that the representations by the manager accompanying the loan as part of the *res gestae* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir."[3] But though admissible, they are not of themselves without other independent evidence, when available, sufficient to constitute proof of their truth, though when other evidence has, through lapse of time, become unobtainable, then they would be sufficient proof of the fact they state.[4]

And the contrary might be proved by calling in the scribe or other attesting witnesses.

Attestation.

1316. Similarly, it is usual in this country to obtain the attestation of persons whom the obligee intends to bind by the deed. But a different rule has come into

(1) *See* the subject discussed in 1 Gour's Law of Transfer (6th Ed.), §§ 691-703.

(2) S. 3, Transfer of Property Act, and *ib.*, Trusts Act.

(3) *Hunooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (419, 420); *Dwarka Ram* v. *Bakshi Purnaw Prasad Singh*, 14 Pat. 595.

(4) *Banga Chandra* v. *Jagat Kishore*, 44 C. 186 (195, 196) P.C.

vogue in accordance with the practice of the English courts, where an attesting witness is not presumed to know anything of the contents of the deed and is not consequently estopped by its recitals.[1] This is a natural presumption due to the habits of the people where the attesting witnesses ordinarily know nothing of the deed. But the very contrary should be presumed here when no one outside the Anglicized Indians, would ever dream of signing a deed without knowing all about it. In fact, no document is ever penned in this country which is not discussed by the scribe, the attesting witnesses and the junto of quidnuncs who surround such transactions. The presumption of law here should certainly be that the attesting witnesses knew its contents. But as it is, the contrary has been laid down by English Judges who have presumed their own social habits as equally applicable to the people of India. However, it is only a presumption.

Quantum of Evidence.

1317. It is, of course, on the creditor or the alienee to prove the factum and validity of his transaction affecting the joint family.[2] The quantum of evidence necessary to support the justifying necessity must, of course, vary according to the circumstances of each case. As the Privy Council observed: "It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time and enjoyment and apparent acquiescence; consequently, if, as is the case here, as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable."[3]

1318. Excessive Alienation.—It has already been stated, **(§ 1202)** and is so held by the Privy Council that, granted the legal necessity for a loan, it is more advantageous to borrow money on a mortgage than on parol, since money on mortgage being better secured ordinarily carries a lower rate of interest. Again, even the raising of money on a mortgage might be an imprudent act if there is no prospect of its repayment. In that case a sale might be justified, though, since sale is the permanent alienation of the joint property, only so much of it should be sold as would suffice to meet the necessity. But this rule does not apply where the excess is small or where the money really required cannot otherwise be raised.[4]

Effect of invalid transfer.

151. Where an alienation by the manager is found to be void, its effect upon the interest of the alienor is subject to the following rules:—

(1) Where the alienation was voluntarily made by the manager subject to the Mitakshara law as applied in Behar, Bengal, the United Provinces, Oudh and the Punjab, it is wholly void, subject however to such restitution and compensation to the alienee as the requirements of equity may demand.[5]

(2) Where however, in the provinces last mentioned, the alienation is involuntary, and in all other provinces whether it is voluntary

(1) *Hunooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (419, 420); *Harikishun* v. *Kashi Pershad*, 42 C. 876 (886, 887) P.C.; *Banga Chandra* v. *Jagat Kishore*, 44 C. 186 (199) P.C.

(2) *Gurusami* v. *Gopalaswami*, 36 M. L.J. 588: 50 I.C. 775; but the case of a trading family is different, *ib.*

(3) *Hunooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (420).

(4) *Luchmeedhar* v. *Eqbal Ali*, 8 W.R. 75.

(5) *See* S. 126 (6), *ante*.

or otherwise, on the alienation being found void against the joint family, the alienee is entitled to obtain his alienor's interest therein.

(3) Without prejudice to the generality of the rule stated in Clause (1) due regard must be had to the following facts:—

(a) The representation made by the alienee as to the necessity of the alienation;

(b) The enquiries, if any, made by the alienee into the same;

(c) Improvements made by him;

(d) The fact that the unconditional rescission of the alienation will benefit the alienor;

(e) Collusion between the alienor and his coparceners;

(f) Acquiescence and delay in challenging the alienation.

1319. Analogous Law.—It has already been seen (**§ 126 (6)**) that the right of transfer of coparcenary interest is variously interpreted by the Indian courts, and this variation is now recognized as settling the principle applicable to various localities. Thus in the Mitakshara territory, subject to the jurisdiction of the courts of Calcutta, Patna, Allahabad, Lucknow and Lahore, a coparcenary interest is not transferable except with the consent of all the coparceners, or in case of necessity, while it may be transferred for consideration in the Central Provinces, Bombay and Madras, and in Bengal, in the area subject to the Dayabhag law, it may be transferred even without consideration. But even in the former provinces, though a coparcenary interest is not voluntarily transferable, the purchaser is entitled to an equity which is stronger if he is an auction purchaser,[1] who is entitled to realize his interest by partition to the same extent that the debtor was entitled to do.[2] But this right does not accrue to a mere voluntary alienee from a coparcener, nor to a creditor who had not acquired his equity by at least attachment of his debtor's interest during his lifetime.[3] But if the debtor was the father, then the pious obligation of the son to discharge his father's liability would give the creditor similar equity,[4] which he may enforce during the father's lifetime, or on his death, if the chance for its enforcement is not barred by time.[5] Again, the representation of legal necessity and *bona fide* belief therein by the creditor after due enquiry, protects the creditor in an alienation, whether voluntary or involuntary, even in the United Provinces where coparcenary interest is inalienable.[6] Again, where the alienor is the father, the rule against alienability would give way if the consideration for his alienation was an antecedent debt.[7]

Powers of other Managers.

152. The provisions relating to the power of the manager to contract debts and alienate or charge the joint estate generally apply to—

(1) A manager whether subject to the Mitakshara or the Dayabhag law.

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(1) S. 126 (6), Comm.

(2) *Deen Dyal* v. *Jugdeep*, 3 C. 198 (209) P.C., (a case from Gaya).

(3) *Madho Prashad* v. *Mehrban*, 18 C. 157 (163) P.C. followed in *Lachman* v. *Sarnam*, 39 A. 500 (505) P.C.

(4) *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (444) P.C.

(5) S. 160.

(6) *Mahabir* v. *Ramyad*, 12 B.L.R. 90: 20 W.R. 192, explained in *Lachman* v. *Sarnam Singh*, 39 A. 500 (504) P.C.; *Manna Lal* v. *Kaku Singh*, 1 P.L.T. 6 P.C. 56 I.C. 766.

(7) *Mahabir* v. *Maheswar*, 17 C. 584 P.C.

(2) The widow managing property inherited by her minor son.
(3) The guardian of a minor's estate.
(4) The manager of a religious endowment.
(5) The manager of the estate of a lunatic.

1320. **Analogous Law.**—The powers set out in section 149 apply to a manager both of a Mitakshara and of a Dayabhag family.[1] They extend equally to the manager of an infant's estate, whether the infant be a real or a jurisdical person such as an idol or a shrine.[2] In each case the powers of the manager must necessarily vary according to the nature of the property and the incidents attaching to it. So again, while the manager of the Mitakshara family possesses the same powers as the manager of a Dayabhag family, his position approximates more closely to that of a trustee than in the case of a family governed by the Mitakshara law.[3]

1321. The manager of a lunatic is indistinguishable from the manager of a family of infant coparceners,[4] and so is the guardian of a minor or the manager of a religious endowment.[5] But though the powers of the joint family manager and of the other managers are analogous, they are not identical, as will be seen in the sequel where the powers of the latter are set out. That they are analogous arises from the fact that by whatever name they may be called they are managers. That their powers are not identical arises from the fact that while the father as manager has historically inherited much larger powers as a relic of his autocratic powers which he wielded as the *pater familias*, the other manager, being a coparcener and a close relation of the other coparceners is necessarily given a larger discretion than any other manager. But though the different managers may differ in their measure of authority, there is really no difference between them in principle and all are equally entitled to incur debts or to charge or alienate property which is the subject of their management for the sake of "necessity" or "benefit" as already defined.

Onus of Proof: Presumptions.

153. Onus of proof in certain suits by or against a coparcener.

(1) In a suit against a coparcener to recover a debt incurred or to enforce an alienation of coparcenary property made by the manager, the creditor or the alienee is bound to prove that the debt of the alienation is binding upon the coparcener.[6]

(2) In a suit by a coparcener for the recovery of coparcenary property sold by the manager, the coparcener is bound to prove that the sale is not binding on him and that the purchaser had notice thereof.[7]

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(1) *Hanuman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393; *Ram Nath* v. *Kusum Kumari*, 4 C.L.J. 56; *Kunja Behari* v. *Nemi Chand*, 2 I.C. (C.) 526 (529).

(2) *Doorganath* v. *Ramchander*, 2 C. 341 P.C.; *Sheo Shanker* v. *Ram Shewak*, 24 C. 77; *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (448) P.C.; *Jogi Dass* v. *Ganga Ram*, 21 C.W.N. 957 P.C.

(3) *Balkrishna* v. *Muthusamy*, 32 M. 371; *Annamalai* v. *Murugesa*, 26 M. 544 P.C.

(4) *Annapurnabai* v. *Durgapa*, (1896) B.P.J. 371.

(5) *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (443) P.C.

(6) *Anant Ram* v. *Collector*, 40 A. 171 (175) P.C.; *Banga Chandra* v. *Jagat Kishore*, 44 C. 186 P.C.; *Dwarka Ram* v. *Bakshi Purnaw Prasad Singh*, 14 Pat. 596; *Abdul Majid* v. *Saraswati*, (1934) P.C. 4; *Narain* v. *Political Agent*, 7 Bom.L.R. 172; *Soiru* v. *Narayanarao*, 18 B. 520; *Krishna* v. *Vasudev*, 21 B. 808. But the effect of long possession and acquiescence is different: *Murugesam* v. *Manickavasaka*, 40 M. 402 P.C.

(7) *Suraj Bansi* v. *Sheo Persad*, 5 C.

(3) In a suit by a coparcener for the recovery of property mortgaged by the manager, the mortgagee is bound to prove that the mortgage is binding on the coparcener.[1]

1322. **Analogous Law.**—This section is supported by decided cases. The authority of both the father and the manager being limited as regards the alienation of joint property, the burden of proving that a mortgage executed by them was within their power as representative of the family is necessarily on the mortgagee,[2] whether the mortgagor be the father or any other manager. As the Privy Council observed: "Responsibility to meet the father's debt is one thing, and the validity of a mortgage over the joint estate is quite another thing".[3]

1323. **Proof of Pressure.**—It has already been seen that necessity implies pressure; but pressure may be of varying strength. And in order to make out a case of legal necessity it must be shewn to be such as justified the alienation in question. Again, a pressure may be such as calls for a loan, but it may not be sufficient to justify a loan at the high interest stipulated. Initially it will suffice if the creditor or alienee proves the pressure impelling the transaction in question. If then the alienor questions its propriety on the ground of its excessiveness it will be on the alienee to justify it,[4] Legal necessity and pressure may often be inferred from the fact of repeated borrowings.

154. **In a suit by a coparcener for the recovery of coparcenary property sold in execution of a decree against the manager, the coparcener is bound to prove that the debt, sale or mortgage on which the decree was passed is not binding on him, and that the purchaser had notice thereof:**[5]

Suit by coparcener to recover property sold in execution of decree against Manager.

Provided that the purchaser (not being the judgment-creditor) shall not be bound to inquire into anything not appearing in the decree or in the execution proceedings.[6]

1324. **Analogous Law.**—This section is drawn from the decided cases. Joint property may pass out of the family by a voluntary or compulsory sale. Of these, the court is especially concerned in protecting

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148 (178) P.C.; *Nanomi* v. *Madun Mohun*, 13 C. 21 P.C.; *Bhagabut Pershad* v. *Girja Koer*, 15 C. 717 P.C.; *Minakshi* v. *Kanaka Ramayya*, 12 M. 142 P.C.

(1) *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (171) P.C.

(2) *Obala Kondama* v. *Kondasamy*, 51 I.A. 145: 1924 P.C. 56; *Sitaramasami* v. *Midatana*, 6 M. 400; *Sami* v. *Ponnammal*, 21 M. 28; *Venkataramanaya* v. *Venkataramna*, 29 M. 200 F.B., overruling *contra* in *Chidambara* v. *Kootha-perumal*, 27 M. 326 P.C.; *Guruswamy* v. *Gopalswamy*, 42 M. 629; *Bheknarain* v. *Januk Singh*, 2 C. 438; *Luchmun* v. *Girdur*, 5 C. 855; *Jamna* v. *Nain Sukh*, 9 A. 493.

(3) *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (443, 444) P.C.; to the same effect, *Hunooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393 (421); *Girdhari Lall* v. *Kantoo Lall*, 14 B.L.R. 187 P.C.; *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 P.C.; *Mahabir* v. *Moheshwar*, 17 C. 584 P.C.; *Madho Pershad* v. *Mehrban*, 18 C. 157 P.C.

(4) *Jag Sahu* v. *Radha Kishen*, 4 Pat. 19: (1920) Pat. 211: 56 I.C. 867.

(5) *Bhanga Chandra* v. *Jagat Kishore*, 44 C. 183 P.C.; *Dwarka Ram* v. *Bakshi*, 14 Pat. 595 (605, 606).

(6) *Muddun Thakoor* v. *Kantoo Lal*, 14 B.L.R. 187 P.C.; *Suraj Bunsi* v. *Sheo Persad*, 5 C. 148 (172, 173) P.C.; *Bhagbut Pershad* v. *Mt. Girja Koer*, 15 C. 717 P.C.; *Gajadhar* v. *Jadubir*, 47 A. 122, followed in *Jihan Singh* v. *Hardat Singh*, 57 A. 357.

the title of the auction-purchaser, for without such protection no one will purchase at such sales.[1]

This protection is subject to the two following rules, namely:—

Firstly.—That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or under a sale in execution of a decree for the father's debts, his sons by reason of their duty to pay their father's debts cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and

Secondly.—That the purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.[2] These were all cases of the son challenging his father's alienation. But the same principle would apply to the sale by any other manager. The only difference between the two would be that on the sale being found to be void if the sale was a voluntary one, then the transferee could not claim even his transferor's interest.[3] This is, however, quite a different question and is the subject of another section.

Sale of coparcenary property not presumed to pass interest of coparcener.

155. A sale of co-parcenary property in execution of a decree passed against the manager, which may be executed against the interest of a co-parcener other than the manager in the co-parcenary property, shall not be deemed to include the right, title and interest of the coparcener unless that intention is proved.[4]

1325. **Analogous Law.**—This section is supported by case-law. It prescribes a rule of construction applicable to ambiguous decrees passed against the manager of a joint family, without express mention of the fact that it is passed against him in that capacity. In such case, the rule is that a decree against the manager shall not be presumed to be a decree against him in his representative capacity, thus entitling the decree-holder to seize all co-parcenary property of which he was the manager. The question whether the decree is against the manager personally or against him as representing the coparcenary is a question of fact, which the decree-holder has to prove and thus overcome the natural presumption that a decree against a person is presumably personal, though it may in reality involve the whole family. The rule is the same whether the decree be against the father or any other manager.[5] In such a case, the questions to consider are the nature of the debt and its binding character on the son and other co-parcener, the interest intended to be sold and the interest which the purchaser had bargained and paid for.

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(1) *Jinnuk Kishore (Mt.)* v. *Raghunandan*, (1861) S.D.A.B. 213, followed in *Girdharee Lal* v. *Kantoo Lall*, 14 B.L.R. 87 P.C.; *Suraj Bansi* v. *Sheo Persad*, 5 C. 148 (170) P.C.

(2) *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 P.C.; *Jamna* v. *Nain Sukh*, 9 A. 493; *Chandra Deo* v. *Mata Prasad*, 31 A. 176; *Sukhdeo* v. *Jhapat*, (1920) Pat. 67 (71).

(3) *Deen Dyal* v. *Jugdeep Narain*, 3 C. 198 (209) P.C.

(4) *Hurdey Narain* v. *Rooder Perkash*, 10 C. 626 P.C.; *Nanomi* v. *Modun*, 13 C. 21 P.C.; *Simbunath* v. *Golab Singh*, 14 C. 572 P.C.; *Maruti* v. *Babaji*, 15 B. 87.

(5) *Nanomi* v. *Modun Mohun*, 13 C. 21 (36) P.C.

156. (1) A decree passed against the manager in respect of a liability incurred within the scope of his authority is enforceable against the other members of the joint family, though they may not have been parties to the suit;[1]

Decrees against the Manager when enforceable against Coparcener.

(2) But in such case the other members are not precluded from contesting the authority of the manager or the binding nature of the debt;[2]

(3) Where a decree directs sale of the right, title and interest of the defendant in any property, the question whether the sale so made suffices to pass the entire estate of which the defendant was the manager or only his own interest, is one of construction and intention to be gathered from the proceedings and other circumstances of the case;[3]

(4) In particular and without prejudice to the generality of the foregoing principle, in determining this question the following facts are material:—

(*a*) The nature of the contract, if any;
(*b*) The character of the debt;
(*c*) The capacity in which the defendant is sued;
(*d*) The intention of the court;
(*e*) The price paid by the purchaser; and
(*f*) Any fact which shows what interest he intended to purchase.

Illustration.

A decree is passed against the father *A*, for sale of his interest in mouza *B*, which is his family property. *C* objects to the sale of anything beyond *A's* interest therein on the ground that the decree was obtained for *A's* immoral debt. He fails to prove it. The sale conveys the entirety of *B*.

1326. Analogous Law.—This rule follows from the last which recognizes the manager as the accredited representative of all members of the joint family in a suit, who are necessarily bound by any adjudication made therein and any decree passed thereon. It has now been so settled by the Privy Council[4] in which the manager was held to fully represent the other members and his failure to redeem the joint property was held to effectively destroy the right of redemption of the entire coparcenary.

It is immaterial whether the manager was the father or any other relation,[5] and whether he had sued or was sued as the representative of the family; though in such cases, it is open to the sons or other coparceners to to show, either in execution or in a suit of their own, that the decree does not affect their interests, either because the manager did not in fact represent them or that the nature of the liability was such as not to bind their interests,[6] as where the manager had acted in fraud of their rights, or that his interests were adverse to those of the other coparceners.

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(1) *Sheo Shankar* v. *Jaddo Kunwar*, 36 A. 383 (386, 387) P.C.

(2) *Nanomi* v. *Modun Mohun*, 13 C. 21 P.C. and cases cited in Comm.

(3) *Bhikaji* v. *Yeswantrav*, 8 B. 489.

(4) *Jaddo Kunwar* v. *Sheo Shankar*, 33 A. 71, affirmed O.A.; *Sheo Shankar* v. *Jaddo Kunwar*, 36 A. 383 (386, 387) P.C.

(5) *Jogendra* v. *Funindro*, 14 M.I.A. 367 (376); *Bissessur* v. *Luchmessur*, 5 C.L.R. 477 P.C.; *Narayan* v. *Pandurang*, 5 B. 685; *Gansavant* v. *Narayan*, 7 B. 467; *Ram Krishna* v. *Vinayak*, 12 Bom.L.R. 219; *Lal Singh* v. *Jagraj Singh*, 50 A. 546 (558). (A decree against the father presumed to be against him *qua* manager).

(6) *Nanomi* v. *Modun Mohun*, 13 C. 21 P.C.; *Girdharee Lall* v. *Kantoo Lall*, 14 B.L.R. 187 P.C.; *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 P.C.; *Bhagbat*

Clause (3).

1327. An auction-purchaser purchases whatever right, title and interest his judgment-debtor may possess in the property at the date of attachment. He cannot set up the title of a *bona fide* purchaser for value without notice. Consequently, where the judgment-debtor's indeterminate interest is sold, the purchaser's title will depend upon determination of the question what interest his judgment-debtor had which the court could and did sell. If, for instance, the decree is against the father for his separate debt not binding on the son, the sale would convey to the purchaser only the father's interest.[1] An auction-purchaser who is a stranger to the suit is not presumed to have notice of the character of the debt, though the case is different when the purchaser is the execution-creditor himself.[2]

Clause (2).

1328. Where a decree is passed against a person, possessing a dual character, personal and representative, his later character may not appear on the fact of the decree, in which case, it is for the executing court to inquire to what extent the decree was intended to cover the interest of persons other than the designated judgment-debtor.[3] A son may show that the decree passed against his father does not warrant seizure of his interest, which would be a question relating to execution without affecting the decree. The question in such a case would be as to how far the terms of the decree precluded the trial of such questions. So where the father mortgaged "his right and interest" in a certain village which was decreed and sold and those words were used in the sale-certificate to define the interest sold to the purchaser, the question arose what interest those words conveyed, whether that of the father alone or that of the entire family, represented by himself and the four sons. The latter sued for a declaration that only the father's interest passed, but the Subordinate Judge dismissed their suit holding that, since two of the sons had consented to the mortgage, it referred to the entirety of the mortgaged property. The High Court reversed this decree, holding that *prima facie* the father conveyed his own interest and this decision the Privy Council upheld on the ground that the sons were not made parties to the execution proceedings, adding: "If Bichuk relied on assent by the sons, he should have taken care to make them parties to the execution proceedings. In *Deen Dyal's case*,[4] where the expressions used by the mortgagor were much more favourable to the conveyance of the entirely than they are here, the creditor's omission of the sons from the proceedings was made a material circumstance against him. And in *Nanomi Babuasin's case*,[5] where the decision was in favour of the purchaser, the same circumstance was recognized as being material when the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or the father's co-parcenary interest alone."[6] Then they added: "That when a man conveys his right and interest and nothing more, he does not *prima facie* intend to convey

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Pershad v. *Girja Koer*, 15 C. 717 (723, 724) P.C.; *Mahabir* v. *Moheswar*, 17 C. 584 P.C.

(1) *Bhikaji* v. *Yeswantrav*, 8 B. 489.

(2) *Suraj Bansi* v. *Sheo Prasad*, 5 C. 148 P.C., explained in *Kumbali* v. v. *Keshava*, 11 M. 64 (72, 73).

(3) Ss. 47 (3); 53 C.P.C. (settling judicial conflict.)

(4) *Deen Dyal* v. *Jugdeep*, 3 C. 198 P.C.

(5) *Nanomi Babuasin* v. *Modun Mohan*, 13 C. 21 P.C.

(6) *Simbhu Nath* v. *Golapsingh*, 14 C. 572 (578, 579) P.C.

also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father."[1]

1329. Their Lordships also adverted to the fact that the creditor had taken no steps to bind the sons and that the price obtained appeared to be nearer the value of the father's share than that of the entirety. This case is instructive. For it shows that the mere fact that the decree is obtained against the manager, would not necessarily carry with it the implication that it embraces the entire interest of the joint family. The question is one of construction and intention.[2] So in another case where the right, title and interest of the judgment-debtor were sold, and his sons claimed exemption of their shares, the court examined the proceedings and found that since the defendant had been sued for arrears of land revenue which were a common liability of the family of which he was the manager, the decree must be taken to have intended to direct the sale of the entirety of the family property, which was held *prima facie* liable for the claim.[3] The fact that the junior members of the family are no parties to the proceedings is material but not conclusive, since the question still remains whether they were not represented by their manager.[4]

1330. In suits by or against the manager, the first question that the court has to examine is the capacity in which the manager sues or is sued. If it be found that he was not sued in his representative character, no further question would arise, but if on the other hand it is not certain in what capacity he was sued, then the court would have to examine the pleadings to determine the nature of the obligation and the extent to which it bound the family. If it appears that the manager was sued for a trade debt in respect of a business carried on for the benefit of the family, then the latter are unquestionably liable.[5] If the debt in respect of which the suit was filed was the father's debt, the fact that he was the holder of an impartible zemindari would not prevent the decree from being binding on the successor. So, in a case where the Zemindar had contracted several debts, unsecured and secured, on parts of the zemindari, and on the suit of a creditor the whole estate was attached, after which the Zemindar having died, his son was brought on the record and he objected to the sale of his interest, but the court ordered sale and sold "the right title and interest of the late Zemindar" to a stranger. On the question arising as to what interest passed to the purchaser, the court held that in view of the debt of the father and the small price paid by the purchaser, what was intended to be sold was the life-interest of the father and not the whole interest in the zemindari.[6] The fact that an execution sale took place under an erroneous view of the law that no more than the life-interest of the Zemindar could be sold, would not enlarge the interest of the purchaser, if it is afterwards held that it was competent to the court to dispose of the entire interest.[7] As Lord Watson observed in another case of a sale in

Cl. (3). Pleading Must Be Examined.

(1) *Simbhu Nath* v. *Golapsingh*, 14 C. 572 (578, 580).
(2) *Mahabir* v. *Moheswar*, 17 C. 584.
(3) *Hitendra* v. *Rameshar*, 18 C.W. N. 42 (49).
(4) *Daulat Ram* v. *Meharchand*, 15 C. 70 P.C.; *Bhagbut* v. *Grija*, 15 C. 717 P. C.
(5) *Umbica Prasad* v. *Ram Sahay*, 8 C. 898 (907, 908).
(6) *Pettachi* v. *Sangili*, 10 M. 241 (250, 251) P.C.
(7) *Abdul Aziz* v. *Appayasami*, 27 M. 131 (142) P.C.

execution of a money decree: "The questions are what did the court intend to sell, and what did the purchaser understand that he bought."[1] These are questions of mixed law and fact, and must be determined according to the evidence in the particular case.[2] In cases of this kind the substance and not the mere technicalities of the transaction should be regarded.[3]

1331. So where in execution of a mortgage decree against the father of a joint Mitakshara family who alone was a party to the mortgage decree and the execution proceedings, the son objected to the sale of the entire estate on the ground that the father's debt was illegal and immoral and the order for sale was amended by adding the words "right, title and interest" of the judgment-debtor, which, the court however added, was intended to define what was actually sold. The son sued for a declaration that his interest was exempt, but it was found that the father's debts were for legal and necessary purposes and the Privy Council held that as the sale was of an indeterminate interest, the definition of which depended upon the character of the debts, and that as these were found to be legal, the interest which the purchaser took was the entire estate including the share of the son.[4] The contrary was held in another case in which the son succeeded in proving that the father had contracted the debt by fraudulently mortgaging a certain mouza to which he was not entitled.[5] There is no necessity to inquire into the nature of the debt if it is found that no more than the father's interest was sold. Such enquiry is only necessary when it is doubtful as to what was sold.[6]

1332. The facts that the decree was a mere money decree and the defendant, the father, against whom it was passed are material but does not suffice to convey the son's interest in the joint property since it is not for every debt of the father that the son is liable. If, however, the debt is shown to be the antecedent or necessary debt of the father, or there appears in anything from the record that the father was sued as head of the family, then the entire estate would pass on sale.[7]

Clause (4).

1333. But the coparcener whose interest is put up for sale is entitled to show that it could not pass, either because the manager did not represent him or that the debt was not of such a nature as to convey his interest.[8] In the case of a money decree against the father, the presumption is that only the father's interest is sold. It is all that passes to the auction-purchaser.[9] But this presumption may be rebutted by special circumstances showing an intention to sell the entire interest of the family in the property.[10] Where

(1) *Pettachi* v. *Sangili*, 10 M. 241 (248) P.C.

(2) *Abdul Aziz* v. *Appayasami*, 27 M. 131 (142) P.C.

(3) *Sripat Singh* v. *Tagore*, 44 C. 524 P.C., following *Mahabir* v. *Moheswar*, 17 C. 584 P.C.

(4) *Sripat Singh* v. *Tagore*, 44 C. 524 (533) P.C.; ***Meenakshi* v. *Immudi***, 12 M. 142 P.C.; *Cooverji* v. *Dewsey*, 17 B. 718.

(5) *Ram Sahai* v. *Kewal Singh*, 9 A. 672.

(6) *Bika Singh* v. *Lachman Singh*, 2 A. 800 (805).

(7) *Kagal Ganpaya* v. *Munjappa*, 12 B. 691; *Kunhali* v. *Keshav*, 11 M. 64.

(8) *Bhagbut Pershad* v. *Girja Koer*, 15 C. 777 P.C.; *Mahabir* v. *Maheswar*, 17 C. 584 P.C.; *Nanomi* v. *Modun Mohan*, 13 C. 21 P.C.; *Beni Parshad* v. *Puranchand*, 23 C. 262 (276, 277).

(9) *Maruti* v. *Babaji*, 15 B. 87 following *Hurdey Narain* v. *Ruder*, 10 C. 626 P.C.; *Simbunath* v. *Golab Singh*, 14 C. 572 P.C.

(10) *Nanomi* v. *Modun Mohan*, 13 C. 21 P.C.; *Minakshi* v. *Immuddi*, 12 M. 142 P.C.; *Mahabir* v. *Moheshwar*, 17 C. 589 P.C.; explained in *Maruti* v. *Babaji*, 15 B. 87 (89).

only the father's interest passes to the purchaser all that the purchaser can claim against a Mitakshara family is to enforce his vendor's right to partition.[1]

Mortgage Debt.

1334. There is a distinction between a money claim against the father and one made to enforce the father's mortgage of the family property. A decree in the one case, presumably affects only the father's interest; in the other case it relates presumably to the entire property mortgaged.[2] But the question is scarcely one for presumption, being rather one of fact as to what the father intended to mortgage.[3]

Father's Fraud.

1335. The sons are not bound by the father's illegal or immoral debt. And they may show it at any stage of the suit whenever their own interests are in jeopardy. So where the father professed to mortgage a certain zemindari in which he had no interest of any kind, whereupon the mortgagee sued him for recovery of the debt upon his personal covenant and in execution had his right, title and interest sold to an auction-purchaser who claimed the son's share on the ground that the decree was against the father, the court had no difficulty in exempting the son's claim on the ground that the debt was tainted with fraud and that the son's interest, therefore, could not and did not pass.[4]

Joinder of Parties.

157. In a suit instituted to enforce a mortgage executed by the manager, the other members are proper parties, but their non-joinder does not exempt them from liability, if it appears that they were sufficiently represented by the manager.[5]

1336. Analogous Law.—This section is explanatory of Or. XXXIV, R. 1 of the Code of Civil Procedure which requires the joinder, in a mortgage suit, of all persons interested either in the mortgage security or in the right of redemption. This rule was S. 85 of the Transfer of Property Act, which had been the subject of much conflict of views discussed in another place.[6] But whatever conflict there may have been in the past, the view of the Privy Council supports this section, for they say: "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions when the manager of a joint Hindu family so effectively represents all other members of the family that the family as a whole is bound."[7] Their Lordships found that the case before them was one in which there was not the slightest ground for suggesting that the managers had failed to act in the interest of the family and this is the test. In that case the mortgagee had sued the mortgagor and his subsequent mortgagees who were members of a joint family. A decree was passed against them. But as they failed to redeem the prior mortgage, their interests were foreclosed, whereupon the minor members sued for redemption, claiming that right on the ground that they should have been impleaded by the prior

(1) *Hurdey Narain* v. *Ruder*, 10 C. 626 P.C., following *Deen Dyal* v. *Jugdeep*, 3 C. 198 P.C. To the same effect *Collector* v. *Hurdai*, 5 C. 425; *Ram Sahai* v. *Kewal Singh*, 9 A. 672.

(2) *Hurdey Narain* v. *Ruder Perkash*, 10 C. 626 P.C., explained in *Kunbali* v. *Keshawa*, 11 M. 64 (75).

(3) *Kunbali* v. *Keshava*, 11 M. 64 (76).

(4) *Ram Sahai* v. *Kewal Singh*, 9 A. 672.

(5) *Sheo Shanker* v. *Jaddo Kunwar*, 36 A. 383 P.C.

(6) *See* 2 Gour's Law of Transfer, (5th Ed.), §§ 2325-2330.

(7) *Sheo Shanker* v. *Jaddo Kunwar*, 36 A. 383 (386, 387) P.C., followed in *Guran Ditta* v. *Pokhas Ram*, 8 L. 693.

mortgagee and that his failure to implead them could not imperil their right. But the Privy Council rejected their claim, holding that they were sufficiently represented through their manager.

This case then settles the rule here stated. The manager has the authority to sue and be sued in respect of all transactions including mortgages, on behalf of the family of which he is the accredited representative, and all decrees obtained by or against him are decrees for or against the family.

At the same time, should any coparcener desire that he should be impleaded in a suit, it is always open to the court to join him, as direct representation is in every way preferable.

1337. The law reports teem with cases in which the courts have discussed the consequence of non-joinder of members of a joint family. They have now no practical value. But the question may sometimes be whether a person sued or was sued as a manager or as a member of the family. This is a question of fact, which must be decided with reference to the nature of the claim and the pleadings in each case.

CHAPTER XI.

THE FATHER'S DEBTS AND ALIENATIONS.

1338. Topical Introduction.—That the father is endowed with larger powers and greater discretion in the management of the coparcenary property is the survival of the ancient right he had as *pater familias*, in which capacity, he was at one time entitled to own not only all that the family possessed, but even the members of his family, namely, his wives and children. "Three persons," says Manu, "a wife, a son, and a slave, are declared by law to have, in general, no wealth exclusively their own: the wealth which they may earn is regularly acquired by the man to whom they belong."[1] But, in later years, this autocratic power was curtailed, and by the time the Mitakshara was composed, the son had acquired a vested right in his patrimony, but the father still retained some of the vestiges of his earlier privileges, which gave him a position of special eminence in the household. But all his special powers are, nevertheless, incidental to his management, and with special reference to his own issue. Indeed, as manager, he has no greater power than any other manager, though in point of practice, he is permitted a larger discretion. But as father, and even when he is no longer the manager, he is entitled to incur debts and make alienations, by which his issues are bound; for, when it is said that the sons are under a pious obligation to discharge their father's debts, the reference is to his personal debts, and not debts incurred as their managing representative. In this respect, when the father and the manager are not the same, the coparceners have a dual liability—first towards their manager, and secondly, towards their father. A further conflict is possible if the father and the manager of a joint family business are not the same. In such case, it is clear that the father's power to alienate property for his own debt, not illegal and immoral, may be in conflict with the manager's power of alienation for legal necessity or benefit. But no such conflict has yet arisen in practice, though it is quite conceivable. In this chapter, the debts and alienations of the father have reference to him as the father, and not as the manager of a joint family. When he is also the manager, his rights and duties are those of any other manager, which have already been set out in the previous chapter. The rights which he possesses and which are the subject of this chapter, are those which he still enjoys as the relics of his patriarchal days.

1339. In this chapter, the term "father" must be understood to include, also the grandfather and the great-grandfather, and the term "son" the grandson and the great grandson. That the son, the grandson, and the great-grandson are all equally liable for the acts, borrowings and alienations of their father, grandfather, and great grandfather is now settled by the Privy Council,[2] who must be deemed to have overruled the

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(1) Manu, VIII-416.

(2) *Masitullah* v. *Damodar*, 48 A. 518 (526, 527) P.C.; *contra* in *Ram Deo* v. *Gopal Koeri*, 16 C.W.N. 383 : 13 I.C. 349.

contrary held in the earlier texts and cases. This will be obvious from the definition of "issue", "father" and "son" in section 112.

Illegal and immoral debt defined.

158. (1) An "illegal or immoral debt," with reference to the father's debt, means not only such debt as is tainted with illegality or immorality as commonly understood, but also a debt which is regarded as *avyavaharik*, that is to say, unusual or not customary:[1]

Explanation 1.—A debt is illegal or immoral if it results from an act *ab initio* criminal, and not only one which is merely wrongful or which merely involves a breach of civil duty;

Explanation 2.—A liability to indemnify an innocent person against the illegal or immoral act of the father is not necessarily illegal or immoral;

Explanation 3.—A debt is not illegal or immoral merely because it is recklessly or imprudently incurred.

Antecedent debt defined.

(2) An "antecedent debt" with reference to an alienation made by the father, means, a debt (not illegal or immoral) incurred, whether on the security of the coparcenary property or not, prior to such alienation in a transaction unconnected therewith, and includes a debt to pay off such a debt.[2]

Father's additional power to transfer.

159. (1) Where the father is the manager, he possesses, as regards his borrowings and alienation, the same powers as any other manager,[3] in addition to, and independently of which, the father, as such, possesses the following powers over his undivided son's interest in the coparcenary property:—

(2) He is entitled to alienate his son's interest in the coparcenary property in payment of his own antecedent debt;[4]

(3) His undivided son is liable to pay his debt, not illegal or immoral, out of his coparcenary interest, which is liable to be seized and sold in execution of a decree passed against the father, to which the son may or may not have been a party;[5]

(4) A *bona fide* purchaser in execution of such decree is, however, not bound to take notice of anything beyond what appears in the proceedings.[6]

Explanation 1.—The terms "antecedent dedbt" and "illegal and immoral debt" with reference to the father's debt and alienation mean a debt as defined in section 136.

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(1) *Chhokori* v. *Ganga*, 39 C. 862.

(2) *Chet Ram* v. *Ram Singh*, 44 A 368 (374) P.C.; *Brij Narain* v. *Mangal Prasad*, 46 A. 95 P.C.

(3) *Nanomi* v. *Modun Mohun*, 13 C. 21 P.C.; *Bhagbut* v. *Girja*, 15 C. 717 P. C.; *Minakshi* v. *Immudi*, 12 M. 142 P C.; *Mahabir* v. *Moheshwar*, 17 C. 584 P.C.

(4) *Brij Narain* v. *Mangal Prasad*. 46 A. 95 P.C.; *Rameshra* v. *Kalpu Rai*, ib., 264; *Anantu* v. *Ram Prasad*; ib.; 295. A *fortiori* in property which he inherited from his father; *Muttyan* v. *Sangilivira*, 6 M. 1 P.C. *Chiranji Lal* v. *Bankey Lal*, 57 A. 370 F.B.; *Official Liquidator v. Jamna Prasad*, 55 A. 417.

(5) *Girdhari Lall* v. *Kantoo Lal*, 14 B.L.R. 187 P.C.; *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 P.C.

(6) *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 P.C.; *Sat Narain* v. *Bihari Lal*, 5 L. 1 P.C.; *Saligram* v. *Lulta Parshad*, 6 N.W.P.H.C.R. 329; *Anooragee* v. *Bhugobutty*, 26 W.R. 148; *Badree Lal* v. *Kantee Lal*, 23 W.R. 260.

Explanation 2.—**The liability of the son arises during the lifetime of the father and it continues after his death until the liability is discharged.**[1]

Explanation 3.—**The son's liability to pay his father's debt is limited to the assets received or inherited from his father. His separate property is exempt from the payment of such debt.**[2]

1340. Analogous Law.—This section is supported by case-law and the following texts:—

Manu.—"158. The man, who becomes surety for the appearance of a debtor in this world, and produces him not, shall pay the debt out of his own property.

Brihaspati.—"47. If the father is no longer alive, the debt must be paid by his sons.

"48. The father's debt must be paid first of all, and after that a man's own debt; but a debt contracted by the paternal grandfather must always be paid before these two men.

"49. The father's debt, on being proved, must be paid by the sons, as if it were their own; the grandfather's debts must be paid (by his son's sons) without interest, but the son of grandson need not pay it at all.

"50. When a debt has been incurred for the benefit of the household by an uncle, brother, son, wife, slave, pupil or dependent, it must be paid by the head of the family."[3]

Vishnu.—"He (the father) throws his debt on him (the son); and the father obtains immortality, if he sees the face of a living son.

"The father's debt must be first paid, and next a debt contracted by the man himself; but the debt of the paternal grandfather must be paid before either of them. The sons must pay the debt of their father, when proved as if it were their own, or with interest; the son's son must pay the debt of his grandfather, but without interest, and his son shall not be compelled to discharge it."[4]

Narad.—"What is left (of the father's property), when the father's obligations have been discharged, and when the father's debts have been paid, shall be divided by the brothers, in order that the father may not continue a debtor."[5]

"When a devotee, or a man who maintained a sacrificial fire dies without discharging his debt, the whole merit of his devotions, of his perpetual fire belongs to his creditors."[6]

"A father must not pay the debt of his son, but a son must pay a debt contracted by his father, excepting those debts which have been contracted from love, anger, for spirituous liquor, games or bailments."[7]

Yadnyavalkya.—"A debt evidenced by writing is binding only on three generations. A pledge can be enjoyed as long as the debt is not returned."[8]

Usanas.—"A fine or the balance of a fine, likewise a bribe or a toll or the balance of it are not to be paid by the son; neither shall he discharge improper (*Avyavharik*) debts."[9]

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(1) *Brij Narayan* v. *Mungal Prasad*, 46 A. 95 P.C.

(2) S. 160; *Muttayan Chettiar* v. *Sangilivira*, 6 M. 1 P.C.; *Roop Singh* v. *Buldeo Singh*, 2 W.R. 258; *Zaburdust* v. *Udurmun*, Agra; F.B. 71; *Sukhdeo* v. *Madhu Sudan*, 10 Pat. 305.

(3) XI-47-50; 33 S.B.E. 328 (329).

(4) XV-45; 7 S.B.E. 65.

(5) Narad, III-10.

(6) Narad, XVIII-32; 33 S.B.E. 197.

(7) I-10; 33 S.B.E. 45.

(8) II-90 (Mandlik), 210.

(9) Quoted in the Mitakshara, Ch. VI-II-48. The word "improper" is not a correct translation of the original "Avyavharik," which means "unusual, or not sanctioned by law (usage)." *See, per curiam*, in *Durbar* v. *Khachar*, 22 B. 348 (351); *Hanmant* v. *Ganesh*, 43 B. 612 (615); *Prayag* v. *Kasi*, 14 C.W.N. 659, 6 I.C. 258; *Chhakaury* v. *Ganga*, 39 C. 862; *Venkatacharyulu* v. *Venkata*, 44 M. 214.

1341. The section is supported by the authority of the Privy Council, who said: "The rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara which consists of a father and his sons, do not differ from those of the coparceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu Law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and in the case of infant sons, necessarily, the manager of the joint family estate."[1]

Then, as to the sons' liability to pay the father's debts, they formulated the two following propositions:—

Firstly, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree on the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and

Secondly, that the purchasers at an execution sale, being strangers to suit, if they have not noticed that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings.[2]

1342. In another case, Lord Hobhouse said: "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."[3]

1343. It will be observed that this section merely deals with the father's power of transfer. It does not exhaust the son's liability to pay his father's debts, which are elsewhere defined. (**S. 160.**) Taking the two sections together, the son will be found liable for all debts of the father not immoral or illegal, whether antecedent or not, and whether they are secured on the joint estate or unsecured. But this does not imply that the father possesses unlimited power of transfer of the joint estate. His power of transfer is limited, as stated in this section. Hindu Law views the father's power of transfer of the joint family estate as a thing apart from the son's pious obligation to pay his father's debt. But the two subjects are co-related and cannot be considered apart. Taking them together, the son's position may be thus stated:—

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(1) *Suraj Bunsi* v. *Sheo Persad,* 5 C. 148 (165) P.C.
(2) *Ib.,* p. 171.
(3) *Nanomi* v. *Modhun Mohun,* 13 C. 21 (35) P.C.; *Brij Narain* v. *Mangal Prasad,* 46 A. 95 P.C. overruling *contra* in *Sahu Ram* v. *Bhup Singh,* 39 A. 437 P.C.

(1) He must pay all debts of his father secured or unsecured, not illegal or immoral.

(2) He may, therefore, have to redeem the security given by his father for such debts.

(3) But since the father's right to charge the estate is more limited than the son's liability to pay his father's debts, it follows that the son may set aside his father's alienation not made for legal necessity or for his own antecedent debt.

(4) But in the last case, his own liability to pay the debt may remain and the creditor may enforce it by attachment and sale of his inherited assets.

1344. Taking this sectien along with those that definite a coparcener's liability, it will be seen that while the latter is liable only for the debts incurred by the manager for legal necessity or benefit, the son's liability is threefold, since, while he is equally liable for necessity, he is, unlike the coparcener, bound by his father's alienation of his interest for an antecedent debt, and further liable to pay his father's debts, whether antecedent or otherwise, provided only that they are not illegal nor immoral.[1] This is in pursuance of his pious obligation to honour his father's debts. But his own liability is not co-extensive with his father's power of alienation which is limited; since he can only alienate so as to bind his son, grandson and great-grandson,[2] whether major or minor,[3] if the consideration therefor is his own antecedent debt, or, of course, if it is otherwise supported by necessity. But if the debt or the alienation is followed up by a decree, then the son's defences become further narrowed. Since he can then escape his larger liability, only by shewing that the consideration was illegal or immoral. It is not sufficient for him to show that the transaction was extravagant or reckless, or that the money might have been got at a cheaper rate of interest.[4]

1345. It will be thus seen that with a decree, the son's larger liability based on his pious obligations, springs into existence. So long as there is no decree that liability is dormant. It remains so even where there is a transfer. In this respect a decree has for the alienee a much higher value than a mere security or sale. But an execution sale in favour of a stranger further curtails his defence. He cannot then complain that the debt of the father resulting in the sale was unsupported by necessity,[5] nor does it determine his own liability, since if the decree remains unsatisfied he would be liable to satisfy it out of the assets inherited by him and the only defence then open to him is the illegality and immorality of the debt.[6] (**§§ 1341-1343.**) The fact that the father had contracted the debt conjointly with another member of the joint family does not exone-

(1) *Kuldip Sahay* v. *Ram Bujhawan Mahto*, 3 Pat. 425; *Ladu Narain Singh* v. *Goberdhan*, 4 Pat. 478; *Madhu Prasad* v. *Nawab*, (1925) O. 185.

(2) S. 112; *Masitullah* v. *Damodar*, 48 A. 518 P.C.

(3) *Tikait* v. *Pandit Malkhiji*, 90 I.C. 276; (1925) Pat. 588; *Bansidhar* v. *Pandurang*, (1925) N. 196; *Ranjit Singh* v. *Ramman Singh*, 87 I.C. 654 : (1925) A. 781; *Sahsri Kishen* v. *Kanhaya Lal*, 86 I.C. 877 : (1925) O. 559.

(4) *Lal Singh* v. *Jagraj*, 50 A. 546.

(5) *Gajadhar* v. *Jadupi*, 47 A. 122; *Lal Singh* v. *Jugraj*, 50 A. 546; *Jahan Singh* v. *Hardat Singh*, 57 A. 357.

(6) *Maharji* v. *Raghoman*, 89 I.C. (O.) 476; *Ram Gulam Singh* v. *Nand Kishore*, 4 Pat. 460.

rate a son's liability which remains coextensive with that of the father.[1] The resultant benefit to him is spiritual not temporal. He would then be liable to pay the debts, even though another (*e.g.*, the daughter) inherits the residue of the estate after paying the debts.[2] His own share is a first charge on such debts,[3] though it does not vest in the Receiver equally with the father's upon the latter's bankruptcy,[4] since only the father's power of alienation of his share vests in the Receiver,[5] and is subject to the same qualification as when it is in the father's hands.[6]

1346. On this question two views are possible, first that Hindu Law limits the father's power of alienation with reference to the nature of the debt and not with reference to the nature of the estate; and secondly, that no man can be deemed to convey more than he has himself got; and that the son's coparcenary interest being distinct from his own estate, a sale of the father's estate cannot be presumed to convey his son's interest unless there is something to shew that it has that effect. The first rule was stated by Knight Bruce, L.J.,[7] as follows: "The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." In another case, Sir Barnes Peacock, C.J., cited this passage and added: "That is an authority to show that ancestral property which descends to a son under the Mitakshara law is not exempted from liability to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father acquires an interest by birth, is liable to the father's debts."[8] "Freedom on the part of the son as far as regards ancestral property from the obligation to discharge the father's debts under Hindu Law can be successfully pleaded only by a consideration of the invalid nature of the debts incurred."[9] This case has been since followed in numerous cases.[10]

1347. **Son's Liability Limited.**—It is now settled that the son's liability to pay his father's debt is limited to the estate inherited by him from his father or to his succeeding to the joint estate in which he and his father were coparceners. It is, however, immaterial whether the estate inherited from his father was the latter's ancestral or self-acquired property. As observed by the Privy Council: "The freedom of the son from the obligation to discharge the father's debt has respect not to the nature of the estate, whether ancestral or acquired, by the creator of the

(1) *Sourendra Mohan* v. *Hari Prasad*, 52 I.A. 418 : (1925) P.C. 280.

(2) *Madhav Rao* v. *Amleabai*, 85 I.C. 193 : (1925) B. 125.

(3) *De Souza* v. *Waman Rao*, 27 Bom. L.R. 1451.

(4) *Sat Narain* v. *Behari Lal*, 6 P.I. (23) P.C., overruling O.A. *Behari Lal* v. *Sat Narain*, 3 L. 329 F.B.; *Narasimulu* v. *Basara*, 47 M.L.J. 799 : (1925) M. 249; *Siddheswar* v. *Deokali*, 9 Luck. 304 (F.B.).

(5) *Stripad* v. *Basappa*, 49 B. 785; *Gopalakrishnayya* v. *Gopalan*, 51 M. 342.

(6) *Allahabad Bank* v. *Bhagwan Das*, 48 A. 343; *Seetharama* v. *Official Receiver*, 49 M. 849; *Gopalakrishnayya* v. *Gopalan*, 51 M. 342.

(7) *Hanooman Pershad* v. *Babooee*, 6 M.I.A. 393 (421).

(8) *Girdhari Lal* v. *Kantoo Lal*, 14 B.L.R. 187 (196, 197) P.C.

(9) *Jumuk Kishori* v. *Raghunandan*, (1861) B.S.D.A. 213, cited in *Girdhari Lal* v. *Kantoo Lal*, 14 B.L.R. 187 (198) P.C.

(10) *Luchmi Dai Koori* v. *Asman Singh*, 2 C. 213; *Bheeknarain Singh* v. *Januk Singh*, 2 C. 438; *Luchman Das* v. *Giridhur Chowdhry*, 5 C. 855 F.B.; *Goburdhan Lal* v. *Singessur Dutt*, 7 C. 52; *Nonomi Babuasin* v. *Modhun Mohun*, 13 C. 21 P.C.; *Bhagbut Pershad* v. *Girja Koer* 15 C. 717 P.C.; *Beni Pershad* v. *Puran Chand*, 23 C. 262; *Amar Chandra Kundu* v. *Sebak Chand Chowdhury*, 34 C. 642 F.B.; *Ponnappa Pillai* v. *Pappu-*

debt."[1] Consequently, unless he can show that the debt for which he is made liable was incurred by the father for illegal or immoral purposes, he cannot escape liability from payment to the extent of the joint property he has received by survivorship, or of any other property which he may have inherited from his father. The same liability and to the same extent extends to the grandson and the great-grandson, who are both comprised in the term "issue" before defined.

1348. Inherited Assets.—The inherited assets in the hands of the son, which is the measure of the latter's liability, mean all the joint property including the son's interest therein[2] and not merely the father's interest or his separate or self-acquired property.

1349. Father's Additional Powers.—The liability of one person to pay the debt of another may be legal, or it may be moral or religious. In the primitive age when the divorce of law from religion had not taken place, religious obligation was indistinguishable from legal obligation, with the result that the son's obligation to pay his father's debt was absolute and independent of any assets of the father received by him by inheritance. This qualification was, however, taken as implied in determining his obligation by all the courts[3] except in Bombay, where the obligation was literally enforced,[4] till it was similarly limited by an Act passed in 1866.[5] The course of decisions in all the courts has since been uniform,[6] except that in Bombay, it appears to be still maintained that the creditor is entitled to obtain a decree against the son, without reference to the assets, though if the son had inherited no assets, the decree cannot be executed against him.[7] In other words, the want of assets is a good defence to recovery, but not to a decree. But if the son is only liable if he has assets, no decree seems justifiable without proof of assets.

Clause (2).

1350. The father as manager possesses all the powers of any other manager, added to which he possesses, as father, an additional power of transferring the estate for his own debt, so as to bind his sons. In fact for so doing he must be deemed to be dicharging his son's pious obli-

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vayyangar, 4 M. 1 F.B.; *Sivasankara Mudali* v. *Parvati Anni*, 4 M. 96 F.B.; *Muttayyan* v. *Zamindar of Shivagiri*, 6 M. 1 P.C.; *Ramasamy* v. *Ulaganatha*, 22 M. 49 F.B.; *Trimbak* v. *Narayan*, 8 B. 481; *Chamaili Kuar* v. *Ram Prasad*, 2 A. 267; *Radha Kishen Man* v. *Bachhaman*, 3 A. 118; *Jamna* v. *Nain Sukh*, 9 A. 493; *Chandradeo Singh* v. *Mata Prasad*, 31 A. 176 F.B.; *Baijnath* v. *Gokul Rai*, 45 A. 718, dissenting from *Sukhdeo* v. *Jhapt*, 54 I.C. (Pat.) 946, in which the statement of law was held to be too wide.

(1) *Hanooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393 (421).

(2) *Ponnappa* v. *Pappuvayangar*, 4 M. 1; *Sheo Prashad* v. *Jung Bahadur*, 9 C. 189; the same rule applies to impartible estates, the heir being liable to pay the previous holder's debts; *Muttayan* v. *Sangili*, L.R. 9 I.A. 128, reversing 3 M. 670; *Sivagiri* v. *Tiruvengada*, 7 M. 339.

(3) *Ponnappa* v. *Pappuvayyangar*, 4 M. 9 (21, 45); *Rayappa* v. *Ali Sahib*, 2 M.H.C.R. 336; *Karuppan* v. *Veriyal*, 4 M.H.C.R. 1; *Jamoonah* v. *Mubben*, Montr. 227; *Aga Hajee* v. *Jagget*, Montr. 272; *Dyamonee* v. *Brindabun*, (1856) S. D. A. B. 97; *Kunhya* v. *Bukhtawar*, 1 S. D. A. N. W. P. 4; *Unnopoorna* v. *Gunga*, 2 W.R. 296.

(4) *Pranbullubh* v. *Deocristian*, (1824) B.S.R. 4; *Narasimharav* v. *Ambaji*, 2 B.H.C.R. 64.

(5) Hindus' Liability for Ancestor's Debts Act, (Bom. Act VII of 1866).

(6) *Sakharam* v. *Govind*, 10 B.H.C. R. 361; *Udaram* v. *Ranu*, 11 B.H.C.R. 76; *Keval Bhagvan* v. *Ganpati*, 8 B. 220; *Girdhar Lal* v. *Shiv*, ib., p. 309.

(7) *Bapuji* v. *Umedbhai*, 8 B.H.C. R. (A.C.) 245; *Lallu* v. *Tribhuvan*, 13 B. 653.

gation on their behalf.[1] Consequently, as he is entitled to dispose of his son's undivided share in payment of his own debts, the creditor is equally entitled to seize in execution of his decree against him his son's separated share.[2] This is the prevailing view and has been expressed[3] or implied,[4] in several cases, including those decided by the Privy Council,[5] though, in some cases, it has been held that the son had the right to set aside the father's alienation made for a debt, not illegal or immoral, and that, in such a case, the decree cannot be made conditional upon his paying up the amount of the debt.[6]

1351. In one case it appears to have been assumed that the power of alienation is personal to the father. There the uncle, as manager had alienated certain property in which his nephew had a share in consideration of his father's death, the nephew objected, and the courts upheld his objection holding that there was nothing in the principles laid down by their Lordships of the Privy Council in the case above quoted[7] to warrant the view that an uncle acting as manager of a joint family is entitled to sell the share of his nephew in the joint family property in order to discharge a debt incurred by his own father, even though the said father be also the grandfather of the nephew whose property is alienated.[8] It is submitted that in that case the nephew's interest would be rightly sold by the manager. Since, it was his pious obligation to pay the debt, and the sale was only a mode of discharge of his liability which, as manager, he was entitled to do. In this view it has been held that on the insolvency of a Hindu father the official assignee could sell the joint ancestral estate of the insolvent and his sons, to pay the debts of the insolvent not tainted with illegality or immorality.[9]

1352. Antecedent Debt.—This term has now become a term of art in Hindu Law and is used in a sense upon which the courts, including even the Privy Council, were, at one time, not agreed. Its meaning is, however, now more certain. In the first place, the term has bearing only in respect of the debt and obligation of the father, and is a judicial deduction from the two acknowledged principles of Hindu Law: *First*, that the son is liable to pay the debts of his father and paternal grandfather, whether he inherits any property from or through them or not, but the grandson is not liable at all, unless he inherits his property; *Secondly*, the father and the grandfather are not entitled to alienate

(1) *Subraya* v. *Nagappa*, 38 B. 264; *Koer Hasmat Rai* v. *Sunder Das*, 11 C. 396; *Biswanath* v. *Jagdip Narain*, 40 C. 342 (353).

(2) *Atul Krishna* v. *Lala Nandaji*, 14 Pat. 732 F.B.

(3) *Chandra Deo* v. *Mata Prasad*, 31 A. 176 F.B.; *Anantoo* v. *Ram Prasad*, 46 A. 295; *Chiranji Lal* v. *Bankey Lal*, 55 A. 370 F.B.; *Official Liquidator* v. *Jamna Prasad*, 55 A. 417. *Bhim Singh* v. *Ram Singh*, ib., 301. *Mathura* v. *Rajkumar*, (1921) Pat. 245 F.B.; *Arumugham* v. *Muthu*, 42 M. 711 F.B.; distinguishing *Sahu Ram* v. *Bhup Singh*, 39 A. 437 P.C.; *Purshottam* v. *Sheo Shanker*, 6 I.C. (A.) 163; *Dharjit* v. *Siria*, 9 I.C. (A.) 484.

(4) *Bissonath* v. *Bindesri*, 40 C. 342; *Bidya Prasad* v. *Bhup Narain*, 42 C. 342.

(5) *Brij Narain* v. *Mangal Prasad*, 46 A. 95 P.C., overruling *contra* in *Sahu Ram* v. *Bhup Singh*, 39 A. 437 P. C.; and the cases decided upon its authority.

(6) *Srinivasa* v. *Kuppuswami*, 44 M. 801; *Badam* v. *Madho Ram*, 2 L. 338; *Daya Ram* v. *Har Charan*, 82 I.C. 678 dissenting from *contra* in *Amir Malik* v. *Kahan Chand*, 73 I.C. (L.) 818; *Koer Hasmat Rai* v. *Sundar Das*, 11 C. 396.

(7) *Brij Narain* v. *Mangal Prasad*, 46 A. 95 P.C.

(8) *Rameswara* v. *Kalpu Rai*, 46 A. 264 (265).

(9) *Baluswami*, (In re), 47 M. 87; *Varadarajan* v. *Srinivasa Rao*, (1924) M. 792.

coparcenary property *qua* father, though *qua* manager their power to alienate such property is well defined and limited to what constitutes legal necessity. If, therefore, the father alienated such property for a price then received, the son could challenge the alienation as beyond his competency, but in such a case, the question would still remain whether the son is not bound by his pious obligation to pay to the alienee the price which the father had received and which, apart from the property alienated, would become a legal debt for which the son would be liable. After some conflict and much indecision, that question had to be settled, and has become settled, so as to reconcile the two conflicting principles by deducing a rule that, in the latter case, there was no legal obligation, because the price paid was a part of the transaction of alienation, but should an alienation be made for a debt previously due, then the son could not challenge the alienation because of his pious obligation to discharge all his father's debts. This ruled out the "antecedent" payment of the price or any antecedent obligation not amounting to a "debt".

1353. Now, since a debt is nonetheless a debt even though it is secured by a mortgage of a joint family property,[1] it follows that the liability of the son is not extinguished by that fact. But the Privy Council had lapsed into holding the contrary in a case decided by their Lordships, in 1917,[2] which they followed and which the Indian courts had to follow till it was in its turn overruled by a Full Bench of the same Board in 1924.[3]

1354. Eliminating this gap in which both the Privy Council and the Indian Courts had given contrary decisions, a debt would be treated as "antecedent" even where for the price of the father's previous alienation he renews his alienation,[4] provided that it is not a renewal made to circumvent the law. The question whether a renewal is *bona fide* or a device is a question of fact, the proof of which must depend upon the circumstances of each case. The term "debt" as used in this connection

"Meaning of "Debt."

is not limited to money lent, since it includes also cases of money due or money payable but not yet due[5] or money due but not payable because it is timebarred (**§§ 1377-1378**) and all such moneys whether ascertained or unascertained,[6] *e.g.*, a trade debt or balance of a partnership or other similar undertaking It has even been held that a decree passed against the father for illegally obstructing the plaintiff's watercourse is a debt, on the ground that it amounts to a "judgment debt,"[7] but a decree might be passed for a liability, however illegal or immoral, if the father failed to

(1) *Brij Narain* v. *Mangal Prasad*, 46 A. 95 (102) P.C.; overruling *Sahu Ram* v. *Bhup Singh*, 39 A. 437 P.C.

(2) *Sahu Ram* v. *Bhup Singh*, (1917) 39 A. 437 P.C.; *Lachman Prasad* v. *Sarnam Singh*, 39 A. 500 P.C.; *Jogidas* v. *Ganga Ram*, (1917) 21 C.W.N. 957 P.C.; *Chet Ram* v. *Ram Singh*, (1922) 44 A. 368 P.C.; overruled in *Brij Narain* v. *Mangal Prasad*, (1923) 46 A. 95 P.C.

(3) *Brij Narain* v. *Mangal Prasad*, 46 A. 95 (102) P.C.; *Lal Bahadur* v. *Ambika Prasad*, 47 A. 795 P.C.; *Arumagham* v. *Muthu*, 42 M. 711 F.B.; *Sheo Prasad* v. *Balwant Singh*, (1927) A. 150; *Sukdeo* v. *Jhapat*, 5 Pat.L.J. 120; *Gopaldas* v. *Topan Das*, 16 L. 624; *Ram Rekha Singh* v. *Ganga Prasad*, 49 A. 123 (128) F.B.

(4) *Lal Bahadur* v. *Ambika Prasad*, 47 A. 795 P.C.; *Jawahar Singh* v. *Udai Parkash*, 48 A. 152 P.C.; *Ram Rekha Singh* v. *Ganga Prasad*, 49 A. 123 (126) F.B.; *Kuldip Sahai* v. *Ram Bhujwan*, 3 Pat. 425.

(5) *Subbarayulu* v. *Ratnam*, (1931) M. 615.

(6) *Bal Rajaram* v. *Maneklal*, 56 B. 36 (47, 48).

(7) *Chakauri* v. *Ganga Prasad*, 39 C. 862 (877), following *Pareman* v. *Bratta*, 24 C. 672 (676).

resist it on that ground, and since such debt must not be illegal or immoral, nor even *avyavaharik*, in all of which cases the son is not liable.

"Antecedent." Meaning of.

1355. As already observed, the term "antecedent" is only loosely used in the lexicon sense, since it embraces debts, which, though antecedent in their etymological sense, are not antecedent in point of law. Such are debts contracted as a subterfuge to evade the law. In its legal sense, the term is intended to mean a debt incurred by the father not only prior to his incurring the liability, upon which the son is to be liable, but such debt must also be unrelated to the latter transaction so as to be independent of it. It does not matter if the later transaction is, in itself, a debt being a mere renewal of a previous debt,[1] nor is the interval of time in itself of much consequence, since the father may incur a debt promising to pay it on receipt of money expected any minute, that failing, he may execute a mortgage of his family estate or another person pays off his debt, in either case it would be binding on the son.

1356. Though an antecedent debt must not be illegal or immoral it is not necessary that it should have been incurred for legal necessity or benefit of the family, or of the son or of the borrower. A neutral debt will be antecedent if it is prior in point of time, whatever be the purpose for which it was taken. Of course, if such debt be for necessity it is doubly binding on the son, but its absence does not make the son anytheless liable. The fact that the father was a spendthrift, wanton or reckless in his dealing with other men may be relevant for the purpose of proving that the debt in question was immoral, but his general character and habits do not otherwise reflect upon the liability of the son. So again the fact that the terms of the loan were oppressive or inequitable have no direct bearing on its antecedence, though they may be otherwise quite relevant.

1357. It is not necessary that such debt should be pressing or even due, for pressure is not a pre-requisite of "antecedence", though it is proof of necessity, nor is the fact that the debt might have been otherwise paid even relevant to such question.[2]

The question whether a debt is antecedent in the technical sense of the term may at times depend upon the intention of the parties, judged by the nature of the contract or upon its terms. Take for example, two cases as follows:—

In the one, *A*, the father borrows, say Rs. 1,000 from *B*, promissing to repay it in ten days' time, failing which he agrees to convey his ancestral land to *B*. In the other, the father agrees to sell his land to *B* for the same price, and receives Rs. 1,000 as its price. He stipulates for return of the money or sale of the house in ten days' time. It is clear that though the two transactions are similar, they are not identical, since in the first case the contract is one of loan, which it is not in the other case.[3]

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(1) *Brij Narain* v. *Mangal Prasad*, 46 A. 95 (109) P.C.

(2) *Purushottam* v. *Ram Rao*, 52 M. 856 (860).

(3) *Ram Rattan* v. *Ganga Prasad*, 49 A. 123 F.B.; *Babulal* v. *Kashmiro*, 93 I. C. (A.) 1037.

A debt may be only partially antecedent, as where a subsequent transfer is made for a consideration which only partially includes such debt, in which case, of course, the sons would be liable to that extent on the ground of their pious obligation. But it may be that a transfer by the father manager is partially supported by legal necessity and partially by antecedent debt, in which case, the liability of the sons would be judged by two separate principles, one of which pays due regards to the quantum of alienation from which the other is free.

1358. The liability of the son to pay the father's antecedent debt is both declared by the texts and enforced by the authorities. It is a liability peculiar to those relations, but does not extend to collateral relations, such as nephews and grand-nephews.[1] And the question is, what is an antecedent debt. At one time, that term was understood at least in four senses, as meaning (*i*) debt merely anterior to the father's security though not necessarily independent of it,[2] (*ii*) a debt anterior merely to the suit in which it was sought to be recovered,[3] (*iii*) a debt due to some one other than the transferee[4] and (*iv*) lastly, as a debt which was both anterior to and independent of the father's security sought to be enforced.[5]

1359. The last view has now received the *imprimatur* of the Privy Council. Antecedent debt must then mean not only a debt which was incurred prior to the security sought to be enforced but which must also be quite apart from and independent of it. It may be secured or unsecured.[6] If, for instance, the father borrows Rs. 100 to-day and executes a bond therefor six months later, the question of its antecedency would depend upon the intention. If the father borrowed the sum agreeing to give the creditor a bond therefor six months later, the bond so

(1) *Mathura* v. *Raj Kumar*, (1921) Pat. 245 : 62 I.C. 132 F.B.

(2) *Manbahalal* v. *Gopal*, (1901) A. W.N. 57; *Debi Dat* v. *Jadu Rai*, 24 A. 459; *Babu Singh* v. *Bihari Lall*, 30 A. 156; *Ram Dayal* v. *Ajudhia*, 28 A. 328; *Chinnayya* v. *Perumal*, 13 M. 51; *Sami Ayyangar* v. *Ponnammal*, 21 M. 28; *Chithambara* v. *Koothaperumal*, 27 M. 326 followed in *Sheopal Singh* v. *Basant Singh*, 12 O.C. 248, overruled in *Venkatramanaya* v. *Venkataramana*, 29 M. 200 F.B.

(3) *Luchmun* v. *Giridhur*, 5 C. 855 F. B. (First question referred to the F.B.); *Hanuman* v. *Daulat*, 10 C. 528; *Khalilal Rahman* v. *Gobind Pershad*, 20 C. 328; *Surja Prasad* v. *Gulabchand*, 27 C. 762; *Maheswar* v. *Kishun Singh*, 34 C. 184; *Kishen Prasad* v. *Tipan Pershad*, 34 C. 735 (747); *Jagannath* v. *Tulsi Das*, (1898) P.R. 72.

(4) *Harpal* v. *Haralal*, 22 O.C. 16: 50 I.C. 795: in *Pandurang* v. *Bhagwan Das*, 44 B. 341 (345), it was contended that such debt must be the prior debt of the transferee himself but the contention was of course overruled; *Ramman* v. *Ram Gopal*, 21 O.C. 200: 47 I.C. 987; *Kesho Dutt* v. *Ram Sundar*, 22 O.C. 25 : 50 I. C. 880; *Guru Sahai* v. *Girdhari Lal* , 22 O.C. 84: 52 I.C. 75; *Ram Dei* v. *Suraj Baksh*, 23 O.C. 204: 60 I.C. 177; *Pudai Ram* v. *Baijnath*, 23 O.C. 264; *Ram Saran* v. *Mangal Singh*, 23 O.C. 327: 60 I.C. 219; *Bagat Ali* v. *Hazari*, 6 O.L. J. 297; 52 I.C. 108; *Chandika* v. *Widow*, 6 O.L.J. 381; 52 I.C. 449.

(5) *Jamna* v. *Nain Sukh*, 9 A. 493; *Badri Prasad* v. *Madanlal*, 15 A. 75 F.B. (in which however the term was not defined); *Manbahal Rai* v. *Gopal*, (1901) A.W.N. 57; *Ram Dayal* v. *Ajudhia*, 28 A. 328; *Chandra Deo Singh* v. *Mata Prasad*, 31 A. 176 F.B. approved in *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (449) P.C.; *Lachman Prasad* v. *Sarnam Singh*, 39 A. 500 P.C.; overruled in *Brij Narain* v. *Mangal Prasad*, 46 A. 95 P.C.; *Sami Ayyangar* v. *Ponnammal*, 21 M. 28; *Hiraram* v. *Udharam*, 9 N.L.R. 74 : 19 I.C. 861.

(6) *Brij Narain* v. *Mangal Prasad*, 46 A. 95 P.C.; *Lal Bahadur* v. *Ambika Prasad*, 47 A. 795 P.C.; *Anantu* v. *Ram Prasad*, ib., 295; *Gauri Shankar* v. *Sheonandan*, ib., 384; *Chandu Lal* v. *Mukandi*, 87 I.C. 40 : (1925) L. 503; *Surendra Nath* v. *Brindavan*, (1925) C. 545; *Chotu Ram* v. *Narayan*, 90 I.C. (N.) 210; *Awadh Ram* v. *Mahbub Khan*, (1924) O. 255.

given would not be for an antecedent debt, because the two form part of the same transaction. If, on the other hand, the father borrowed the money as a parol debt, promising to pay it six months later, and on his failure to pay it, he gave him the bond as a security, then it would be a bond given for an antecedent debt. Even a mere renewal of a debt may make the latter antecedent, especially where the renewal is a fresh contract, or is upon fresh terms.[1]

1360. Of course, a bond may be partially for an antecedent debt and partially for a debt presently advanced. In that case, the son's liability will be limited to the extent of the debt which is antecedent, or is supported by legal necessity, or benefit.

1361. An antecedent debt must, of course, be itself not tainted with illegality or immorality.[2] If *A* borrows money from *B* for an illegal purpose and he then borrows from *C* to pay off *B*, the fact that *C* has lent money to *A* to discharge his antecedent debt is not sufficient to validate his claim. He must further show either that he had made enquiry and was satisfied that the antecedent debt was legal or that it was in fact so.[3] A debt may be antecedent, though it may bear an excessive rate of interest or might have been recklessly or imprudently incurred. The defences open to a coparcener are not available to the son. His liability is as large as the father's powers are great. The only qualification upon his power is that the debt must not be tainted with illegality or immorality.[4]

1362. No Antecedent Debt.—In order that debt might be antecedent there must be a debt paid and not merely promised. The father mortgaged the family property, to redeem which he agreed to sell it, and a sale deed was drawn up, whereupon one Dalip Singh sued for pre-emption and obtained a decree for Rs. 13,000, which was paid to the father, which he appropriated to his own use. He had, during the pendency of the pre-emption suit, otherwise redeemed the mortgage. To sons sued to set aside the sale to the pre-emptor, Dalip Singh, as neither made for an antecedent debt nor supported by legal necessity. On appeal to the Privy Council, it was argued that the sum of Rs. 13,000 paid to the father to pay off the mortgage constituted an antecedent debt and that the fact that the father had not used it for that purpose was immaterial, to which their Lordships replied that "if the present contention is acceded to, it would mean that a contract for loan which never was completed, to pay off a previous debt otherwise discharged, would become an 'antecedent debt.' The contention is on the fact of it absurd."[5]

1363. Father's Illegal or Immoral Debts.—The son is not liable to pay off his father's debts incurred for illegal or immoral purposes. Consequently, where the father's transfer has been made for a consideration tainted with illegality or immorality[6] the son is entitled to impugn it

(1) *Ram Rakha Singh* v. *Ganga Prasad*, 49 A. 123 F.B.; *Babu Lal* v. *Kashmiro*, 93 I.C. (A.) 1037, *contra* in *Babu Ram* v. *Mahadeo Ram*, 98 I.C. (A.) 1012 : (1927) A. 127.

(2) *Madan Gopal* v. *Sati Prasad*, 39 A. 485; *Sheo Prasad* v. *Balwant Singh*, 98 I.C. (A.) 1023: (1927) A. 150.

(3) *Baran Deo* v. *Rupnarain*, 11 I.C. 654.

(4) *Bansidhar* v. *Pandurang*, (1925) N. 196.

(5) *Jawahir Singh* v. *Udai Parkash*, 48 A. 152 P.C.

(6) *Sheo Dayal* v. *Jagannath*, 8 A.L.J. 992; *Pokhpal Singh* v. *Chhidu Singh*, 9 A.L.J. 653; *Kanhaiyalal* v. *Niranjan*, 47 A. 351; *Brij Narain* v. *Mangal Pra-*

on that ground, and in hat case the alienee may forfeit his property, unless he is able to protect his alienation by appealing to some equity in his favour.

But since the right of the son to impeach his father's unwarranted alienation rests on the ground that he was a coparcener on that date and that the father could not convey away his coparcenary interest for a consideration not binding upon him, it follows that such a plea is not open to a son not born[1] or at least begotton[2] at the the date of that transfer. (§ **162.**) Where, however, the son was in existence at the date of the debt he is entitled to repudiate it if he can shew that it was incurred for a purpose which Hindu Law regards as "illegal or immoral," or *avyavaharik* in the sense of the following texts:—

Manu.—"Money due by a surety, or idly promised, or lost at play, or due for spirituous liquor, or what remains unpaid of a fine and a tax or duty, the son (of the party owing it) shall not be obliged to pay."[3]

Brihaspati.—"51. Sons shall not be made to pay (a debt incurred by their father) for spirituous liquor, for losses at pay, for idle gifts, for promises made under the influence of love or wrath, or for suretyship, nor the balance of a fine or toll (liquidated in part by their father)."[4]

Ushanas.—"A fine or the balance of a fine, likewise a bribe or a toll or the balance of it are not to be paid by the son, neither shall he discharge a debt which is not lawful—*avyavaharik.*[5] (अव्यावहारिक)."

Gautam.—"Money due by a surety, for a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or for gambling and a fine shall not involve the sons of the debtor."[6]

1364. It will be thus seen that the textual authorities instance nine main heads of debts which the son need not pay. They are:—

(1) Debts due for spirituous liquor;[7]

(2) Debts due for lust;

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sad, 46 A. 95 P.C.; *Jokharmal* v. *Eknath*, 24 B. 343.

(1) *Raja Ram* v. *Luchmun*, 8 W.R. 16; *Bholanath* v. *Kartick*, 34 C. 372; *Hazarimal* v. *Abani Nath*, 17 C.L.J. 38 (48); *Fazulbhoy* v. *Sadanund*, 5 Bom. L. R. 678; *Sitaram* v. *Varihar*, 12 Bom. L.R. 910; *Naro* v. *Paragowda*, 19 Bom. L. R. 59 (75); *Chattarpal Singh* v. *Natha*, 3 A.L.J. 38; *Chuttan Lal* v. *Kallu*, 33 A. 283; *Suraj Prasad* v. *Makhan Lal*, 44 A. 382 *Partab Singh* v. *Bohra*, 45 A. 49 (52); *Mohesh* v. *Goswami Banwari Lal*, 18 O.C. 162: 31 I. C. 717; *Yekeyamian* v. *Agniswaran*, 4 M. H.C.R. 307; *Sabapathi* v. *Somasundaram*, 16 M. 76; *Chinnu* v. *Kalimurthi*, 35 M. 47 F.B.; *Soundara* v. *Saravana*, 30 M.L.J. 592: 34 I.C. 794; *Ganesh* v. *Tulja*, 26 M.L.J. 460: 24 I.C. 696; *Sardar Singh* v. *Ajit Singh*, 2 C.P.L. R. 141; *Moti* v. *Kanlya*, 5 N. 181 (188); *Narayan* v. *Dhudabai*, 21 N.L. R. 33: (1925) N. 209; *contra* in *Tulshi Ram* v. *Babu*, 33 A. 654; *Bhup Kunwar* v. *Balbir Sahai*, 44 A. 190; *Partab Singh* v. *Bapra*, 45 A. 49.

(2) *Deonarain* v. *Ganga Singh*, 37 A. 162; *Sabapathi* v. *Soma*, 16 M. 76; *Venkata* v. *Gatham*, 27 M. L. J. 580; *Dwarka Das* v. *Krishna*, 2 L. 114: 61 I. C. 628; *Sobbaram* v. *Makdu*, 12 C.P. L.R. 63, *contra* in *Gowra* v. *Chummun*, (1864) W. R. 340; *Bhup Kunwar* v. *Ballier Sahai*, 44 A. 190.

(3) Manu, VIII-159; 25 S.B.E. 282.

(4) Brihaspati, XI-51; 33 S. B. E. 329.

(5) Cited in the Mitakshara, Bk. II, § 47, cited in *Chhakauri* v. *Ganga Prasad*, 39 C. 862 (867); *Khagindra* v. *Nanak Chand*, (1909) P.R. No. 24, 1 I. C. 13.

(6) XII-41.

(7) Son not liable—*Khagindra* v. *Nanak Chand*, (1909) P.R. No. 24 : 1 I.C. 13.

(3) Debts due for gambling;
(4) Unpaid fines;
(5) Unpaid tolls;
(6) Useless gifts; or promises without consideration, or made under the influence of lust or wrath;
(7) Suretyship debts;
(8) Commercial debts;
(9) *Avyavharik* debts.

Of these the first three would still be regarded as "immoral," while the fourth and fifth are non-obligatory on the son, because "they are ready money payments, for which credit will have been given at the risk of him by whom they ought to have been received,[1] while the sixth would not constitute even an enforceable contract against the father. The seventh and eighth clauses are now largely inoperative, since the son's liability to pay for his father's suretyship except for appearance and honesty is now established, while he is equally liable to pay his father's trade debts. Trade appears to have been despised in the olden days and the classical writers, therefore reprobated trade debts, but their prohibition is now obsolete.[2] There remain the *avyavharik* debts which have been loosely rendered as "illegal or immoral debts,"[3] but which only roughly convey the sense implied in that term. The word has been variously translated as "unusual," "unlawful," and "illegal and immoral," the last phrase being commonly used by the text writers to describe the debts which the son is not liable to pay. The word "*avyavharik*" is a loose expression and merely means what is not lawful, usual or customary, or which, according to Colebrooke, is repugnant to good morals. The illustrations given are in themselves diffuse, and they are, of course, not exhaustive. This has led to divergence of views reflected in the judicial decisions to be presently examined.

1365. The conflict in cases is due to the various meanings ascribed to the word "*avyavharik.*" According to the Calcutta High Court, it means no more than a debt which is not lawful, usual or customary.[4] Even if it did so, its obscurity is scarcely relieved, since what is usual or customary in one locality or community may not be so elsewhere. In agreeing with this view, the Madras court defines the term to mean "a debt which is not supportable as valid by legal arguments, and on which no right could be established by the creditor in a court of Justice,"[5] but this is not the sense in which it was defined in Calcutta. Both the courts, however, reject its narrow interpretation accepted in Bombay, where, while admitting the meaning of the word, the court laid down the narrow

(1) Strange's Hindu Law, Ch. VIII, P. 167.
(2) *Achutramayya* v. *Ratnajee*, 49 M. 211.
(3) In *Achutaramayya* v. *Ratnajee*, 49 M. 211, it is said that this phrase was coined by the Privy Council in (1874) *Girdhari Lal* v. *Kantoo Lal*, 14 B. L.R. 187 (197) P.C.; but reference to that case does not support that view.
(4) *Chhakauri* v. *Ganga*, 39 C. 862 (868), followed in *Venugopala* v. *Ramanadhan*, 37 M. 458 (460); *Gurusarn* v. *Mohan Lal*, 4 L. 93; *Ramakrishna* v. *Narayan*, 40 B. 126 (130); *Hanmant* v. *Ganesh*, 43 B. 612.
(5) *Venugopala* v. *Ramanadhan*, 37 M. 458 (460).

rule, that the son was not liable for a debt which the father ought not, "as a decent and respectable man" to have incurred[1] This view has not found favour with the same[2] and other courts and is obviously too narrow even when taken in conjunction with Brihaspati's illustrations.

1366. The subject for discussion may be classified as under:—

(1) Debts which by reason of their illegality or immorality neither bind the father nor the son. (§ **1367.**)

(2) Those, which, though illegal and immoral, still bind the father but not the son (§§ **1368, 1374-1380**).

(3) Those, which, though illegal or immoral, still bind both the father and the son (§§ **1369-1373, 1380-1389**).

Debts wholly void.

1367. Debts which are so illegal or immoral as to bind neither the father nor the son must be those which fall under the ban of S. 23 of the Contract Act. As such, they create no legal obligation of any kind, and fall into the domain of the general law of contracts. Such is an agreement to pay monthly allowance to the parents for giving their daughter in marriage,[3] or money advanced to assist the borrower in visiting brothels and bringing in prostitutes,[4] or for gambling,[5] drinking[6] or stifling a prosecution for a non-compoundable offence,[7] giving a bribe,[8] say, to a widow on condition that she would make no adoption[9] or that she would adopt the payer's nominee.[10] An agreement in the nature of a marriage brokage is illegal; consequently, an agreement between *A* and *B*, that *B's* daughter shall marry *A's* son, and that if she fails to do so, *B* shall pay a sum of Rs. 5,000 to *A*, is illegal, being opposed to public policy.[11] These cases, by no means exhaustive, are cited here merely to shew that in cases in which the object or consideration is illegal or immoral, the transaction itself becomes a *nudum pactum*, or destitute of any legal value, and neither party is entitled to enforce the agreement. The subject will be found discussed in greater detail elsewhere.[12]

1368. Leaving aside such debts and alienations, there remain those in which the father's liability is personal and such as need not be shared by the son. Such is the money borrowed to pay a fine[13] or a decree obtained against him for a purely criminal act, *e.g.*, theft and misappro-

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(1) *Durbar* v. *Khachar*, 32 B. 348.

(2) *Ramakrishna* v. *Narayan*, 40 B. 126 (130), dissenting from *Durbar* v. *Khachar*, 32 B. 348; *Hanmant* v. *Ganesh*, 43 B. 612.

(3) *Baldeo* v. *Jumna*, 23 A. 495.

(4) *Rajendra* v. *Abdul Hakim*, 39 I. C. (C.) 767.

(5) *Subbaraya* v. *Devendra*, 7 M. 301; *Ramalinga* v. *Muthu*, 29 I.C. (M.) 573.

(6) *Khagindra* v. *Nanak Chand*, (1909) P.R. No. 24 : 1 I.C. 13.

(7) *Dal Sukhram* v. *De Breton*, 28 B. 326.

(8) *Attar Singh* v. *Haku*, 24 I.C. (L.) 692.

(9) *Jagannadha* v. *Kunja*, 49 I.C. (M.) 929.

(10) *Sita Ram* v. *Harihar*, 12 Bom.L. R. 910.

(11) *Deverayan* v. *Mutturaman*, 37 M. 393; *Venka* v. *Lakshmi*, 32 M. 184 F.B.; *Vaithyanatham* v. *Gangaraju*, 17 M. 9; *Pitambar* v. *Jagjiran*, 13 B. 131-n; *Baldeo* v. *Jamna*, 23 A. 495; *Mg Shwe* v. *Mg. Po*, (1918) 2 U.B.R. 119 : 50 I.C. 551.

(12) Gour's Law of Transfer, 16th Ed., §§ 274-296.

(13) *Garuda* v. *Narsila*, 48 I.C. 740; 35 M.L.J. 661.

priation[1] or for malicious prosecution.[2] It is said that where a Hindu father becomes liable for money taken by him and misappropriated under circumstances which constitute the taking itself a criminal offence, it is not recoverable from the son.[3] But, between this and a mere dishonest misappropriation of money there is a dividing line, since the courts have held the son liable for the father's misappropriation in his character as agent,[4] or as trustee of a public charity,[5] A misappropriation of money, whether dishonest, and so criminal, or merely wrongful, always implies a civil liability to make good the amount misappropriated. There is nothing illegal or immoral in discharging this obligation, even though the act may also amount to a crime, in which case the only question is whether the payment made or promised was in discharge of the civil liability or amounted to the compounding of an uncompoundable offence. If the former, the son is liable, if the latter, there is no legal liability at all, as the transaction is illegal.[6] The fact that the father's misappropriation is criminal only shews that it is a misappropriation of a serious nature; but that fact aggravates the father's liability but it is no ground for exoneration of the son.

1363. A debt is neither illegal nor immoral, because the father subsequently misappropriated it. Such was the case of the Patwari who, being authorised to make collections for the plaintiff, received certain sums which he failed to bring into account. He mortgaged his family lands to the plaintiff. On his death his sons pleaded their non-liability on the ground that their father had misappropriated the money. But the court upheld the plaintiff's suit for the money holding that the plaintiff had taken security for the Patwari's debt, which was a debt when he received the money, and his subsequent misappropriation of it could not exonerate the sons, though they would be exempt if the taking itself were a criminal offence.[7] But in this case the Patwari would have been convicted under S. 403 of the Indian Penal Code. As Tyndall, C.J., observed: "We have no doubt that in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit."[8] A threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor,[9] provided that in consideration of such security he does not agree to stifle a prosecution.

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(1) *Mahabir* v. *Basudev*, 6 A. 234. *Niddha Lal* v. *Collector*, 14 A.L.J. 610: 25 I. C. 209; *Sabhaddi Lal* v. *Gobind Singh*, 46 A. 616; *Jagannath* v. *Jugal Kishore*, 48 A. 9 (10, 11); *Pareman Dass* v. *Bhattu*, 24 C. 672 (674); *Chhakauri* v. *Ganga*, 39 C. 862; *Hanmant* v. *Ganesh*, 43 B. 612 (615, 616).

(2) *Sunder Lal* v. *Raghunandan*, 3 Pat. 250 (254).

(3) *McDowell* v. *Ragavan*, 27 M. 71; *Jagannath* v. *Jugal Kishore*, 48 A. 9.

(4) *Venkatacharyulu* v. *Mohana*, 44 M. 214.

(5) *Garuda* v. *Narella*, 35 M.L.J. 661 : 48 I.C. 740.

(6) *Jaikumar* v. *Gouri Nath*, 28 A. 718.

(7) *Rameshwar* v. *Durga*, 90 I.C. 954: (1926) Pat. 14, following *Chakouri* v. *Ganga Prosad*, 39 C. 862; to the same effect, *Jagannath* v. *Jugul Kishore*, 23 A. L.J. 882: 89 I.C. 492: (1926) A. 89; *Ganesh Prasad* v. *Jot Singh*, 87 I.C. 1017: (1925) O. 719.

(8) *Keir* v. *Leeman*, L.R. 9 Q.B. 371 (392): 72 R. R. 398; cited in *Jaikumar* v. *Gauri Nath*, 28 A. 718 (721).

(9) *Flower* v. *Sadler*, 10 Q.B.D. 572; *Kessowji* v. *Hurjiwan*, 11 B. 566; *Jaikumar* v. *Gauri Nath*, 28 A. 718 (721).

1370. In all offences relating to property the act has a dual aspect. If it involves the deprivation of one's property, there is nothing wrong in obtaining its restitution or compensation in lieu thereof; the only proviso being that if the act amounts equally to the commission of a non-compoundable offence, then, while the owner is entitled to his reparation, he must not, at the same time, compound the offence. In this view, the court held the son liable on a promissory note passed by the father on his failure to account for the money entrusted to him as a servant,[1] agent,[2] or manager,[3] or which he received as trustee of another person,[4] or of a public charity. The courts are now agreed that the son is bound to discharge his father's liability for misappropriation or breach of trust,[5] and for damages caused by his wrongful act.[6] This was denied in some cases,[7] which have been distinguished on the ground that in them the father's misappropriation was from the first a criminal[8] offence. It is suggested that the determining factors in such cases are the nature and degree of the crime, which must depend upon the particular facts of each case.[9] If the element of criminality and its degree are such as render the act first and foremost criminal, then the liability, being essentially immoral, the son would be exempt from it.

1371. It would seem that the presence of dishonesty is not incompatible with the son's liability for restitution of the money. But where the father had dishonestly received money, it would be honest of the son to do so.[10] The mere fact that there was dishonesty at some stage of the transaction does not exempt the son from liability. Apart from the stage, there are degrees of dishonesty as there are degrees in crime, and the trend of modern cases would seem to incline to the view that while the son will escape his liability for the father's crime, he cannot escape it if it fell short of it, and was, say, a mere tort, or an actionable wrong.[11] (§ 1389.).

1372. But while the son is not liable for the father's criminal act he is liable for his release from conviction, as in that case another principle comes into play.[12] It was held in a case in which one Sheo Jagat committed dacoity of the plaintiff's property at the time of the mutiny. Such offenders were then liable to the sentence of death, or at least a long term of imprisonment, but Government permitted wrong-doers to

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(1) *Jaikumar* v. *Gaurinath*, 28 A. 718; (2) *Nidha* v. *Collector*, 14 A. L. J. 610: 35 I.C. 209.

(3) *Gurdaru Das* v. *Mohan Lal*, 4 L. 93.

(4) *Hanmant* v. *Ganesh*, 43 B. 612; *Toshanpal* v. *District Judge*, 51 A. 386 O.A. 56 A. 548 P.C. (High Court decree varied on facts.)

(5) *Toshanpal Singh* v. *District Judge*, 56 A. 548 P.C.; *Chhakauri* v. *Ganga*, 39 C. 862; *Krishna* v. *Radha*, 16 I.C. (C.) 410; *Peary Lal* v. *Chandi Charan*, 11 C. W.N. 163 (169); *Hanmant* v. *Ganesh*, 43 B. 612; *Natesayyan* v. *Ponnusami*, 16 M. 99; *Kanemar* v. *Krishna*, 31 M. 161; *Gurunathan* v. *Addepally*, 31 M. 472; *Venugopala* v. *Ramanadhan*, 37 M. 458: 4 I.C. 1090; *Medai* v. *Veerabudra*, 19 M.L.J. 759; *Hanumant* v. *Sonadhari*, (1919) 4 Pat. L.J. 653; *Gursarn* v. *Mohan Lal*, 4 L. 93; *Kartar Singh* v. *Harjimal*, (1879) P.R. 728; *Jagannath* v. *Jugal Kishore*, 48 A. 9.

(6) *Chakkauri* v. *Ganga*, 39 C. 862.

(7) *Pareman* v. *Bhattu*, 24 C. 672; *Mahabir* v. *Basdeo*, 6 A. 234; *McDowell* v. *Ragava*, 27 M. 71.

(8) *Chakkauri* v. *Ganga*, 39 C. 862 (871, 872).

(9) *Jagannath* v. *Jugal Kishore*, 48 A. 9 (10).

(10) *Natesayyan* v. *Ponnusami*, 16 M. 99 (104), followed in *Gursarn* v. *Mohan-lal*, 4 L. 93.

(11) *Chakkauri* v. *Ganga*, 39 C. 862; *contra* in *Deoba* v. *Babia*, 23 N.L.R. 134: 103 I.C. 809: (1927) N. 337 (but pious obligation overlooked).

(12) S. 11 (*i*).

make restitution and thus escape trial and punishment. For this purpose Sheo Jagat sold his zemindari, subject to a previous mortgage, to the plaintiff for Rs. 2,000 in satisfaction of his claim. The plaintiff sued to redeem the mortgage, to which the three sons of Sheo Jagat were made parties. They challenged the plaintiff's sale as illegal and immoral, but the court upheld it, holding that it was perfectly lawful for the father to sell his ancestral property to effect his release from prison.[1] This case is indistinguishable from those in which law permits the compounding of an offence by the payment of compensation for the causing of civil injury as distinct for the commission of crime for which the offender and the offender alone is liable.

1373. But these cases lie on the borderland between crimes and delicts upon which there is room for a difference of opinion. And so it has been held that where the father is clearly guilty of embezzlement[2] or forfeits a bond for keeping the peace, or for his good behaviour[3] the son is not bound to discharge his father's obligation.

Son not liable.

1374. As such, the son has been held not liable on a decree for damages, being the price of grain stolen by the father,[4] or where the father has misappropriated under circumstances which constituted the taking itself a criminal offence.[5] Such was the case of the father, who, as agent of a Zamindar, committed criminal breach of trust in respect of certain monies belonging to his employer, for which he was convicted and sentenced to two years' imprisonment. His employer also sued him and obtained a decree in execution of which his occupancy land held at fixed rates of rent was sold, whereupon his two minor sons sued to recover two-thirds of the holding on the ground that the debt did not bind them. It was held that as the father had been convicted of the offence, and the embezzlement was initially a crime, the debt must be deemed to be tainted with such illegality or immorality as did not bind the issue. The same view prevailed where the father had forfeited his bond for keeping the peace, or for his good behaviour,[6] *a fortiori* where he had to pay a fine[7] which, at any rate, is not a "debt" and so irrecoverable from the son. The intention, in such cases, is a matter of substance, and therefore, the first motive, as showing the intention, must be principally regarded.

1375. Immoral Debts.—A debt may be immoral according to the old ideas, and yet it may not be immoral so as to be irrecoverable. One such plea was overruled in a case in which the plaintiff had lent money to the uncle and nephew, being two members of a joint family, for the latter's marriage, being the cost he had to pay for his bride which the Shastric law denounces as illegal, and the marriage so brought about is the *asur* marriage which it disapproves. It was pleaded for the defendants

(1) *Duleep Singh* v. *Sree Kishoon*, 4 N.W.P.H.C.R. 83, following *Lachman Koer* v. *Madaree Lall*, (1850) 5 S. D.A.N.W.P. 327; *Beni Ram* v. *Man Singh*, 34 A. 4 (7); earlier cases held to be no longer good law, but their principle was followed.

(2) *Mahabir* v. *Basudeo*, 6 A. 234.

(3) *Hiralal* v. *Chandrabali*, 13 C. W. N. 9: 1 I.C. 153.

(4) *Pareman Dass* v. *Bhattu*, 24 C. 672 (674).

(5) *Toshanpal Singh* v. *District Judge*, 56 A. 548 P.C. (varying O.A. 51 A. 386); *McDowell* v. *Ragava*, 27 M. 71 (75).

(6) *Hiralal* v. *Chandrabali*, 13 C. W. N. 9: 1 I.C. 153.

(7) *Nhanee* v. *Hureeram*, 1 Borr. 90 (101).

that the plaintiff had lent money for an illegal object and that, therefore, it could not be sued for. But the court held that the *asur* form of marriage, though disapproved, was not illegal, and was in fact quite customary, and that, therefore, the loan could not be repudiated as made for an illegal purpose. It may be a reprehensible conduct on the part of a Government servant to trade in contravention of the Government Servants' Conduct Rules, but the son cannot repudiate his father's trade debts on that account, since such contravention amounts to no more than a breach of duty and is neither illegal nor immoral.[1] such is the father's conduct in wrongfully cutting down certain trees and demolishing a house,[2] closing up a channel[3] or otherwise meddling with another's property.[4] So, the son was held liable to repay money borrowed by the father for subsidising wrestling matches, as distinct from betting on them[5] or for the prosecution of the abductor of his wife,[6] or accused of the murder of the father.[7]

The term "immoral," when used in connexion with the father's debt, then implies common immorality and not that of the textual or artificial kind. Even then the debt must be clearly connected with it.

1376. It is, of course, obvious that the father may borrow money for debauchery from *A*, and then borrow more money from *B* to pay off *A*. Here *B's* debt cannot be repudiated by the son as immoral because it was advanced to satisfy an antecedent debt. But in such a case it will still be a question whether the debt was an "antecedent debt" within the meaning of law, which the son is under the legal duty to repay. Reserving this question for future consideration, the question of immorality must be considered in the light of Brihaspati's texts already cited. According to him, if the father incurs debt for drink or debauchery or reckless display or for any improper purpose, it is immoral. "Neither sins nor the expiation of them are hereditary."[8] In order to be immoral, a debt must promote immorality. Any loan made to an immoral man does not become immoral. And regard must be had to the character of the loan. In one case, a somewhat novel contention was made that the son was not liable to pay for the cloth purchased by the father who was a habitual drunkard. It was pointed out that there was no connexion between the two and the son could not evade his liability on the ground of his father's general immorality.[9]

Father's promise to pay Barred Debt.

1377. It has been already stated that the coparceners are not bound to pay a debt acknowledged by the manager after it is barred by time. It is, however, said, that though this is the rule, the fact that the son is under a pious obligation to pay his father's debt renders him liable to pay his barred debts, if duly revived by an acknowledgment. It is conceded that without an acknowledgment the son would not be under any obligation to pay his father's barred debt.[10] But a barred debt is a good

(1) *Ram Krishna* v. *Narayan*, 40 B. 126 (129).
(2) *Chandrika* v. *Narain*, 46 A. 617.
(3) *Chhakauri* v. *Ganga*, 39 C. 862.
(4) *Gursarn Das* v. *Mohan Lal*, 4 L. 93; *Matadin* v. *Maharaj*, 12 O.L.J. 33: 85 I.C. 959: (1925) O. 325.
(5) *Jai Ram* v. *Shankar*, 9 I.C. (O.) 406.
(6) *Anokh Singh* v. *Sapuran*, (1923) L. 660.
(7) *Maruthappan* v. *Niraikulathan*, I. L.R. (1937) M. 943.
(8) *Nhanee* v. *Hureeram*, 1 Bor. 84 (90).
(9) *Hurnarain* v. *Arur Singh*, (1872) P.R. 44; *Sri Narain* v. *Raghubans Rai*, 17 C.W.N. 124 P.C.; 17 I.C. 729.
(10) *Subramania* v. *Gopala*, 33 M. 308, *Srinivasa* v. *Municipal Council*, 22 M.

foundation for a written promise to pay signed by the party liable to be charged therewith.[1] The question then arises whether, if the father makes such promise, the son is bound to pay the debt? That he is, is now held in several cases, in one[2] of which the court observed: "The fact that the debt was barred by the Act of Limitation did not affect the existence of the debt and there was nothing illegal or immoral in the action of the father promising to pay it. The new note operated as a renewal of the obligation. It was a good debt and the son is bound to pay it from any assets of his father,"[3] and *a fortiori*, the father may alienate joint property therefor.[4] In another case the same view was justified on the ground that Hindu Law did not recognize any rule as to the extinction of claims by the efflux of time,[5] to which may be added, that Hindu Law regards the father, the son, the grandson and the great-grandson as a single entity, and strictly speaking, a promise by one is a promise by the other, but the fiction of this rule has of course its limits.

Barred Debts.

1378. The question whether the pious obligation of the son to pay his father's debt extends even to the debt after it has become barred by time, is now decided by the consensus of authorities in the affirmative, the view of the courts being that since Hindu Law contains no rule of limitation, but, on the other hand, provides for the payment of debt from generation to generation until it is fully discharged, and since the statute of limitation merely bars the remedy of the creditor but does not extinguish the debt, the son's liability is unaffected by any rule of law personal or statutory. Consequently, while the creditor cannot resort to the coercive process of law to realize his debt after it is time-barred, it does not put an end to the son's moral obligation to pay the debt if he is so minded. Such payment, though optional, is nonetheless morally obligatory, and, as such, it affords a good ground for contribution from others equally liable for it.[6] As will be seen in the sequel, the same rule extends to the widow who, with the son, is equally under a pious obligation to discharge her husband's debt—if necessary, by alienation of her inherited property, so as to bind the reversioner.[7] So far as regards the son, it has been held that he is liable to pay a debt acknowledged or renewed by the father even after it has become barred by time[8] and he is equally liable on his renewal of a debt incurred when he was a minor.[9]

242; *Haro* v. *Paragauda*, 41 B. 347; *Chitnavis* v. *Nathu Sao*, 20 N.L.R. 106.

(1) Ss. 25 (3) and 60, Contract Act, *Subramania* v. *Gopala*, 33 M. 308 (309).

(2) *Narayanasami* v. *Samidas*, 6 M. 293.

(3) *Narayanasami* v. *Samidas*, 6 M. 293; *Ramkishan* v. *Chhedi Rai*, 44 A. 628; *Gauri Shankar* v. *Sheonandan*, 46 A. 384; *Gajadhar* v. *Jagannath*, 46 A. 775 F.B. (overruling *contra* in *Indar Singh* v. *Sarju Singh*, 8 A.L.J. 1099: 11 I. C. 737; *Dalip Singh* v. *Kundan Lal*, 35 A. 207); *Shib Nath* v. *Alliance Bank*, (1915) P.R. No. 3: 25 I.C. 480; *Har Hari Baksh* v. *Bharat*, 16 O.C. 485: 20 I.C. 590; *Sitla Bux* v. *Jagat Pal*, 86 I. C. (O.) 693, contra *Deo Narayan* v. *Lall Hari*, 20 O.C. 1: 38 I.C. 821.

(4) *Gajadhar* v. *Jagannath*, 46 A. 775 F.B.

(5) *Ram Kishan* v. *Chhedi Rai*, 44 A. 628.

(6) *Per* Westropp, C.J., in *Bhala* v. *Parbhu*, 2 B. 67 (73); *Gajadhar* v. *Jagannath*, 46 A. 775 F.B.: 80 I. C. 684 (689) (overruling *contra* in *Indar Singh* v. *Sarju Singh*, 8 A.L.J. 1099: 11 I.C. 737; *Dalip Singh* v. *Kundan Lal*, 35 A. 207; Shankar v. Sheonandan, 46 A. 384 (388).

(7) S. 339 (5).

(8) *See* cases *supra*.

(9) *Kundan Bibi* v. *Sree Narayan*, 11 C. W. N. 135; *Karam Chand* v. *Basant Kuar*, (1911) P.R. No. 31: 11 I. C. 321; *Ram Rattan* v. *Basant Rai*, 2 L. 263 (268, 269).

Limitation.

1379. The limitation applicable to a suit against the son depends upon the nature of the claim laid. Such a claim may be instituted, (*i*) against the son as a member of the joint family, or (*ii*) by reason of his pious obligation, or (*iii*) because he is the heir and legal representative of the father. In the first case, if the suit is on a mortgage executed by the father and the suit is to enforce the mortgage then the limitation would be as prescribed by Article 132 and the starting point of limitation would be the accrual of the cause of action.[1] But if the suit be not on the mortgage, and if it is not binding on the son because the debt secured was neither antecedent nor supported by family necessity or benefit, then the courts hold the suit against him as still maintainable on the ground of his pious obligation to discharge his father's debt, and in that case, it has been held, that as regards limitation, the suit would be subject to Article 120,[2] from the date when the debt became payable.

A Father's Suretyship.

1380. But the courts are not agreed on the subject of the son's liability to pay for his father's suretyship. The question cannot be answered in a general way without reference to the nature of the security given by the father, which, though variously classed by other Smritikars, is thus classified by Brihaspati into four heads: (*i*) for paying the debts of another; (*ii*) for delivery of the debtor's effects; (*iii*) for appearance; iv) for honesty.[3] The son is expressly declared liable for the first two[4] and the only question is whether he is equally liable for the other two. The texts on the subject cannot all be reconciled, and the Bombay High Court holds the son actually bound also in respect of the latter two kinds of security, on the ground that, being an antecedent debt of the father, the son is *prima facie* bound, unless the son can shew it to be illegal or immoral![5] But if he shows this, he will be exonerated from all liability without reference to the fact whether the surety is of the former or of the latter kind. In a later case in which the son's liability to discharge his father's liability as a surety was reaffirmed, it is held to extend no further to his grandson, unless the grandfather had, in becoming a surety received some consideration for it.[6] But it is submitted, that there is no distinction in principle between the liability of the son and that of the grandson, and the other courts do not discriminate between the two.[7] In one case, the father had executed a surety bond stipulating that the mortgagee could realize his claim from his land, if he failed to realize it from the land of the debtor mortgaged to him. It was found that this bond was recklessly given without any necessity or benefit, and though it was one reason given for dismissing the claim, the other and more

(1) *Brijnandan* v. *Bidya*, 42 C. 1068 (1092) F.B.

(2) *Surja Prasad* v. *Golap Chand*, 27 C. 762.

(3) *See* texts collected in Mandlik's H.L., 107, 108; *Kotapalli* v. *Kanuparli*, 58 M. 375; *Dwarka Das* v. *Kishen Das*, 55 A. 675.

(4) Brihaspati, IX-40, 41; Gautam, II-41; Yadnavalkya, II-55; Vyas, cited in Virmitroday, I-100, p. 2; *Tukaram Bhat* v. *Ganga Ram*, 23 B. 454 (456); *Moolchand* v. *Krishna*, Bellasis, 54.

(5) *Tukaram Bhat* v. *Ganga Ram*, 23 B. 454 (459, 460).

(6) *Narayan* v. *Venkatacharya*, 28 B. 408 (411).

(7) *Maharaja of Benares* v. *Ramkumar*, 26 A. 611; *Sitaramaiya* v. *Venkatramanna*, 11 M. 373; *Chetti Kulam* v. *Chetti Kulam*, 28 M. 377; *Raghunath* v. *Natesa*, 17 M.L.J. 283; *Kameswarma* v. *Venkata*, 38 M. 1120; *Basik Lal* v. *Singeswar*, 39 C. 843; *Gopal Rao* v. *Berar Manufacturing Co.*, 1 N.L.R. 173; *Bhagwan Das* v. *Salig Ram*, (1886) P.R. 60.

substantial reason was that the creditor's remedy had become barred by time.[1]

1381. Right of Receiver in Bankruptcy.—The question whether, on the father's insolvency, his son's coparcenary interest vests in the assignee or receiver with his own interest depends on the definition of "property" in S. 2 (*e*) of the Presidency Towns Insolvency Act, 1909,[2] which, in the absence of a corresponding definition in the Provincial Insolvency Act,[3] was held to extend equally to cases under it. The definition of "property" is expressed to "include any property over which, or the profits of which, any person has disposing power, which he may exercise for his own benefit."[4] It was held,[5] though reluctantly, in some cases, and, following the *stare decisis*,[6] that the term was sufficiently wide, *prima facie* to embrace the Mitakshara son's coparcenary interest in the joint family, though it was at the same time conceded that it was open to the son to show that his share was exempt by reason of the character of the father's debts. It is submitted that the principle of *stare decisis* should not stand in the way of a correct interpretation of the definition which does not *prima facie* include the son's coparcenary share over which the father cannot be said to possess an unqualified disposing power, without which the son's property is not his own. It has since been so held by the Privy Council.[7] The Indian courts have, moreover, held[8] that since the father possesses the right to dispose of his son's interest in ancestral immovable property for the payment of his own debts, not contracted for illegal and immoral purposes, a vesting order made whether under the Presidency[9] or the Provincial Insolvency Act,[10] would suffice to vest that right in the Receiver, who would become possessed of the father's right to alien the ancestral property even though the father should afterwards die, since the right once vested in the Receiver could not be divested from him and vested in the son by right of survivorship. In the legal aspect of the matter, the natural existence of the insolvent is for the purpose of dealing with his estate, artificially continued in the Receiver who can, after the insolvent's death, deal with the estate as he could have done with it were the insolvent still alive.[11] The same prin-

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(1) *Hiralal* v. *Chandrabali*, 13 C.W. N. 9: 1 I.C. 153.

(2) III of 1909.

(3) V of 1920.

(4) The same words occur in S. 60 of the Code of Civil Procedure, S. 266 (XIV of 1882), now S. 60 (V of 1908) which have been similarly interpreted; *Jagabhai* v. *Vijbhukhandas*, 11 S. 37, following *Nanomi Babuasin* v. *Madhun Mohun*, 13 C. 21 P.C.; but *contra* in *Harde Narain* v. *Ruder Perkash*, 10 C. 626 P.C. *Nunna* v. *Chidarboyama*, 26 M. 214.

(5) *Fakirchand* v. *Motichand*, 7 B. 438: *Sardarmal* v. *Aranvayal*, 21 B. 205; *Rangayya* v. *Thanikachalla*, 19 M. 741, followed in *Birhari Lal* v. *Sat Narain*, 3 L. 329 F.B.

(6) *Bihari Lal* v. *Sat Narain*, 3 L. 329 (342) F. B.

(7) *Sat Narain* v. *Bihari Lal*, 6 L. 1 (25) P.C., overruling O.A. *Bihari Lal* v. *Sat Narain*, 3 L. 329 F.B.; *Siddheshwar* v. *Devkali*, 9 Luck. 304 F.B.

(8) *Official Assignee* v. *Ramachandra*, 46 M. 54; *Venkatarayudu* v. *Shivaramakrishnayya*, 58 M. 126; *Sellamuthu Servai*, (In re), 47 M. 57 F.B.; *Sat Narain* v. *Srikishen*, 7 L. 376 (387), affirmed O. A. 17 L. 644 P.C.

(9) *Sat Narain* v. *Srikishen Das*, 17 L. 644 P.C.

(10) S. 28 (2), Act V of 1920, *Sat Narain* v. *Bihari Lal*, 6 L. 1 P.C.; *Bhiswanath Sao* v. *O. R.*, 16 Pat. 60; *Venkatarayudu* v. *Sivaramakrishnayya*, 58 M. 126.

(11) *Fakirchand* v. *Motichand*, 7 B. 438 (443, 444); *Bawan Das* v. *Chiene*, 44 A. 316 (318); *Allahabad Bank* v. *Bhagwan Das*, 48 A. 343; *Om Prakash* v. *Moti Ram*, *Ib.*, 400, *Ram Ghulam* v. *Kailash*, 52 A. 493 F.B.; *Bihari Lal* v.

ciple would, of course, equally apply to a managing member, other than the father, but, in that case, the character of the debt must be such as to be recoverable from the joint family.[1]

1382. Avoidance of Illegal Transfer.—The son being entitled to set aside his father's illegal or immoral transfer, a question arises whether he is entitled to avoid the transfer as a whole or only to the extent of his own interest therein. In Bengal, Behar, the United Provinces and the Punjab, where coparcenary interest is inalienable even for value without the consent of the other coparceners, the father's alienation must stand or fall as a whole.[2] If it is illegal or immoral it must be wholly set aside not excepting even the father's interest, since such interest was incapable of alienation.[3] Where, however, such interest is alienable for value, as it is in Madras, Bombay and the Central Provinces, the transfer would, in such cases, take effect to the extent of the father's interest.[4] Even elsewhere, the court may refuse to disturb the alienee's possession if it has been acquiesced in by the son.[5]

The right of the son or of a coparcener to avoid an alienation passes to his own alienee, so that he becomes entitled to the remedies open to his alienor. A sale purporting to be made for an antecedent debt may be set aside at the instance of the son on proof that the debt was not antecedent. In that case the son, it is said, is not liable to refund the price paid by the purchaser since it cannot be regarded as a debt of the father until the sales have been set aside.[6] Even if so, there is nothing to preclude the court from making it a term of the decree.[7] Indeed, if the court is entitled to take all things into consideration before cancelling an alienation, it has to see what equities the alienee is entitled to,—refund of his money, cost of improvements or the like. It has to see whether the plaintiff has not by his long inaction,[8] latches, acquiescence or the like disabled himself from contesting the alienation.[9] An alienation only partially supported by antecedent debt may be set aside or upheld in accordance with the principle of section 135. Where the alienation is set aside, the plaintiff becomes ordinarily entitled to mesne profits at least from the date of the suit, since the institution of the suit is a repudiation of the sale:[10] of course, there is no question of mesne profits where the alienation is set aside on the son's paying a portion of the price held binding on him, since the alienee's possession cannot then be held to be wrongful.[11]

Sat Narain, 3 L. 329 (342) F.B.; *Sat Narain* v. *Sri Kishen*, 7 L. 376; *Official Assignee* v. *Ramachandra*, 46 M. 54; *Sellamuthu Servai*, (*In re*), 47 M. 87 F.B.; *Seetharama* v. *Official Receiver*, 49 M. 849 F.B.; *Gopala Krishnayya* v. *Gopalan*, 51 M. 342.

(1) *Rangayya* v. *Thanikachella*, 19 M. 74 (77, 78).

(2) *Ballaram* v. *Atma Ram*, (1933) 14 L. 584: *Chiranji Lal* v. *Kartar Singh*, (1925) L. 130; *Luchman Prasad* v. *Sarnam Singh*, 39 A. 500 P.C.

(3) *Sadabart* v. *Foolbash*, 3 B.L.R. 31 F.B., approved in *Balgobind* v. *Narain Lal*, 15 A. 339 P.C.; *Lachman* v. *Sarnam Singh*, 39 A. 500 P.C.; *Chamaili* v. *Ram Prasad*, 2 A. 267 F.B.

(4) *Naro* v. *Paragauda*, 41 B. 347; *Marappa* v. *Rangasami*, 23 M. 89; *Shivanath* v. *Tulshi*, 23 A.L.J. 865: 89 I.C. 480.

(5) S. 167; *Darsu Pandey* v. *Bikramjit*, 3 A. 125; *Bankey Lal* v. *Durga Prasad*, 53 A. 565 F.B.

(6) *Madan Gopal* v. *Sati Prasad*, 39 A. 485 (488); *contra* in *Koer Hasmat Rai* v. *Sundar Das*, 11 C. 396.

(7) *Koer Hasmat Rai* v. *Sundar Das*, 11 C. 396.

(8) *Kamta Prasad* v. *Sidh Narain*, 14 I.C. (A.) 251.

(9) S. 169.

(10) *Bhirjee Nath* v. *Narsing*, 39 A. 61; *Subha Goundan* v. *Krishnan*, 45 M. 419.

(11) *Banwari Lal* v. *Mahesh*, 41 A. 63 P.C.

1383. Limitation.—A suit by or against the son to avoid or enforce the father's debt or alienation is subject to varying periods of limitation according to the nature of the suit and the remedy sought. Taking first the creditor's suit, it is clear that, having the same right both against the father as well as the son, his limitation against the two must be the same. But he is not bound to sue both the father and the son, at the same time. He may sue the father and then the son, but that would not enlarge his limitation, since his cause of action against the two is the same.[1] But he may sue the father and then the son, if the former dies before attachment, though having sued the father the son would be *prima facie* liable unless he can shew that his own interest is exempt as the debt was illegal or immoral. It is held that in such a case, the creditor has the option of suing the son on the original cause of action against the father, or on the basis of the decree obtained against him, or of proceeding against him in execution,[2] and that in the former case if he sues on the decree obtained against the father, he is entitled to the limitation prescribed in Article 120. The liability of the son to pay his father's debt is not contractual but legal, and it has nothing to do with the fact that the creditor has obtained a decree against the father or is proceeding in execution against him. He can sue the son, and even if he wished to enforce his father's mortgage, the limitation would be subject to Article 120 and not Article 132 or Article 147, as there is no charge to enforce against the son.[3] This article equally applies to a claim made against the son for the father's defalcation, the *terminus a quo* being the death of the father or his failure to account when called upon to do so.[4]

The Limitation Act expressly prescribes 12 years for a suit by the son to set aside his father's alienation of ancestral property against the alienee who has taken possession of the property.[5] When, however, the son wishes to set aside nothing but merely seeks a declaration that the alienation does not affect the son's share his suit would be subject to Article 120;[6] of course, the son must sue for possession if it is with the alienee, though before he takes it, he may sue him for a mere declaration of his right.

It has already been seen that a son born after the alienation has no right to set it aside. (§ **162.**) Consequently, such son cannot receive the benefit of sections 6-8 of the Limitation Act.[7] As regards limitation, the alienee from the son stands in the same position as the son. Consequently, where the plaintiff who had purchased the property from the son in 1912 sued to eject the defendant who had purchased it from the father in 1897, the court threw out the suit as barred by Article 126, though it might have been in time if Article 144 were applicable.[8]

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(1) *Ramasami* v. *Ulaganatha*, 22 M. 49 F.B., *Mallesam* v. *Jugala*, 23 M. 292 (297) F.B.; *Periasami* v. *Seetharama*, 27 M. 243 (249) F.B.

(2) S. 53, C. P. C.; *Periasami* v. *Seetharama*, 27 M. 243 (251-254) F.B., Limitation 12 years under Art. 183—*Sri Chandra* v. *Shyam Kumari*, 11 Pat. 445 (454).

(3) *Bidya Prosad* v. *Bhupnarain*, 42 C. 1068 F.B.; *contra* in *Ram Singh* v. *Sobha Ram*, 29 A. 544; *Dharam Singh* v. *Angan Lal*, 21 A. 301; *Ariabudra* v. *Dorasami*, 11 M. 413.

(4) *Rao Biraj Singh* v. *Rani Raghubir*, 31 A. 429; *Fakir Chand* v. *Dara Ram*, 25 A. 67 (70); *Narsingh* v. *Lalji*, 23 A. 206.

(5) Art. 126; Art. 144 does not apply to such cases; *Murajalli* v. *Ramasami*, 41 M. 650.

(6) *Devi Raj* v. *Shiv Ram*, (1914) P. R. 70; 25 I.C. 463.

(7) *Ranodip Singh* v. *Parameshwar*, 47 A. 165 (169) P.C.

(8) *Munia* v. *Ramasami*, 41 M. 650.

Mesne Profits: Damages.

1384. The son's liability for mesne profits and for damage due from or awarded against the father has been asserted in several cases,[1] though there is a dissenting case in which the contrary was laid down. In this case the plaintiff had obtained a decree against the defendant's father for damages to the plaintiff's property caused by a dam erected by the latter, which obstructed the passage of water from a certain well to the plaintiff's land. The decree was sought to be executed against the son, but the court held the son not liable, holding that the father's act being wrongful, the son was not liable as there was nothing to show that the estate he had inherited had benefited from the act.[2] It was said that such a liability was *avyavharik* or one which no decent and respectable man should have incurred. This argument was answered by the Calcutta Court who had to decide a similar case in which they held the word *avyavharik* to mean no more than "lawful, usual or customary,"[3] and as such they held the son liable. But, in such case, the question would seem to be one of degree. If the tortious act of the father, however egregious, was intended to benefit the estate, the son would be liable to bear the burden of an act, the effect of which was miscarried.

Costs.

1385. According to Brihaspati, the son is exempt from payment of his father's "fine". And the question has arisen whether acting upon its analogy the son should not be held exempt from payment of costs decreed against the father as an unsuccessful litigant. In the view of the Calcutta High court, concurred in by the other courts, such costs would be payable by the son, however imprudent and speculative may have been the father's action.[4] It is pointed out that costs, as now awarded by the court, were no part of the ancient procedure under which an unsuccessful litigant had to pay a penalty to the king for making a false claim or a false defence;[5] and therefore, when the ancient law-giver exonerated the son from the "fine" they could not have intended to exempt him from the costs which had then no existence. There are, however, cases in which the courts draw a line if the suit instituted was false, in which case it is said that the son should not be saddled with the costs thrown on the father.[6] But there appears to be no ground for this distinction.

1386. It would seem, however, that while the son must pay all costs decreed against the father, a discrimination is made in costs otherwise incurred, the son being in that case liable to pay only such costs as the father incurs in defending himself in civil or criminal cases;[7] but it

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(1) *Chhakauri* v. *Ganga Prasad*, 39 C. 862; *Peari Lal* v. *Chandi Charan*, 11 C. W.N. 163.

(2) *Durbar* v. *Khachar*, 32 B. 348 (351, 352).

(3) *Chhakauri* v. *Ganga Prasad*, 39 C. 862 (868).

(4) *Prayag* v. *Kasi*, 14 C.W.N. 659: 11 C.L.J. 599: 6 I.C. 258; *Chakkauri* v. *Ganga*, 39 C. 862; *Venu Gopala* v. *Ramanadhan*, 37 M. 458, distinguishing *contra* in *Ramaiengar* v. *Secretary of State*, 20 M.L.J. 89: 4 I.C. 105; *Sumer* v. *Liladhar*, 33 A. 472.

(5) Manu, VIII-59; Yadnyavalkya, II-11.

(6) *Ramaiengar* v. *Secretary of State*, 20 M.L.J. 89: 4 I.C. 105; *Durbar* v. *Khachar*, 32 B. 348; *Mahomed Ali* v. *Jhao Lal*, 4 O.W.N. 1069; *Hariyappa* v. *Deputy Commissioner*, (1927) 5 Mys. L. J. 173.

(7) *Sumer Singh* v. *Liladhar*, 33 A. 472; *Beni Ram* v. *Man Singh*, 34 A. 4; *Premsukh* v. *Rambhejawan*, (1920) 1 P. L.J. 34; *Hanmant* v. *Sonadhari*, 4 Pat. L.J. 653: 52 I.C. 734; *Sundar Lal* v. *Raghunandan*, 3 Pat. 250 (254); *Rama-*

is otherwise if he incurs costs in launching a false and malicious prosecution.[1] The defence of title of members of the family is, indeed, a recognized head of legal necessity, for which not only the son but all coparceners are equally liable.[2]

The cost of a criminal prosecution alone is a charge on the joint family. The fact that the manager was, in execution of his own personal debt, committed to jail, would not entitle him to mortgage the family property to secure his liberation.[3]

1387. Liability to Indemnify.—That a liability to indemnify an innocent person against the illegal or immoral act of the father is not necessarily illegal or immoral follows from the fact that the cause is one thing and the effect another. If the father commit dacoity and with the booty so received purchase an estate, the right of the owner to indemnity cannot be regarded as illegal or immoral, nor can the son complain that he should not be mulcted for his father's criminal act. All he can complain, and justly, is that so long as the father's liability is no more than a claim, it is not a "debt", and so long as it is indeterminate and its amount uncertain, he should not be held liable. But once its measure is fixed and ascertained, by admission or adjudication, it becomes a certain sum recoverable from the father, and on that ground, recoverable from the son. But this rule has its limits being inapplicable to personal injuries, *e.g.*, defamation of character,[4] malicious prosecution[5] malicious search[6] or obstruction to the right of way in no way benefit the estate of the wrong-doer.[7] Indeed, as observed by Bowen, L.J.: "The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appears to us to be those in which property, or the proceeds of value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys."[8] But this does not appear to be the limit of the son's liability, who has to pay for paternal misfeasances though they may not have in the slightest degree benefited the estate.

Imprudent Debt not Illegal.

1388. A debt or an alienation is not illegal or immoral merely because it was imprudently or recklessly incurred or made, or that the money might have been got at a lower rate of interest.[9] The son's liability to pay for a debt borrowed to pre-empt a property depends upon *qua* the son, whether the debt was antecedent and *qua* other coparceners, whether it was supported by necessity or benefit.[10] The enlarge-

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lingam v. *Muthayyan*, 26 M.L.J. 528: 24 I.C. 356; *Hari* v. *Sant Prasad*, 32 I.C. (C.) 969.

(1) *Sundar Lal* v. *Raghunandan*, 3 Pat. 250.

(2) S. 118 (*e*) (*i*).

(3) *Ram Ratan* v. *Lachman Das*, 5 A. L.J. 417.

(4) *Muzaffar* v. *Ghulam*, (1915) P. R. 62: 28 I.C. 455.

(5) *Murugappa* v. *Ponnuswami*, 44 M. 828; *Rustomji* v. *Nurse*, *ib.*, 357; *Subramania* v. *Venkataramier*, 31 I.C. (M.) 4; *Punjab Singh* v. *Ramatar*, 52 I.C. (L.) 348.

(6) *Gadigi* v. *Vamajee*, 21 M. L. J. 772: 38 I.C. 823.

(7) *Haridas* v. *Ram Das*, 13 B. 677; *Ma Shwe* v. *Mg. Po*, 65 I.C. (R.) 66.

(8) *Phillips* v. *Homfray*, 24 Ch. D. 439 (454).

(9) *Khabhel Rahman* v. *Gobind*, 20 C. 328 P.C.; *Kuldip Sahai* v. *Rambhujhawan*, 3 Pat. 425; *Tikait* v. *Malhjyi*, (1925) Pat. 588.

(10) *Amrej Singh* v. *Shambhu*, 55 A. 1 F.B.

ment of family estate is wise but it might be foolish in one who has to mortgage his ancestral estate to acquire it, for the chances are that he may lose both. But such a venture, though highly speculative, is not illegal or immoral, and if it results in a legacy of debt, the son has got to pay it.[1] But a pre-emption decree which gives the pre-emptor the option to acquire certain property at a certain price does not constitute an antecedent debt.[2] The father is entitled to embark on a new trade, howsoever speculative, and the son is liable for his trade debts. The texts of Gautam, exempting the son from the father's commercial debts is now obsolete, and the only rule which now limits the son's liability applies to debts which are illegal or immoral.[3] As such, the son is liable to pay his father's debts incurred in a new trade started by him, since such debt is not illegal or immoral.[4] It is said that the son is not bound by the father's mortgage of his ancestral property to save his self-acquired property, *e.g.*, property inherited from a cousin, though the liability would spring into existence as soon as a mortgage decree is passed.[5]

1389. Non-liability After Separation.—The son's liability to pay his father's debts and the latter's power to alien the coparcenary estate cease on partition. But since an unequivocal declaration of his intention may amount to separation, the son would thenceforward cease to be liable for his father's debt. If, however, the creditor, in ignorance of this declaration, *bona fide* purchased from the father what he conceived to be his joint estate, the purchaser would be protected and the purchase treated as if the father and son were joint,[6] the reason being that as between two such persons, the one with a secret title must suffer because he had done nothing to disclose it to the other who had, therefore, acted to his prejudice, relying upon the ostensible title as the real title. Where, during the pendency of proceedings in insolvency against the father in a joint Hindu family, a partition takes place, it is competent to the receiver to take possession of the shares obtained on partition by the sons for the purpose of paying thereout such of the father's debts as the sons were legally liable to pay.[7] The mere fact that in a partition suit a personal decree was passed against the father does not shew that the debt for which the decree is passed is immoral or illegal.[8]

Non-liability of Separate Property.

1390. Of course, as previously remarked, the son's liability is now limited to the extent of his share in the coparcenary or the assets inherited by him. His separate property is not liable. Where, therefore, the son had purchased his father's property in execution of a decree passed against the latter, the decree remaining unsatisfied, that property could not be again seized in execution of the same decree, though it was in charged. (**§§ 1377, 1378.**)

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(1) *Tulram* v. *Tulshi Ram*, 42 A. 559. This was overlooked in *Shankar Sahai* v. *Bechu Ram*, 47 A. 381; *Pirthi Singh* v. *Mamchand*, 16 L. 1077; *Maulakchand* v. *Dayakishan*, 106 I.C. (L.) 183.

(2) *Amrej Singh* v. *Shambhu*, 55 A. 1 F.B.; *Chatarbhuj* v. *Govind Ram*, 45 A. 407.

(3) *Achutaramayya* v. *Ratnajee*, 49 M. 211; *Raja Gopal* v. *Veeraperumal*, 53 M. L.J. 232: 102 I.C. 680: (1927) M. 792; *Ramkrishna* v. *Narayan*, 40 B. 126.

(4) *Annabhat* v. *Shivappa*, 52 B. 376.

(5) *Nand Lall* v. *Umrai*, 295 C. 260: 93 I.C. 655: (1926) O. 321.

(6) *Vemi* v. *Nallappa*, 11 M. L. W. 611: 57 I.C. 800; *Bankey Lal* v. *Durga Prasad*, 53 A. 868.

(7) *Sita Ram* v. *Beni Prasad*, 47 A. 263.

(8) *Raghunath* v. *Basudeo*, 3 Pat. L. J. 764: (1925) Pat. 823.

(9) *Kanhaiya Lal* v. *Niranjan Lal*, 47 A. 351.

160. Son's liability defined. **(1) Save as provided in sections 146 and 149, the son's liability for his father's debt only arises in respect of a debt incurred during the state of his jointness with his father, but it may be enforced against the son even upon his separation, out of the share allotted to him, or otherwise inherited or obtained by him, but on his accounting for such share in the course of due administration in payment of the paramount charge of his father's debt, his liability will cease:**[1]

Provided that if he fails to so account for it, his liability will not cease, but shall then extend to his person and other property.[2]

(2) Where there are more sons than one, all are jointly and severally liable to the extent of the assets received by them; though as between themselves, their liability is proportionate to the value of such assets.[3]

1391. **Analogous Law.**—This section is supported by the following authorities,[4] and the following texts:—

Narad.—"The father being dead, it is incumbent on the sons to pay his debts, each according to his share (of the inheritance), in case they are divided in interests, or, if they are not divided in interests, the debt must be discharged by that son who becomes manager of the family estate."[5]

The pious obligation of the son to pay his father's debt arises equally whether the debt was incurred in a state of his jointness with the father or after partition, but in the one case, it is limited to his coparcenary share, whether undivided or since divided, and in the other, to the assets of the father inherited by him. The liability only relates to a debt not illegal or immoral. The debt need not be antecedent, but if it is so, the father then possesses the additional power of alienation of his son's undivided share, in discharge of such debt. Taking this section along with sections 133 and 146 (4) the son may be liable (*a*) as coparcener, (*b*) as the heir and (*c*) as the son of his father. In the first case his liability does not go beyond that of any other coparcener, extended however, by his pious obligation, which equally attaches to him when he takes only as an heir. But even in such case, though all heirs are liable to pay the owner's debts, the son as heir is morally bound to pay them even when barred by time. But this liability is optional and if he takes his stand on the law of limitaton he is entitled to do so. But if, in spite of limitation, which merely bars the creditors' remedy but does not extinguish the debt, he chooses to pay the debt, he can compel others, equally liable with him, to pay their contribution to the debt which he has discharged. (§§ 1377-1378.)

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(1) *Muttayan Chettiar* v. *Sangilivira*, 6 M. 1 P.C.; *Roop Singh* v. *Buldeo Singh*, 2 W.R. 258; *Zuburdust* v. *Udurman*, Agra F. B. 71; *Ramchandra* v. *Kondayya*, 24 M. 555; *Kameswaramma* v. *Venkatasubba*, 38 M. 1120; *Muthu* v. v. *Chinnasawmy*, 39 M.L.J. 486: 59 I.C. 685; *Jagannath* v. *Viswesan*, 47 M. 621; *Subramania* v. *Sabapathi*, 51 M. 361 F. B.; *Muniswami* v. *Kutti Moopan*, 56 M. 833.

(2) *Raj Roop Singh* v. *Buldeo Singh*, 2 W.R. 258; *Unnopoorna* v. *Ganga*, 2 W.R. 296; *Mooktareshee* v. *Wooma Churn*, 12 W.R. 233; *Jamiyatram* v. *Parbhu Das*, 9 B.H.C.R. 116.

(3) Manu, VIII-166; Vishnu, VI-27; Yad., II-45-50; *Narad*, I-2; 33 S. B. E. 41; *Salem Town Bank* v. *Ramaswamy*, 27 M.L.J. 256: 26 I.C. 362; *Ramchandra* v. *Kondayya*, 24 M. 555 (557); *Bhagwan Singh* v. *Prem Singh*, (1883) P.R. No. 79.

(4) *Ib.*, foot-notes (1), (2) and (3).

(5) I-2; 33 S.B.E. 41, 42; 1 Dig. Bk. 1 Ch. V, § 169, cited in *Udaram* v. *Ranu*, 11 B.H.C.R. 76 (85).

1392. The liability arises as soon as the obligation is made; but "it is not joint liability, nor a joint and several liability, as ordinarily understood, in English Law; in fact, it is difficult to bring it under any particular legal category of the English Law."[1]

Though his liability arises in his father's lifetime, he cannot be sued alone without the father, though the father can be sued alone without the son. And though a decree might be obtained against the father, a suit might be instituted against the son on the original cause of action.[2] The fact that the son had since taken his share in a *bona fide* partition is immaterial, if only the debt was contracted when he was joint. The obligation which then came into being cannot be discharged by a subsequent partition.[3] But it has been said that if the debt contracted before the partition is renewed after the partition, the son ceases to be liable.[4] But the question depends upon whether the renewal amounts to a novation giving rise to a fresh obligation. Again, if the debt was not merely the father's debt but also a debt contracted by the father as manager and is supported by legal necessity or benefit, then it will be a family debt payable out of the family assets and not only from the son's share.[5]

The share of the son liable is the share of his ancestral property which the son obtains howsoever, whether in a partition or by survivorship or inheritance. So long as the son takes it as an heir he is liable. He may take it even as a devisee but then as a testamentary heir his liability remains.

1393. This liability is discharged as soon as the assets inherited or received by the son have become exhausted in due administration of the payment of a paramount charge of his father's debts. If he is guilty of fraud in concealing the property or maladministering the estate with intent to defraud, defeat or delay his father's creditors, his liability will extend to his own property. Such was the case of one Khema Singh who had purchased a certain landed estate in the name of his sons, which was attached by his father's (Hurdeb Roy's) creditors. Khema Singh resisted the attachment, alleging that he had inherited no property from his father, Hurdeb Roy, but the court found otherwise and held the attachment, till Khema Singh gave a full and true account of all moneys and property to which he had succeeded as heir to Hurdeb Roy.[6]

Clause (2).

1394. It has already been seen that the father, the son, the grandson and the great-grandson are regarded as one juridical person, and it follows that so far as the creditor is concerned, he is entitled to hold all and any of the sons liable, to the extent of their inherited assets.[7] He holds them liable because they are in possession of the father's assets, which he was entitled to sell in order to pay off his debt.[8] But it is the right of the creditor which

(1) *Narayanan* v. *Veerappa*, 40 M. 581 (584).
(2) *Ib.*
(3) *Subramania* v. *Sabapathi*, 51 M. 361 F. B.; *Muniswami* v. *Kuthi Moopan*, 56 M. 833; *Mutyala* v. *Mahbub*, 57 M. 190; *Jawahar Singh* v. *Parduman Singh*, 14 L. 399.
(4) *Peda Venkanna* v. *Srinivasa*, 41 M. 136.
(5) *Ramachandra* v. *Kondayya*, 24 M. 555.
(6) *Raj Koop Singh* v. *Buldeo Singh*, 2 W.R. 258.
(7) *Salem Town Bank* v. *Ramaswamy*, 27 M.L.J. 236: 26 I. C. 262; *Bissessor Eam* v. *Ramakant*, 13 Pat. 7; *Devi Das* v. *Jadaram*, 15 L. 50.
(8) *Ramchandra* v. *Kondayya*, 24 M. 555 (557), distinguishing *Krishnasami* v. *Ramasami*, 22 M. 519 (521).

he might waive by apportioning liability.[1] So, the case would be different where, after partition, the creditor sues the father alone for his debt incurred before partition, in which case the son's share cannot be seized in execution.[2] Where a son has to pay more than his *quota* of the father's debt, he is entitled to contribution from the other sons since, as between the sons, the liability is proportionate to the benefit received. This principle applies equally to all heir.[3]

Liability of divided son for debts and alienations of the father.

161. (1) **A divided son is not liable for debts incurred, and is not bound by an alienation of the coparcenary property made by the father after partition,[4] unless the partition was made with intent to defeat or delay the creditors of the father,[5] or had failed to provide for such debts.[6]**

(2) A divided son is liable for a debt incurred by the father on the death of the father,[7] and where the partition was made with intent to defeat or delay the creditors of the father, in the life-time of the father,[8] and is bound by an alienation of the coparcenary property made by the father before partition, in like manner as an undivided son in respect of a debt, or alienation incurred or made by the father, to the extent of the property taken by the divided son on partition.[9]

(3) The property taken by a divided son on partition shall not be attached or sold in execution of a decree passed against the father, unless:—

(*a*) the property had been attached before partition,[10] or

(*b*) the partition was made with intent to defeat or delay the creditors of the father.[11]

1395. **Analogous Law.**—On separation the son ceases to be a member of the joint family, and as his liability depends upon receipt of assets after the death, it follows that the son who has already received his heritage can no longer be compelled to discharge his pious obligations in respect of debts incurred by the father after his separation.[12] He is, however, liable for debts incurred before partition[13] and for debts after partition to the extent of the father's assets in his hands.[14]

The son will, of course, be liable if the partition was unreal,[15] or even if otherwise, it was made with intent to defeat the father's creditors,

(1) *Durga Pershad* v. *Kesho Pershad*, 8 C. 656 (664) P.C.

(2) *Krishnasami* v. *Ramasami*, 22 M. 519 (521), explained in *Ramchandra* v. *Kondayya*, 24 M. 555 (557).

(3) *Karimuddin* v. *Gobind Krishna*, 31 A. 497 (506) P.C.

(4) *Kulada Prasad* v. *Haripada*, 40 C. 407.

(5) *Annabhat* v. *Shivappa*, 52 B. 376 (380, 381).

(6) *Bankey Lal* v. *Durga Prasad*, 53 A. 868 F.B.; *Lalta Prasad* v. *Gajadhar*, 55 A. 283; *Chottay Lal* v. *Ganpat*, 57 A. 176; *Devi Das* v. *Jada Ram*, 15 L. 50.

(7) *Ram Ghulam* v. *Nand Kishore*, 4 Pat. 469.

(8) *Krishnaswami* v. *Ramaswami*, 22 M. 519; *Annabhat* v. *Shivappa*, 52 B. 376.

(9) *See* cases cited in foot-note (12) *post*.

(10) *Krishnaswami* v. *Ramaswami*, 22 M. 519.

(11) *Ib.*

(12) *Kulada Prasad* v. *Haripada*, 40 C. 407.

(13) *Krishnasami* v. *Ramasami*, 22 M. 519; *Ramachandra* v. *Kandayya*, 24 M. 555; *Kameswaramma* v. *Venkata*, 38 M. 1120; *Muthu* v. *Chinasawmy*, 39 M.L.J. 486: 59 I.C. 685; *Vinjamampati* v. *Vadlamanti*, 41 M. 136; *Subramania* v. *Sabapathi*, 51 M. 361 F.B.; *Muniswami* v. *Kuthi Moopan*, 56 M. 833; *Annabhat* v. *Shivappa*, 52 B. 376 (381, 382); *Gayaprasad* v. *Murlidhar*, 25 A.L.J. 829: (1927) A. 714; *Hema Ram* v. *Chhatta*, 2 L.L.J. 751; *Jawahar Singh* v. *Parduman Singh*, 14 L. 399.

(14) *Ram Ghulam* v. *Nand Kishore*, 4 Pat. 469.

(15) *Krishnasami* v. *Ramasami*, 22 M. 519; *Gaya Prasad* v. *Murlidhar*, 25 A.

or had resulted in defeating them,[1] as where the partition had ignored their debts.[2]

162. (1) **The liability of the undivided son to discharge his father's obligation is independent of whether it was incurred before he himself was born.**[3]

Liability of after-born son.

(2) **A son cannot sue to set aside his father's alienation made before he was born.**[4]

1396. **Analogous Law.**—This rule is supported by the undernoted cases.[5] It proceeds upon the assumption that the right to question an improper alienation belongs only to a coparcener then in existence. If after-born coparceners were permitted to canvas the property of an alienation made years before they were born, it would lead to uncertainty and confusion of titles derived from the father or the manager. Moreover, since all coparcenary property vests in the coparceners then in existence, who can by their consensus convey a valid title, it follows that an alienation so made or ratified cannot be permitted to be unravelled at the instance of a subsequent born coparcener. In this view, the same rule would appear to hold good whether the alienor is the father or any other manager. The same rule, of course, governs an adopted son,[6] who, however, possesses the power to challenge his adoptive mother's prior alienations.[7] Similarly, the reversioner may dispute the validity of the previous owner's alienation. The right to challenge an anti-natal disposition is thus a right which can only be asserted as against a female.

1397. In a mortgage executed by the father before the birth of a son, the latter becomes interested only in the equity of redemption.[8] He is not interested in the renewal of such mortgage, though the renewal be after he was born.[9]

163. **Both the grandson and the great-grandson are liable for a debt incurred by their grandfather and great-grandfather, not being a debt incurred by standing as surety without consideration, and are bound by an alienation made by the grandfather and the great-grandfather, in the manner in, and to the extent to, which a son is liable for a debt incurred, or bound by an alienation made or executed by the father.**[10]

Liability of grandson and great-grandson for debts of their ancestor.

1398. **Analogous Law.**—This section follows from the definition of "issue" given in section 107 and is now supported by a decision of the Privy Council.[11] Under Hindu Law, the son, the grandson and the

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L.J. 829, (1927) A. 714; 1 Gour's Law of Transfer, (6th Ed.) §§ 1026-1035.

(1) *Annabhat* v. *Shivappa*, 52 B. 376 (380, 381).

(2) *Bankey Lal* v. *Durga Prasad*, 53 A. 868 F.B.

(3) *Ramasami* v. *Virasami*, 21 M. 222; *Muthuramian* v. *Ettappasami*, 22 M. 372.

(4) *Rano Dip Singh* v. *Parmeshwar Prosad*, 47 A. 165 P.C.; *Visweshwar Rao* v. *Surya Rao*, 59 M. 667; *Udaya Muthier* v. *Shanmugham*, (1935) M. 431; *Jado Singh* v. *Ranee*, 5 N. W. P. H. C. R. 113; *Ram Deo* v. *Ram Rathi*, (1935) A. 742; *Doole Chand* v. *Wooma Sunkur*, 7 C.L.J. 429; *Chuttan* v. *Kallu*, 5 I.C. 719; *Sobharam* v. *Makdu*, 12 C. P.L.R. 63; *aliter*, if then conceived.—*Sabapathi* v. *Somasundaram*, 16 M. 76; *Minakshi* v. *Vikappa*, 8 M. 89.

(5) *See* f.-n. (3) and (4).

(6) S. 55.

(7) S. 56.

(8) *Bholanath* v. *Kartick Kissen*, 34 C. 372 (379).

(9) *Partab Singh* v. *Bohra*, 45 A. 49.

(10) *Masitullah* v. *Damodhar*, 48 A. 518 P.C.

(11) *Ib.*

great-grandson are all members of the joint family and share equal rights and must, therefore, be necessarily subject to equal obligations. The texts on the subject are discrepant, though they all recognize the identity of the son, the grandson and the great-grandson.[1] Brihaspati however, ordains that while the son must pay the father's debt as his own (*i.e.*, with interest) the grandson has to pay only the principal, while the great-grandson shall not be compelled to pay anything unless he has assets.[2] The liability to pay independently of the assets was relieved against by the courts, who have at the same time recognized the logical identity of the three descendants regarding the extent of their liability to pay their ancestor's debts.

Liability to pay interest.

1399. It has been held that this provision does not affect secured debts which are payable out of the property.[3] And the rule was no doubt literally enforced in a case decided in 1865 in which the grandson was held liable to pay his grandfather's debt without interest, independently of any inherited assets[4] but this unqualified liability was removed by a local Act passed in the following year.[5]

In another case a degree for mesne profits obtained against the father and the grandfather was sought to be executed against the grandson who claimed exemption from payment of interest on the strength of Hindu Law, but the court appears to have conceded the rule, though it held the grandson liable on the ground that the decree he had to satisfy was passed for the wrongful act of both.[6]

It may perhaps be added that the Hindu Law prescribes a rule of liability independent of the assets, and now that it has been limited to assets, there is no reason why a further limitation detached from the context should be sanctioned to limit the liability of the grandson.

1400. The question whether the pious obligations of the son, the grandson and the great-grandson made them equally and at the same time liable is now settled,[7] though the same Board had in a previous case laid down the contrary, their view then being that the creditor cannot proceed against the grandson in the lifetime of the son.[8]

Hindu Law declares the liability of the son as co-extensive with that of the father, though some texts differentiate between the liability of the son and the grandson, but in either case, the liability was made independent of the assets. Even as such, Narad,[9] Vishnu[10] and the other sages made no distinction between the son and the grandson which Brihaspati,[11] Katyayan[12] and Nilkanth[13] did, holding the grandson exempt

(1) Manu, IX-137; Vashisth, XVII-5; Dattak Mimansa, I-13 (Setlur), I-356; Dattak Chandrika, I-6; *ib.*, I-423; Dayabhag, XI-34; *ib.*, II-75; Viramitrodaya, III-I-11; *ib.*, II-390; Smriti Chandrika, VIII-9-14 (Setlur), I-254; Daya Tattwa, XI-4; *Ib.*, II-505.

(2) Brihaspati, XI-49; 33 S.B.E. 328, 329.

(3) *Lachman* v. *Khunnulal*, 19 A. 26 P.B.; 2 Gour's Law of Transfer (6th Ed.), §§ 2208, 1426.

(4) *Narasimharao* v. *Antai*, 2 B.H.C.R. 61.

(5) Hindu Heir's Relief Act (Bom. Act VII of 1866), printed in 2 B.H.C.R. (App.) 413.

(6) *Ram Deo* v. *Gopi*, 16 C.W.N. 383: 13 I.C. 349.

(7) *Masitullah* v. *Damodar Prasad*, 48 A. 518 P.C.

(8) *Chet Ram* v. *Ram Singh*, 44 A. 368 (376) P.C.

(9) Narad; 33 S.B.E. 41 42.

(10) Vishnu, Ch. VI; 7 S.B.E. 44.

(11) Brihaspati, Ch. XI; 33 S. B. E. 319, 320.

(12) Katyayan, 1 Dig. 207.

(13) Mayuk (Mandlik's Tr.), 113.

from the payment of interest on a debt due from the grandfather. The courts have limited the liability of both the son and the grandson to the extent of the assets of their ancestor, but otherwise equalized their liability both for the principal and interest. The same principle would equally extend to the great-grandson in spite of Brihaspati's dictum that he is exempt from the payment of both the principal and the interest.

[For further information, *see* Commentaries on section 112.]

Onus of proof in certain suits by or against the son.

164. (1) **In a suit against a son to recover a debt incurred by the father, the burden of proving that the debt was incurred for an illegal or immoral purpose is on the son.**[1]

(2) In a suit against a son to enforce an alienation of coparcenary property made by the father, and in a suit by a son for the recovery of coparcenary property alienated by the father, the alienee is bound to prove in respect of the debt, to pay off which, or in consideration of which, the alienation was made, that the debt was, in good faith believed by him to be, an antecedent debt.[2]

(3) And where the son contends that the debt was incurred for an illegal or immoral purpose, the son is bound to prove that the debt was so incurred,[3] **and, in a suit by a son for the recovery of coparcenary property alienated by the father; that the alienee had notice that the debt was so incurred.**[4]

1401. Analogous Law.—This section deals with the burden of proof in a suit by or against the son. The section provides for four contingencies which may be thus restated:—

(1) Suit by the creditor or the alienee against the son for recovery of the debt;

(2) Suit by the alienee for enforcement of an alienation;

(3) Suit by the son for recovery of alienated property;

(4) *Ditto*: in which the son contends that the consideration was illegal or immoral.

1402. In the first and last cases, the burden lies on the son, while in the other two cases the burden lies on the alienee. In other words, the burden is on the son only when he challenges the legality of the consideration,[5] otherwise, the alienee must justify his alienation.[6] In the one case there is a presumption in the father's favour that his act is not illegal or immoral, though that presumption does not extend to his alienations. Consequently, where the alienation is purported to be made for an antecedent debt, it is on the alienee to shew that the debt was antecedent or

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(1) *Shyam Narain* v. *Suraj Narain*, (1933) P.C. 38; *Raj Kishore* v. *Madan Gopal*, 13 L. 491; *Somasundara* v. *Murugappa*, 36 M. 325; *Chandradeo* v. *Mata Prasad*, 31 A. 176 F.B.; *Babu Singh* v. *Behari Lal*, 30 A. 156; *Peare Lal* v. *Sunder*, 20 A.L.J. 658: 68 I.C. 805.

(2) *Hanooman Preshad* v. *Mt. Babooee*, 6 M.I.A. 393; *Sitaramasami* v. *Midatana*, 6 M. 400.

(3) *Shyam Narain* v. *Suraj Narain*, (1933) P.C. 38, and cases cited in footnote 5 *post*.

(4) *Ib*.

(5) *Shyam Narain* v. *Suraj Narain*, (1933) P.C. 38; *Babu Singh* v. *Bihari Lal*, 30 A. 156; *Maharaj Singh* v. *Balwant Singh*, 28 A. 508 (527, 528); *Pem Singh* v. *Partab Singh*, 14 A. 169; *Bhawani* v. *Ram Dei*, 13 A. 216; *Beni Madhov* v. *Basdeo*, 12 A. 99; *Raj Kishore* v. *Madan Gopal*, 13 L. 491.

(6) *Sitaramasami* v. *Midatana*, 6 M. 400; *Hanuman* v. *Doulat*, 10 C. 528.

that the alienee had made inquiries, and was in good faith led to believe it to be so.[1] In a suit by the son to contest his father's alienation, it is for the alienee to justify it. This rule would be clear if regard be had to the fact that (*i*) the son is bound to pay all his father's debts excepting only those that are shown to be illegal or immoral, (*ii*) though the father has no power to transfer the joint property for such debts, his power being limited to transfer made as provided in section 113, it will be seen that the burden of proof must necessarily vary according as the creditor is secured or unsecured. In the former case, the father having only a limited power of transfer, it is for the creditor to show that he had acted within that power. In the latter case, the father's debts being *prima facie* binding on the son, it is upon the latter to prove the exceptional cases of his immunity. If he does so prove, the creditor may then rebut the son's case by shewing that whatever might be the facts, he believed them to be true after due inquiry. In that case, law will give him the same benefit as if the facts had really existed. The view is supported by the principle that where of two persons one must suffer, it must be the one who is more liable.

1403. It is immaterial whether the property inherited by the son was the father's ancestral or self-acquired property, since "by the Hindu Law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the estate, whether ancestral or acquired by the contractor of the debt."[2] As however, the filial duty is general and the exemption an exception to the rule, his liability may be established on proof of the debt and it will be then on the son to establish his exemption by showing that the debt was either not antecedent or that it was illegal or immoral.[3] The court presumes the debt to be binding because it presumes that the creditor would not have lent himself to an illegal or immoral transaction.[4] This question was referred to a Full Bench of the Calcutta High Court, but its reply is not very illuminating,[5] and in other cases the distinction between the father's debt and his transfer appears to have been ignored.[6] For, while it is unquestionable that the son being under the duty to pay his father's debts, the creditor suing for money need not prove anything beyond a debt of the father, it by no means follows that the son is equally bound by an alienation of his interest made by the father, and that in a creditor's suit for enforcement of the alienation, he is as a matter of course entitled to a decree unless the son shews cause against it.

1404. It is apprehended that in a case of alienation the son is entitled to say, whatever may be his obligation for the payment of a debt, the father could not charge his interest except for limited purposes and that therefore, the transferee occupies no better position than the transferee

(1) *Hunooman Pershad* v. *Babooee*, 6 M.I.A. 393; *Bhoorun* v. *Sahebzada*, 6 W.R. 149; *Sitaramsami* v. *Midatana*, 6 M. 400; *Subramania* v. *Sadasiva*, 8 M. 75; *Chandradeo* v. *Mata Prasad*, 31 A. 176 F.B.

(2) *Hunooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393; *Kurukundi* v. *Vanuapi*, 46 M. 64.

(3) *Shyam Narain* v. *Suraj Narain*, (1933) P.C. 38.

(4) *Rampardip* v. *Salig Rai*, (1883) A.W.N. 107; *Karansing* v. *Bhupsing*, 27 A. 16 F.B.; *Babusing* v. *Biharilal*, 30 A. 156 (159); *Abdul Karim* v. *Ram Kishore*, 47 A. 421 (423).

(5) *Luchmun* v. *Girdhur*, 5 C. 855 F. B. The view of "antecedent debt" in this case has since been overruled by the Privy Council in *Brij Narain* v. *Mangal Prasad*, 46 A. 95 P.C.

(6) *Maheswar* v. *Kishun Singh*, 34 C. 184 (189); *Kishun Pershad* v. *Tipan Pershad*, *ib.*, p. 735.

from any other manager. They must both prove the act to be *intra vires* of the transferor.

1405. The only exception that the rule admits of is that in favour of the purchaser who has already taken possession, and of the execution purchaser whether he has or has not taken possession. The reason why they are entitled to greater rights will be seen in the sequel.

1406. Burden of Proof.—Where the creditor proves that the debt was incurred by the father the son is *prima facie* liable by reason of his pious obligation to discharge his father's debts and it is then upon him to prove that the debt was such for which he could not be made legally liable.[1] In this respect a distinction is to be made between a suit to recover the father's debts and one to enforce a mortgage or any other transfer effected by him. The two cases stand on quite a different footing, since in an ordinary money suit instituted by the creditor to recover his debt avanced to the father, the creditor may rest his case on the pious obligation of the son. But the case is different where the father has charged or alienated the joint estate for a debt of his own. In such a case, as already seen, the question of burden of proof depends upon whether the property has or has not passed out of the family. If it has, then he who sues to recover it must impeach the transfer, otherwise he cannot recover. If it is still in the family and the creditor sues to enforce the charge, it is upon him to show that the debt was such as entitled the father to charge the interest of his son with his own.[2]

1407. It is also a well settled rule, that where it is alleged by the sons that a particular debt was contracted by the father for an illegal or immoral purpose, the burden lies upon them to show that it was contracted for such purpose. Such burden is not discharged by proof that the father lived an extravagant or immoral life. It must be proved that the debt in question had been contracted for such purpose.[3] A mere general evidence adduced to show that the father used to attend *nautches*, and that he occasionally gave *nautches* at his own expense is no proof of immorality at all, much less of any specific act of immorality upon which the son might claim freedom from the debt.[4] Where, however, the court found that the father was generally of dissolute habits and had squandered a large fortune thereon and commenced to borrow large sums, though his ordinary income was ample to meet his usual require-

(1) *Ramasami* v. *Ulaganatha*, 22 M. 49 F.B.; *Nathumi* v. *Baijnath*, (1917) Pat. L.J. 212: 39 I.C. 352.

(2) *Girdharee Lall* v. *Kantoo Lall*, 14 B.L.R. 187 (198) P.C.; *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (P.C.); *Nanomi* v. *Madun Mohun*, 13 C. 21 P.C.; *Bhagbut* v. *Girja Koer*, 15 C. 717 (724) P. C.; *Jogi Das* v. *Ganga Ram*, 21 C. W. N. 957 P.C.: 12 I. C. 791 P.C.

(3) *Girdharee Lall* v. *Kantoo Lall*, 14 B.L.R. 187 (198) P.C.; *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 P.C.; *Bhagbut Pershad* v. *Girja Koer*, 15 C. 717 P.C.; *Sri Narain* v. *Raghubans*, 17 C.W.N. 124 P.C.: 17 I.C. 729; *Shyam Narain* v. *Suraj Narain*, (1933) P.C. 38; *Hanuman Singh* v. *Nanukchand*, 6 A. 193; *Sita Ram* v. *Zalim Singh*, 8 A. 231; *Kishan Lall* v. *Garurudwaj*, 21 A. 238; *Maharaj Singh* v. *Balwant Singh*, 28 A. 508; *Lal Singh* v. *Jograj Singh*, 50 A. 546 (548, 558) *Sadashiv* v. *Dinkar*, 6B. 520: *Chintaman Rao* v. *Kasinath*, 14 B. 320; *Vasudev* v. *Krishnaji*, 20 B. 534; *Dattatray* v. *Vishnu*, 36 B. 68; *Hazari Mal* v. *Abani Nath*, 17 C.L.J. 38 (47); *Subramania* v. *Sadashiva* 8 M. 75; *Sheopal Singh* v. *Basant Singh*, 12 O.C. 248: 3 I.C. 911; *Jawahir Singh* v. *Mohanlal*, 6 C.P.L.R. 140; *Babusingh* v. *Beharilal*, 30 A. 156; *Chail Behari* v. *Gulzarimal*, 6 A.L.J. 133; *Bhagat Mal* v. *Abdul Karim*, 1 Pat. L.J. 86: 20 C.W.N. 797.

(4) *Budree Lall* v. *Kantoo Lall*, 23 W. R. 260 (262); *Sri Narain* v. *Lala Raghubans*, 17 C.W.N. 124 P.C.; *Maharaj Singh* v. *Balwant Singh*, 28 A. 508 (521, 525); *Ram Nath* v. *Bulaqi*, (1913) P.R. 50; *Shib Nath* v. *Alliance Bank*, (1915) P.R. 3; *Kishen* v. *Bhagwan*, (1915) P.R. 89; *Indar Narain* v. *Nankchand*, (1916) P. R. 58; *Jaswanti* v. *Tej Narain*, (1918) P. R. 10.

ments, the court held that the creditor advancing him loans was at least bound to enquire into their purpose, and his failure to make any enquiry, coupled with the general dissolute habits of the borrower, might be sufficient ground for the court to hold that the loans were made for an immoral purpose.[1] This was the line of ratiocination adopted in another case in which it was argued "that although the creditor would have been justified in advancing the money if he had made such inquiry as was open to him and had satisfied himself as well as he could as to the existence of the necessity, he did not, in this case, make such inquiry; or rather perhaps, his words may be taken to mean that the result of any inquiry must have shown him quite clearly that the only necessity of Adit Sahai was his own improper and immoral way of life, which caused the expenditure of funds not derivable from his regular income."[2] But these remarks were made with reference to one who had acted as the family banker for a long time previously and must necessarily have been acquainted with the debtor's circumstances and way of life. The illegality or the immorality of a debt cannot be proved by a general proof of immorality, *e.g.*, that the father kept a mistress without establishing any connection between the act and the debt in question.[3] The son is liable to pay his father's debts, whether the father was or was not the manager of the joint family.[4]

165. **In a suit by a son for the recovery of coparcenary property sold in execution of a decree against the father, the son is bound to prove that the debt for which the decree was passed is not binding upon him, and that the purchaser had notice thereof:**[5]

Suit by son to recover coparcenary property sold in execution of decree against father.

Provided that the purchaser (not being the judgment-creditor) shall not be bound to inquire into anything not appearing in the decree or in the proceedings in execution.

1408. Analogous Law.—This section is supported by cases.[6] It is the replica of the rule applicable to a co-parcener.[7] In both cases, whether the plaintiff be the son or a coparcener, the initial burden is on him to shew why he is not bound by the execution sale. So far as the stranger purchaser is concerned, he is further protected by the proviso. Where the son attacks the father's sale as illegal or immoral, he cannot succeed by leading evidence of his father's general immorality. He has to prove that the transaction he appears to challenge is so tainted and

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(1) *Maharaj Singh* v. *Balwant Singh*, 28 A. 508 (531); *Jaswanti* v. *Tej Narain*, (1918) P.R. 10; *Narayan* v. *Jaganath*, 4 C.P.L.R. 29 (30); *Sheo Narayan* v. *Nathia*, 19 N. 81 (87).

(2) *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (153, 162, 163) P.C.; *Narayan* v. *Jaganath*, 4 C.P.L.R. 29.

(3) *Sadashiv* v. *Dinkar*, 6 B. 520 (523).

(4) *Kunbali* v. *Keshava*, 11 M. 64 (71) explaining *Girdharee Lall* v. *Kantoo Lall*, 14 B.L.R. 187 P.C.

(5) *Muddan Thakoor* v. *Kantoo Lall*, 14 B.L.R. 187 P.C.; explained in *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (171) P.C., *Bhagbut* v. *Girja Koer*, 15 C. 717 P.C.; *Gajadhar* v. *Jadubir*, 47 A. 122; followed in *Jihan Singh* v. *Hardat Singh*, 57 A. 357.

(6) *Ib.*

(7) S. 152.

the purchaser had notice of it.[1] If this is *prima facie* established, the purchaser may rebut notice by shewing the price paid for the property,[2] representations made by the father[3] or proper inquiry.[4]

Decree against father when enforceable against Son.

166 A decree passed against the father for a debt for which his son is liable may be executed against the interest of the son in the coparcenary property, unless the son proves that he is not liable for the debt.[5]

1409. Analogous Law.—This section, which combines the rule as enacted in sections 50, 52 and 53 of the Code of Civil Procedure, affirms the view of the Calcutta and the Bombay High Courts,[6] overruling that taken by the other courts[7] in which the courts had held that the father's interest could not be seized in execution of such decree though the creditor might institute a separate suit against the son to enforce his decree like any other debt due from the father. The amended Code enables the decree-holder to follow his debtor's property in the hands of his son and grandson, any controversy arising as to the nature of the debt being determined in execution instead of a separate suit. In so far as the father's interest is seizable in execution even after his death, the rule creates an exception to the law of survivorship. This rule accords with section 53 of the Code of Civil Procedure, and is a necessary corollary to the dictum of the Privy Council quoted under section 160.[8] But as the same high tribunal pointed out in a later case, the fact that the son was no party to the decree is a circumstance which cannot be ignored, nor can it be overlooked that where a man conveys his right and interest and nothing more, he does not *prima facie* intend to convey away also rights and interests presumably vested in others, even though the law may give him the power to do so.[9] Finally, it was added that each case must depend upon its own circumstances. So it must, but the rule, as here formulated, favours a presumption which is in entire accord with the precedents and the general principle of Hindu Law. It has recently been held by the Privy Council that while the son is undoubtedly under the pious obligation to pay his father's debts, it does not thence follow, having regard to the provisions of the Insolvency Law that, on the insolvency of the father, the joint property of the family at once vests in the assignee. "It may be that under the provisions of section 52,[10] or in some other way that property may, in a proper case, be made available for payment of the father's just debts; but it is quite a different thing to say that by virtue of his insolvency alone, it vests in the assignee and no such provisions should be read into the Act."[11]

(1) *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (171) P.C.; *Bhagabut* v. *Girja Koer*, 15 C. 717 P.C.

(2) *Sripal Singh* v. *Prodyot Kumar*, 44 C. 524 P.C.

(3) *Lachman Prasad* v. *Sarnam Singh*, 39 A. 500 P.C.

(4) S. 211.

(5) Ss. 50, 52, 53, C.P.Code; *Amar Chandra* v. *Sebak Chand*, 34 C. 642; *Umed* v. *Gomam*, 20 B. 385.

(6) *Amar Chandra* v. *Sebak Chand*, 34 C. 642; *Umed* v. *Goman*, 20 B. 385.

(7) *Venkatarama* v. *Senthivelu*, 13 M. 265; *Lachmi Narain* v. *Kanji*, 16 A. 449.

(8) *Hanooman Pershad* v. *Mt. Babooee*, 6 M.I.A. 393; *Mathura Prasad* v. *Ram Chandra*, 25 A. 57.

(9) *Simbhu Nath* v. *Golap Singh*, 14 C. 572 P.C.

(10) Of the Presidency Towns Insolvency Act (III of 1909).

(11) *Sat Narain* v. *Behari Lal*, 6 L. 1 (23) P.C., reversing O.A. *Bihari Lal* v. *Sat Narain*, 3 L. 329 F.B.; *Siddheshwar* v. *Deokali*, 9 Luck. 304 F. B.

167. A sale of coparcenary property in execution of a decree against the father which may be executed against the interest of the son in the coparcenary property shall not be deemed to include the right, title and interest of the son, unless that intention is proved.[1]

Sale of coparcenary property not presumed to pass the interest of the son.

1410. Analogous Law.—This section is analogous to section 152 which applies the same rule to the manager, with this difference that in practice the pious obligation of the son towards his father enhances his liability which does not extend to any other coparcener. In other respects the difference between the two is only one of degree. The question what was sold depends upon the nature of the debt and the interest expressly excluded from the sale. The mere fact that the title conveyed by the sale was made expressly stated to be the "right, title, and interest" of the father would not preclude an inquiry into the quantum of interest sold, which, of course, includes an inquiry whether the consideration of the sale affected the son's interest. It was so held in a case in which the son having obtained an *ad interim* injunction, restraining the execution court from selling his interest, it was subsequently agreed that without prejudice to the son's right the interest sold should be described as the "right, title, and interest" of the father which were held to leave the question of the *quantum* of the father's interest conveyed to the purchaser for an express decision.[2] As such, there are cases in which on a sale in execution of a decree against the father, the court held the son's interest equally conveyed to the purchaser, because the son had failed to attack the factum or the validity of the debt upon which ground alone he could obtain the exoneration of his share.[3] It is by no means necessary that he should have been a party to the suit, and even if he were the question might still remain—did the decree affect his interest? Even in a mortgage suit, in which there is the statutory compulsion to implead all persons interested in the subject matter, the father is held to sufficiently represent his sons who are constructively held bound by the decree unless they are able to avoid it as against themselves.[4] Nor it is necessary that in the proceedings the son's interest or the binding character of the debt be adverted to.[5] It is, of course, open to the son to intervene so long as the case is under inquiry, but if he fails to do so, he is not prejudiced beyond the fact that the decree against the father would be held to *prima facie* bind him unless he is able to shew that it does not.[6] His position is the same if the decree has culminated in a sale,[7] with this

(1) *Gajadhar* v. *Jadubir*, 47 A. 122; *Abdul Karim* v. *Ram Kishore*, *ib.*, 421; *Jahan Singh* v. *Hardat Singh*, 57 A. 357; *Maruti* v. *Babaji*, 15 B. 87; *Sripat Singh* v. *P. K. Tagore*, 44 C. 524 (533, 534) P. C.; *Jugul Kishore* v. *J. M. Tagore*, 10 C. 985 (992) P.C.; *Nanomi Babuasin* v. *Modhun Mohun*, 13 C. 21 (35) P.C.; *Hitendra Singh* v. *Rameshwar*, 18 C.W.N. 42; 22 I.C. 878; *Abdul Karim* v. *Ram Kishore*, 47 A. 421.

(2) *Sripat Singh* v. *P. K. Tagore*, 44 C. 524 (533, 534) P.C.

(3) *Nanomi Babuasin* v. *Madhun Mohun*, 13 C. 21 (35, 36) P.C.; *Bhagbut Prasad* v. *Girja Koer*, 15 C. 717 (723, 724) P.C.

(4) *Sheo Shankar* v. *Jaddo Kunwar*, 36 A. 383 P.C.; *Khairajmal* v. *Daine*, 32 C. 296 P.C.; *Raghunandan* v. *Parmeshwar*, (1917) Pat. 137: 39 I.C. 779; *Jahan Singh* v. *Hardat Singh*, 57 A 357.

(5) *Gadadhar* v. *Ghanshyam Das*, 47 I.C. (Pat.) 212.

(6) *Ganesh Rai* v. *Deo Saran*, 52 I. C. (Pat.) 271; *Lal Singh* v. *Jagraj Singh*, 50 A. 546 (548).

(7) *Suraj Bunsi* v. *Sheo Prasad*, 5 C. 148 (164, 165) P.C.; *Desouza* v. *Waman Rao*, 27 Bom. L. R. 1451: 91 I.C. 984: (1926) 117.

difference that while in the one case he can intervene in execution,[1] he is driven to a suit if the sale has been followed up by delivery of possession to the auction purchaser.

But in such cases, the fact that the son was not a party and the price paid would naturally weigh with the court.[2]

[For further commentary on this section, *see* under sections 160 and 161.]

168. **The title of a vendee of property from the father whether in a voluntary or involuntary sale is not affected by a defect in the sale if he had taken without notice of any defect in his title and after making in good faith reasonable inquiry into his title.[3]**

Protection of bona fide transferee.

Provided that in the case of an execution sale the purchaser is not bound to make inquiry beyond what appears on the surface of the proceedings.[4]

1411. Analogous Law.—This is only an illustration of the general principle of equity which protects a *bona fide* transferee without notice; and which has been enunciated and recognized by the Privy Council in several cases and is now embodied in S. 33 of the Transfer of Property Act.[5] As Sir Barnes Peacock, in a leading case said: "A purchaser, under an execution is surely not bound to go back beyond the decree to ascertain whether the court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one, the interest of the sons as well as the interest of the fathers in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bona fide* purchased the estate under the execution, and *bona fide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in and to set aside all that has been done under the decree and execution and recover back the estate from the defendant."[6]

[For further commentary, *see* the Author's Law of Transfer, Vol. I, 6th Ed., §§ 681-690.]

169. **Save as provided in this Code and saving any liability arising out of any express or implied ratification, or any liability attaching to the legal representative of a deceased person, or under any other law for the time being in force, a debt incurred or an alienation made by a manager, or the father, shall not be binding respectively on a coparcener or a son, and no decree passed against a manager or the father shall be executed against the interest respectively of a coparcener, or a son, in the coparcenary property.**

Saving clause and bar of other claims.

(1) *Mahabir Pershad* v. *Moheshwar*, 17 C. 584 P.C.
(2) *Simbhu Nath* v. *Golap Singh*, 14 C. 572 (578, 579) P.C.
(3) S. 33, T. P. Act.
(4) *Girdhari Lal* v. *Maddun Thakur*, 14 B.L.R. 187 (199, 200) P.C.
(5) Act IV of 1882.
(6) *Girdhari Lal* v. *Muddun Thakur*, 14 B.L.R. 187 (199, 200) P.C.

1412. Analogous Law.—This section is taken from the official draft and is intended to define and limit the liability of the coparcener, son, grandson and great-grandson to circumstances mentioned in the chapter and in the section. In so limiting, it categorises their liability arising from any of the following sources, namely:—

(1) As provided in the Code;

(2) From their assent, acquiescence or ratification;

(3) As a legal representative of the deceased; or

(4) Under any other law for the time being in force.

It will thus be seen that apart from the personal law, their liability may spring from other sources, namely, the general law to which clauses (2) to (4) refer. These should not be ignored in determining their liability, since on this point, this Code is not exhaustive, setting out as it does merely the rules of vicarious liability implict in the Mitakshara joint family; apart from which there is the general law under which a coparcener and the son might be liable, as where he had profited by the act of the manager or the father which he cannot be permitted to repudiate without also making an adequate restitution for the benefit he had received.

CHAPTER XII.

DAYABHAG JOINT FAMILY.

1413. Topical Introduction.—The Mitakshara and the Dayabhag joint family systems in many respects present a contrast since there can be no comparison between them. And all the difference that exists between them arose from ascribing a different meaning to a single word "*Daya*," which the Mitakshara defines as "wealth which becomes the property of another solely by reason of the relation to the owner,"[1] whereas the Dayabhag holds it to mean "what is given" from the verb "*da*" to give, and hence the wealth which one acquires on another's death.[2] This turn in the expression has sufficed to alter the entire law of coparcenary in the two schools. Under the Mitakshara, the right arises by "reason of relation," that is, on birth, while under the Dayabhag, the right can only arise upon another's death; the position then being that while the issue under the one system acquires a vested right in their family property, no such right accrues to a Dayabhag son whose right can only arise on his father's death. The latter is then the absolute owner of his property and the sons have no right of partition. Indeed, their interest being in the nature of a possibility, there is nothing to partition.[3] But it is a right which only the father possesses against his sons, and on his death, the Dayabhag family is little distinguishable from a Mitakshara family, save that a Dayabhag coparcener possesses the larger power of disposal, being free to dispose of his share as if it were his separate or self-acquired property, and women are not disqualified from being admitted into the rank of coparceners. To this extent the Dayabhag takes a more modernized view of ownership, though in its law of inheritance, it gives greater prominence to the theory of spiritual benefit, the effect of which will have to be considered in the sequel. But so far as the law of joint property is concerned, the difference between the two systems is the difference between coparcenary and co-ownership with the consequential result that there can be no survivorship, but only inheritance, so that on the death of their father, the heirs take as tenants-in common and not as joint tenants.

1414. The Dayabhag joint family is thus the very antithesis of the Mitakshara family, as it recognizes no right by birth, no co-ownership, no fetter on female rights to coparcenership or succession. As regards all property, whether ancestral or self-acquired, divided or undivided, the father of a Dayabhag family is entitled to absolute right of enjoyment and alienation by an act *inter vivos* or by will. His sons and grandsons possess no vested right but merely a *spes successionis*, which they cannot dispose of. But on the father's death, the sons and the grandsons and the

(1) Mit. I-I-2.
(2) Dayabhag, I-I- 4, 5.
(3) *Kumla* v. *Gooroo*, (1829) B.S.D. A. 322 (410); *Juggomohun* v. *Neemoo*, Morton, 90; *Motee Lal* v. *Mi Herjeet*, 6 B. S. D. A. 73 (85); *Ramkishore* v. *Bhoobunmoyee*, (1859) B. S. D.A. 250. affirmed, on review, (1860) *ib.*, I-489; *Uddoy* v. *Jadublal*, 5 C. 113; *Narain* v. *Lokenath*, 6 C. 461; *Saradu* v. *Mohananda*, 31 C. 448.

widows of those predeceased become entitled to dispose of their share, whether divided or undivided, and in all property, whether ancestral or self-acquired, both by an alienation *inter vivos* or by will, to any person whatsoever, even to the exclusion of their own offspring.

1415. The antithesis between the two schools may be set out thus:—

Joint Family.

Mitakshara.	*Dayabhag.*
(1) Right arises upon birth.	(1) No right arises upon birth. It arises upon the father's death.
(2) Only males are qualified to be co-parceners.	(2) Widows of co-parceners become co-parceners.
(3) No co-parcener can alien his interest.	(3) A co-parcener aliens it even by gift or will.
(4) Father can only alien joint property for legal necessity or for his own antecedent debt.	(4) He possesses absolute power of disposal and may alien it to any one.

170. In a family comprising the father and his sons and grandsons, the father is absolutely entitled to all property, whether ancestral, or his self-acquired property.[1]

Dayabhag family with father as head.

1416. Analogous Law.—The following texts support the section:—

Dayabhag.—"Sons have not a right of ownership in the wealth of the living parents, but in the estate of both when deceased."[2] "If sons have property in their father's wealth, partition would be demandable even against his consent, and there is no proof that property is vested by birth alone, nor is birth stated in the law as a means of acquisition."[3]

"Hence (that is, because property is not vested in sons, while the father lives, or because property is not by birth, but by survival or because the demise of the ancestor is a requisite condition) the passage cited beginning with the words "after the death of the father"[4] being intended to declare that property vested at that period (namely at the moment of the father's decease) recites partition which, of course, then awaits the right pleasure (of the successor.) For it cannot be a precept as the same result respecting the right of partition at (pleasure) was already obtained (as the necessary consequence of a right of property)."[5]

1417. Dayabhag Family.—A Dayabhag joint family may have the father as its head, or it may be a family comprising the brothers and nephews with a head other than the father. In the first case, so long as the father is the head of the family, he is the sole master of all its property, whether ancestral or self-acquired. His sons and grandsons possess no right over him. Nor is there the presumption of law that while a Hindu family remains joint, all property including acquisitions made in the name of individual members is joint property.[6] They cannot enforce a partition or exercise any of the rights of a Mitakshara coparcener. The father is not even bound to maintain his adult sons or grandsons, though he is bound to maintain his minor sons,[7] his unmarried daughters,[8] his wife[9] and his parents[10] Under the Mitakshara, the father is under a legal duty to maintain his son's widow, but under the Dayabhag, the son having no vested interest in his father's property, his

(1) Dayabhag, Ch. I-26, 49.
(2) Dayabhag, Ch. I Sec. II-§§ 11-31.
(3) Ch. I-19.
(4) From Manu, IX-104 : After the death of the father and the mother, the brethren being assembled, must divide equally the paternal estate: for they have not power over it, while their parents live."
(5) Ch. I-26.
(6) *Jasoda* v. *Lal Mohan*, 42 C.L.J. 486; *Hemchandra* v. *Matilal*, 60 C. 1203 (1257).
(7) *Premchand* v. *Hulaschand*, 12 W. R. 494; *Nilmony* v. *Boneshur*, 4 C. 91 (93).
(8) Dayabhag, Ch. II-34.
(9) *Khetramani* v. *Cashinath*, 10 W. R. F.B. 89.
(10) *Kamini* v. *Chandra*, 17 C. 373.

widow has equally no legal claim for her maintenance. Her claim upon her father-in-law for maintenance is merely moral and unenforceable in a court of law.[1] But she has a legal claim to be maintained by her husband's brother if he inherited property from his father, in which case the moral obligation of the father becomes a legal obligation of the son.[2] The mother is entitled to maintenance, and is allotted a share in lieu of maintenance.[3] With the exception of the "outcast and his son" all disqualified members of the family are entitled to maintenance.[4] the son of the outcast being entitled to a share of the inheritance.

No Estoppel.

1418. The absolute ownership of the Dayabhag father may be emphasized by the fact that the son does not acquire any right against him even by estoppel. So where the son constructed a house with money of his own on a plot of land belonging to the father, he could not claim even joint ownership thereon with the father,[5] and the father had the right of turning him out of the house, even though he had allowed and encouraged the son to spend large sums of money for that purpose.[6] In such cases, there can be no estoppel against the father, since the son is presumed to know the law, though the father would equitably be bound to pay for the improvements he had encouraged his son to make.[7]

Other Dayabhag families.

171. Except where the father is alive, the Dayabhag joint family is, as regards its management and the rights of members, subject to the same rules as the Mitakshara family, except that:—

(*a*) a co-parcener may alien his share by sale, mortgage, gift or devise.[8]

(*b*) women are not disqualified from becoming coparceners.[9]

1419. Analogous Law.—Except that the father under the Dayabhag school possesses absolute power over the family estate, whether ancestral or self-acquired, a Dayabhag family without the father is indistinguishable from a Mitakshara family with only two exceptions set out in the two clauses.

1420. In all other respects, the powers and duties of the manager of families subject to the two schools are identical. The manager may contract debts for the joint family for which its members would be liable, and a decree passed against the manager would bind them even though they were not parties to the suit.[10] The general principle of Hindu Law, in so far as it is based upon the principle of agency and as quite apart from any religious or moral duties, is that all members of a joint family, and therefore, all their properties, divided or undivided, are

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(1) *Janki* v. *Nand Ram*, 11 A. 194 F. B.; *Kamini* v. *Chandra*, 17 C. 373; *Ammakannu* v. *Appu*, 11 M. 91; *Siddessury* v. *Janadhan*, 29 C. 557 (575).
(2) *Kedarnath* v. *Hemangini*, 13 C. 336 O.A. *Hemangini* v. *Kedar Nath*, 16 C. 758 P.C.
(3) Dayabhag, Ch. V-11.
(4) *Ib.*, Ch. V-19.
(5) *Bejoy Krishna* v. *Ashutosh*, 13 C.W.N. 397.
(6) *Dharma Das* v. *Amulyadhan*, 33 C. 1119 (1127).
(7) *Ib.*, p. 1129.
(8) *See* § 1421.
(9) Dayabhag, XI-I-8.
(10) *Dwarka Nath* v. *Bungshi*, 9 C.W.N. 879; *Sukhadakanta* v. *Joginikanta*, 60 C. 1197.

liable for debts contracted on behalf of the family by one authorized to contract them. But in a Dayabhaga family, though there is no joint family, strictly so called, nor can, therefore, be any manager, nor do the members share the special obligations of the sons as regards the debts contracted by the father, still if it appears that if any one of those members thereof are charged with the management of the family estate, it will be presumed that their management is with the presumed consent of the other members of the family,[1] and if such manager contracts a debt for a joint family purpose the joint family and not the managing member becomes liable for it,[2] *a fortiori* if all the members benefited by it.[3] But in such a case, if the manager has given security of a mortgage, the members must hold the creditor to his primary security, though the manager *qua* mortgagor would be personally liable, if he is so liable under law, *e.g.*, section 68 of the Transfer of Property Act.[4] It has been held that the manager is accountable to the other members, and in this respect the Dayabhag manager is subject to an added liability[5] but this view is not supported by any special rule of the Dayabhag school, but maintains his liability to account which is inconsistent with the fundamental idea of coparcenership.[6]

Clause (a).

1421. It has already been seen that Jimut Vahan allows a coparcener an unfettered right of disposal over his coparcenary interest. In this respect the Bengal coparcener has greater rights than his confrere in the Bombay and Madras Presidencies, in that, while the latter can only transfer for value, the former can do so even by gift or devise. His transferee has not merely an equity to a partition but acquires a title to his coparcener's share of which he may enforce a partition by metes and bounds.

Again, while a Mitakshara minor coparcener can only claim partition upon special grounds, the Dayabhag minor may do so as of right. To borrow a term from the English Law, the Dayabhag coparceners are, as regards their rights, tenants-in-common.

Clause (b).

1422. As such, it follows that they have no rights of survivorship. Consequently, if of two brothers one should die, his widow becomes a coparcener with the other and is entitled to enforce all the rights of her deceased husband.[7]

The Dayabhag makes no distinction between movable and immovable property inherited by a female as the heiress of a male relative. She has the same powers and is subject to the same restrictions as regards management and alienation.[8]

Presumption of joint Acquisition.

1423. It is stated that the presumption of the Mitakshara law that acquisitions made in the names of the individual members, while the family remains joint, are joint property, is not applicable to

(1) *Müller* v. *Ranga Nath*, 12 C. 389.
(2) *Dwarkanath* v. *Bungshi*, 9 C.W.N. 879.
(3) *Sukhada Kanta* v. *Jogini Kanta*, 60 C. 1197 (1202).
(4) *Ib.*, p. 1204, 1205.
(5) *Abhay Chandra* v. *Pyari Mohan*, 5 B. L. R. 347 F.B.; 13 W.R. 75 (F. B.), distinguished in *Balakrishna* v. *Muthusami*, 32 M. 271 (274); *contra* in *Rungun* v. *Kassinath*, 13 W.R. 76-*note*.
(6) *Balakrishna* v. *Muthusami*, 32 M. 271.
(7) Dayabhag, Ch. XI-i-8; *Cossinaut* v. *Hurro Soondery*, (1826) Clarke's Rules and Orders (App.) 91; *Sudaminee* v. *Jogesh Chunder*, 2 C. 262; *Janoki*, v. *Mothara*, 9 C. 580; *Bepin Behari* v. *Lal Mohun*, 12 C. 209; *Durga Nath* v. *Chintamani*, 31 C. 214 (218).
(8) Dayabhag, Ch. XI-1; *Durga Nath* v. *Chintamani*, 31 C. 214 (218).

a joint family under the Dayabhag school, under which it is incumbent upon a person alleging any property to be joint at least to prove the existence of an original nucleus with the aid of which the property, sought to be partitioned, has been increased and amplified.[1] But in a subsequent case it was explained that the Mitakshara rule equally applies to a Dayabhag family.[2] (§ 1425.)

172 Effect of individual acquisitions.

(1) All acquisitions are presumed to be made for the joint family, provided it had then a nucleus from which such acquisitions were possible;[3]

(2) Those made by a member without the aid of joint funds become exclusively his own;[4]

(3) But those acquired mainly by his own exertion with little assistance from the joint funds become accretions to the joint estate, the acquirer being entitled to a double share therein on partition;[5]

(4) Acquisitions made with the aid of joint funds fall into the joint estate in which the acquirer is entitled to no preference.

1424. Analogous Law.—This section is supported by the undernoted authorities, the substance of which is stated in the rule:—

Dayabhag.—"That which is acquired by a person, belongs exclusively to him so long as he lives, if there be no special rule (to the contrary): but, where the exertion of one is merely through the joint family, and the other contributes to the acquisition by his person and wealth, it is a rule suggested by reason, that the one shall have a single share, and the other two. Hence likewise it follows, that if the joint stock be used, shares should be assigned to each person in proportion to the amount of his allotment, be it little or much, which has been used."[2]

To this effect was the *futwah* of the Pandits in a case[8]: "Of several brothers living together in a family partnership, should one acquire property by means of funds common to the whole, the property so acquired belongs jointly to all the brothers. Should, however, the means of acquisition, drawn from the joint funds, be of little consideration and the personal exertions considerable, two shares belong to the acquirer and one to each of the other brothers."

1425. This section lays down a rule for the appointment of property acquired with the aid of nucleus of the joint family, and that acquired solely or mainly by a member's own exertions. In the first two clauses, the Dayabhag rule is not different from that of the Mitakshara, the only rule special to the Dayabhag being that stated in clause (3)[9] which gives the acquirer two portions in property acquired mainly by

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(2) *Saroda Prasad* v. *Mahananda*, 31 C. 448, followed in *Govind* v. *Radha Kristo*, 31 A. 477 (480).

(2) *Rama Nath* v. *Kusum Kamini*, 4 C. L. J. 56 (62, 63) distinguishing *Sarada Prasad* v. *Mahananda*, 31 C. 448, following *Tauck Chunder* v. *Joodhesser*, 19 W.R. 178; *Kanhia Lal* v. *Debi Das*, 22 A. 141.

(3) *Gobinda* v. *Radha*, 31 A. 477 (480); *Sarada Prosad* v. *Mahananda*, 31 C.L.J. 56 (61); *Hemchandra* v. *Matilal*, 60 C. 1252 (1258).

(4) Dayabhag, VI-§§ 23-30; *Lalchand* v. *Swarnamoyi*, 13 C.W.N. 1133 : 3 I.C. 102.

(5) Dayabhag, VI-§ 23.

(6) *Vide* foot-notes (3), (4) & (5).

(7) Dayabhag, VI-1-23.

(8) *Partap Bahadur* v. *Tilukdharee*, 1 S.D.A.B. 179 (236), cited in *Lalchand* v. *Surnomoyee*, 13 C.W.N. 1133 : 3 I.C. 102 (104).

(9) *See* S. 109 (*d*); S. 110 (*c*).

his exertions.[1] Again, the presumption of the Mitakshara that acquisitions made in the name of individual members, while the family remains joint, are joint property, is not applicable to a Dayabhag joint family, it being incumbent upon a person governed by that school to prove the existence of an original nucleus with the aid of which the property sought to be partitioned has been increased and amplified.[2] The question what exertions entitle the acquirer to two shares must depend upon the value of the property, and the value of his own contribution to its acquisition or improvement.

It will be noticed that while clauses (1), (2) and (4) are in accord with the Mitakshara, clause (3) gives the acquirer an additional share to which a Mitakshara coparcener is not entitled. As such, the clause marks the growth of individual rights over the more indiscriminate collectivism of the orthodox school.

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(1) *Partab Bahadur* v. *Tilukdharee*, 1 B.S.D.A. 179 (236); *Lalchand* v. *Sarnamoyee*, 13 C.W.N. 1133 : 3 I.C. 102.

(2) *Govind Chandra* v. *Radha Kristo*, 31 A. 477 (480); *Sarada Prosad* v. *Mahanand Roy*, 31 C. 448; *contra* in *Rama Nath*, v. *Kusum Kamini*, 4 C.L.J. 56 (62, 63).

CHAPTER XII-A.

FAMILY ARRANGEMENT.

Family arrangement.

173. A family arrangement is the *bona fide* settlement of a claim or dispute[1] by members of a family, made or acquiesced, in for the benefit; peace or security of the family generally or for preserving its property or honour.[2]

Explanation 1.—The term "family", as used in this connection, is a wide one and includes not only the members of the family, male and female, legitimate and illegitimate, natural and adopted, or to be adopted for the time being; but also those; yet unborn, including reversioners,[3] and all persons having some claim on the family for maintenance, residence, marriage portion or the like.[4]

Explanation 2.—It is not essential to a family arrangement that its benefit should be limited to the members of a family, since a stranger may equally benefit by it.[5]

Illustrations.

(*a*) Of three brothers *A*, *B*, and *C*, *A* died last, leaving him surviving his widow and a daughter. *D* claimed the whole estate as the adopted son of *B's* widow. The dispute was settled by an award, which divided the estate into four quarters giving a share each to the widow, her daughter and the two widows of *B* and *C*. Nothing was given to *D* who, however, acquired his adoptive mother's quarter by relinquishment. *D* cannot sue for the balance of the estate on the death of *A's* widow when the succession opened.6

(*b*) *A*, who had inherited her husband's estate, made a gift of some of the properties to one *B* who claimed to be her husband's sister's son, whereupon the presumtive reversioner *C* sued *A* for declaration of the invalidity of the gift beyond her lifetime. The suit was compromised by the parties who divided the estate between themselves. The compromise does not bind the next reversioner.7

(*c*) *B* and *C* enter into a family arrangement, by which, after settling about their own shares, they allot a village and some money out of *B's* share to *A's* illegitimate son *D*. *D* is entitled to realize his allotment from *B*.8

(*d*) In 1911, a daughter's daughter was not an heir to her maternal grandfather's estate. As such, there could be no family arrangement affecting her right as a member of the family. Consequently, if her maternal grandmother adopted *A* who simultaneously agreed to pay a sum of Rs. 5,000 to her daughter's daughter, the latter cannot sue for the amount, as the money was not payable under a family

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(1) A claim or dispute arising or that may arise—*Pakhar Singh* v. *Dulari*, 52 A. 716; *Ameer Hasan* v. *Mhd. Ejaz Husain*, (1929) O. 134; *Rai Bajrang* v. *Rameshar*, (1937) O. 189; *Sital Singh* v. *Kalka Singh*, (1937) O. 433.

(2) *Basant Kumar* v. *Lala Ram Sankar*, 59 C. 859.

(3) *Kanhai Lal* v. *Brij Lal*, 40 A. 487 P.C.; *Chunnilal* v. *Swami Prasad*, (1935) A. 418.

(4) 15 Halsbury's Laws of England (2nd Ed.), p. 3; *Jang Bahadur* v. *Ramnath*, (1937) O. 99 (102).

(5) 15 Halsbury's Laws of England, p. 8; *Kashibai* v. *Tatya*, 40 B. 668; *Subbu Chetti* v. *Arunachalam*, 53 M. 270 F.B.; *Jagadamba* v. *Bibbootibhooshan*, 60 C. 767; *Jang Bahadur* v. *Rana Umanath*, 12 Luck. 639; (1937) O. 99.

(6) *Sahu Ram* v. *Bhup Singh*, 40 A. 437 P.C.

(7) *Rajpali* v. *Sarju Bai*, (1936) A. 507 F.B., approving *Mahadel* v. *Baldeo*, 30 A. 75.

(8) *Jung Bahadur* v. *Uma Nath*, (1937) O. 99.

arrangement, nor was *A* to hold the amount in trust for her.[1] The case would have been different if, instead of the money, she had left land of the same value.[2]

(*e*) In the settlement of a family dispute between *A* and *B*, it is agreed that *A* should pay a sum of money to a stranger *C*. *C* can recover the money from *A*.[3]

(*f*) The widow adopted one *A* and at the same time made a will, bequeathing certain properties to her granddaughter *B*, which *A*, then a major, attested. The widow had no power to make a will, but her bequest was still held good as a family arrangement by which *A* was bound.[4]

1426. Analogous Law.—The law of family arrangement flows out of the law of conpromise and is a branch of the general law, being a rule of broad equity, equally applicable to all families, understood in their broadest sense as comprising all relations legitimate or illegitimate, both male and female as described in the explanation. In applying the doctrine to Hindu cases, the courts have as a rule followed the leading principles of English equity jurisprudence, which, embodying as it does, the rules of justice, equity and good conscience, become applicable in the absence of anything in Hindu Law to the contrary.[5] As such, reference to the English cases in this connection would furnish a useful guide in the decision of cases in this country, and they will be consequently referred to.

1427. Principle.—A family arrangement or settlement is a compromise, but being a compromise of a claim between relations in which sentiment has a place, it follows rules of its own, and once made is treated as final except that it may be unravelled on the grounds set out in the next section. Such compromise may bind even one not a party to it, if he has adopted or acquiesced in it. The fact of unfair advantage or bad bargain is foreign to such settlement which is upheld on the ground that it is conducive to the maintenance of peace and harmony in the family.

1428. Meaning of words : *Claim or dispute.*—Claim to property, dispute regarding status, adoption, marriage, legitimacy or the like.

"*Members of the same family.*" Male and female, major or minor[6] legitimate or illegitimate[7] alive or yet to be born.[8] But there can be no family arrangement with a stranger though it may be made between two or more interrelated families in which a stranger is interested. "*Made or acquiesced in.*" As where the members do not partition property out of respect to their ancestors' agreement.[9] "Preserving its property or *honour.*" Honour would be preserved if any flaw in the marriage or legitimacy of a relation is not unravelled to strangers.

1429. Family Arrangement and compromise.—A family arrangement or settlement is a special branch of the law of compromise, but unlike compromise, it is supported upon grounds wider than those applicable to

(1) *Vithal* v. *Yamunabai*, 58 B. 234.
(2) *Subbu Chetti* v. *Arunachalam*, 53 M. 270 F.B.; followed in *Jagadamba* v. *Bibhootibhooban*, 60 C. 767.
(3) *Subbu Chetti* v. *Arunachalam*, 53 M. 270 F.B.
(4) *Kashibai* v. *Tatya*, 40 B. 668.
(5) *Jang Bahadur* v. *Rana Uma Nath*, (1937) O. 99.
(6) *Dadasahib* v. *Gajraj Singh*, (1925) M. 204; *Keshava Rao* v. *Nathravati*, (1928) M. 200; *Dangal Ram* v. *Jaimangal*, 5 Pat. 480.
(7) *Stapilton* v. *Stapilton*, 1 Atk. 2 (10): 26 E.R. 1 (6); *Westley* v. *Westley*, 2 Dr. & War. 502.
(8) *New*, In re, (1901) 2 Ch. 534.
(9) 1 Law of Transfer, (6th Ed.), 415-417; pp. 282-284; *Sidh Gopal* v. *Behari Lal*, 50 A. 284; *Khanta Moyee* v. *Hridayanenda*, (1929) C. 149; *Jogeshwar* v. *Bhushan*, (1921) O. 134.

dealings between strangers, since, as observed by Lord Cottenham, L.C., "The consideration in this, and in other such cases is compounded partly of value and partly of love and affection."[1]

So Cockburn, C.J., said: "The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration, and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day, a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of being annoyed with an action, he escapes from the vexation incident to it."[2] The arrangement does not depend for its validity upon any right, for the plaintiff may have no right at all, and the defendant may know it, yet if the plaintiff believed that he had a right and the defendant preferred its settlement to trial by court, it is a good settlement binding on the parties.[3] It is not a *nudum* because the settlement of a dispute is in itself a good consideration, provided that there was some dispute to settle and the party making a claim *bona fide* believed in it.[4] In the case of family arrangements, the consideration is not the sacrifice of any right, but the settlement of a dispute and the court does not consider narrowly the *quantum* of consideration. Equity leads towards the maintenance of family arrangements and a fair settlement of the dispute is, as already stated, a sufficient consideration in such cases.[5]

1430. The question of consideration, which determines the validity of a compromise, is subordinated to other questions, such as the settlement of a dispute without recourse to publicity, the greater forbearance and less scrutiny into the justice of the claim, since the guiding motive in such arrangements is the benefit of the family generally, preservation of peace and good relations between its members, and it may be the saving of its honour. As such, such settlements are recognized in all systems of law, and the same rules guide them, whether they are made between members of the family who are British[6] Hindu[7] or Musalman;[8] in all of which the court is guided by the fact that what the family have decided must be treated as final and not open to re-examination of its fairness or finality, since it is of the very essence of a family arrangement that it should be private and kept out of court. The fact that one party was drunk at the time would be sufficient to avoid a compromise,

(1) *Per* Lord Cottenham L.C., in *Persee* v. *Persee*, 7 Cl. & F. 279 (318): 7 H.L.C. 1073 (1089).

(2) *Callisher* v. *Bischofsheim*, L.R. 5 Q.B. 449 (451, 452).

(3) *Cook* v. *Wright*, 1 B. & S. 559 (570); 30 L.J. (Q.B.) 321 (324), cited *per* Blackburn, J., in *Callisher* v. *Bischofsheim*, L.R. 5 Q.B. 449 (451-452), and *per* North, J., in *Mile* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266 (273).

(4) *Per* Cotton, L.J. in *Mile* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266 (283); *Kamal Kumari* v. *Narendra*, 9 C.L.J. 19: 1 I.C. 573.

(5) *Kamal Kumari* v. *Narendra*, 9 C.L.J. 19: 1 I.C. 573.

(6) Hals. L. Eng., *Tit* Family Arrangements: *Jodrell* v. *Jodrell*, 14 Beav. 397 (412): 51 E.R. 339 (345); *Williams* v. *Williams*, L.R. 2 Ch. 294; *Mile* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266; *Hoblyn* v. *Hoblyn*, 41 Ch. D. 200 (204); *Callisher* v. *Bischofsheim*, L.R. 5 Q.B. 449.

(7) *See* cases *post*.

(8) *Dada Sahib* v. *Gajraj Singh*, (1925) M. 204.

but not so a family arrangement.[1] A family arrangement is good even though one of the parties thereto[2] or neither had a good title.[3] All that is required is a claim or a dispute to settle and *bona fides* is the essence of its validity.[4] (§ **1432.**)

1431. It is not essential for its validity that a settlement should have been acted upon, though the fact that it has been acted upon adds to its binding force. It is a mistake to suppose that the doctrine of family arrangements extends no further than arrangements for the settlement of doubtful or disputed rights. The principle is applicable not merely to cases in which arrangements are not between members of a family for the preservation of its peace, but also to cases in which arrangements are made between them for the preservation of its property.[5]

1432. Family arrangements are governed by a special equity peculiar to themselves and will be enforced, if honestly made, although they have not been meant as a compromise but have proceeded from an error of all parties originating in mistake or ignorance of facts as to what their rights actually are on the points on which their rights actually depend.[6]

These principles have been given effect to by the Privy Council in several cases[7] to be presently considered.

These facts distinguish a settlement from what may be a colourable transaction which may bear the appearance of a settlement, but is in reality a fictitious transaction.

1433. Form immaterial.—The court will uphold an arrangement, though it may not be clothed in a legal form.[8] As aa matter of fact, a family arrangement requires no formal deed or contract in writing, and it does not necessarily involve the transfer of a right from one person to another, so as to require its registration, but if it is reduced to writing,[9] and even where it involves a transfer, and is, therefore, compulsorily registrable,[10] still the court may, it is said, admit into evidence in proof of not what the parties said therein, but of what they did thereon, calling in the aid of the doctrine of part performance, now given legislative sanction both in the Registration and the Transfer of Property Acts.[11] This question has been considered under another section. (**S. 174.**)

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(1) *Stockley* v. *Stockley*, 18 Ves. 30; *Cory* v. *Cory*, 1 Ves. 19.

(2) *Ockford* v. *Barelli*, 25 L.T. 504; *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266.

(3) *Gordon* v. *Gordon*, 3 Swans. 471; *Vatsalabai* v. *Vasudev*, 33 Bom. L.R. 1483.

(4) *Basanta Kumar* v. *Lala Ram Sankar*, 59 C. 859; *Joges Chandra* v. *Prasana Kumar*, 55 C. L.J. 283: (1932) C. 664.

(5) *Stapilton* v. *Stapilton*, 1 Atk. 2, cited in *Helan Dasi* v. *Durga Das*, 4 C.L.J. 323 (331, 332).

(6) *Williams* v. *Williams*, L.R. 2 Ch. 294, cited in *Helan Dasi* v. *Durga Das*, 4 C.L.J. 323 (331), followed in *Sukhram* v. *Uderam*, 3 I.C. (A.) 85 (compromise by a widow binds the reversioner).

(7) *Rajunder* v. *Bajai Govind*, 2 M.I.A. 181 (249) *Hetnarain* v. *Madnarain*, 7 M.I.A. 311 (322); *Mantappa* v. *Baswanirao*, 14 M.I.A. 24 (36); *Greender* v. *Troyluck*, 20 C. 373 (377, 378) P.C.; *Bishenchand* v. *Asmaida*, 5 A. 560 (574, 575) P.C.; *Kedar Nath* v. *Ratan Singh*, 32 A. 415 (426) P.C.; *Khunilal* v. *Gobind*, 33 A. 356 P.C.; *Kanhai Lal* v. *Brijlal*, 40 A. 487 P.C.

(8) *Choudhuri Monohar Lal* v. *Amano*, (1924) N. 14.

(9) *Baldeo* v. *Udal Singh*, 43 A. 1 (6).

(10) *Ram Gopal* v. *Tulsai Ram*, 51 A. 79 F.B. Contra *Mahadevi* v. *Padranath*, (1937) A. 817.

(11) S. 49 of the Registration Act as amended by Act XXI of 1929; S. 53-A of the Transfer of Property Act, IV of 1882, added by S. 16, Act XX of 1929. *See* 1 Law of Transfer (6th Ed.), 1077, 1082; *Mahomed Musa* v. *Aghore Kumar*, 42 C. 801 (817) P.C.; *Ram Lal* v. *Sita Bai*, 14 L. 635.

1434. A family arrangement may at times take the form of the aid of arbitration resulting in an award, in which case, the court will have regard not to the form but to the substance of the transaction.[1] Apart from a transfer or other writing, such a trnsaction may be inferred from a course of conduct or dealings,[2] which will support a suit for specific performance[3] Inadequacy of consideration is immaterial, unless it furnishes evidence of fraud. Its adequacy, when entering into calculation, rather shows that the transaction was a transfer and not a mere family arrangement in which consideration is subordinate to other motives.[4] A time-expired debt is a good consideration for a family arrangement[5] which will be upheld even though, taken as a transfer, it would be void on the ground of public policy.[6]

1435. So is the fact that there were no rights in dispute.[7] A family arrangement is supported because the impelling motive therefor is the avoidance or settlement of a family dispute, and not that the parties have an actionable right. In such cases, the compromise of a disputed claim, made *bona fide* is a good consideration for a promise, even though it ultimately appears that the claim was wholly unfounded.[8] In such a case if two parties were strangers, and one enters into an arrangement in ignorance of his rights, the agreement would not in general be binding upon him.[9] A mistake of fact is a good ground for avoiding a compromise, though it cannot affect a family arrangement.[10] But neither can it be set aside merely because the right then in doubt had been subsequently decided to be non-existent.[11] So while a compromise might be set aside,[12] if it is the result of a mutual mistake, as where *A* conveys the moiety of his estate to *B*, both believing him to be so entitled, whereas *B* was not entitled to anything at all, it is no ground for setting aside a family arrangement.[13]

174. A family arrangement is not required to be in writing, but if it is reduced to writing and affects immovable property of the value of one hundred rupees or upwards, it must be registered.[14]

Form.

1436. Analogous Law.—A family arrangement, like a partition, requires no writing, but if it is reduced to writing and affects immovable property of the value of Rs. 100 or upwards, then it must be registered,[15] But it is said that where such document is not registered but has been acted upon for several years, it would become admissible even if unregistered on the strength of part performance.[16] But this view is questioned

(1) *Ram Bahadur* v. *Mahant Ganesh*, 2 Pat. 554.

(2) *Per* Lord Chelmsford, L.C., in *Williams* v. *Williams*, L.R. 2 Ch. A. 294 (300).

(3) *Wycherley* v. *Wycherley*, 2 Eden. 175.

(4) *Dimesdale* v. *Dimesdale*, 25 L.J. Ch. 806 (in which the same case showed a family arrangement, and no family arrangement).

(5) *Penhall* v. *Elwin*, 1 Sm. & G. 258.

(6) *Jadrell* v. *Jadrell*, 9 Beav. 45.

(7) *Ib.*, *Per* Turner, L.J., p. 304.

(8) *Ockford* v. *Barelli*, 25 L.T. 504 approved in *Callisher* v. *Bischofsheim*, L.R. 5 Q.B. 449.

(9) *Badding* v. *Oliver*, 2 L.J., Ex. 76.

(10) *Trigge* v. *Lavallee*, 15 Moore, P. C. 271.

(11) *Lawton* v. *Campion*, 23 L.J. Ch. 505.

(12) S. 20, Contract Act.

(13) *Heald* v. *Walls*, 39 L.J. Ch. 217.

(14) S. 17 (1) (*b*) Reg. Act; *Ram Gopal* v. *Tulsi Ram*, 51 A. 79 F.B.

(15) S. 17 (1) (*b*) Registration Act, (XVI of 1908) *Ram Gopal* v. *Tulsi Ram*, 51 A. 79 F.B.; *Ram Lal* v. *Sita Bai*, 14 L. 635 (639).

(16) *Ram Lal* v. *Sita Bai*, 14 L. 635 (639) (but submitted the case being decided on 28-3-33, the doctrine was limited as embodied in S. 49 of the Registration Act.).

on the ground that a family arrangement is not a transfer or covered by the exception to S. 49 of the Registration Act.[1] In one such case, where the arrangement was reduced to writing and rejected for want of registration, the parties relied on it as a settlement or a will, the Privy Council held that it was bound to give effect to the real character of the instrument which they held to be a family settlement. As such, it was inoperative as regards immovable property, but was otherwise valid and could be given effect to. But inasmuch as both parties had made inconsistent pleas anent thereto the court deprived the successful appellant of his costs.[2] It is not necessary that a family arrangement should be entered into as such. All that law requires is that whatever its form, it must have that effect. Consequently, the combined effect of a will and an adoption deed may result in a family arrangement as in the following case. The widow adopted *A*, who, being major, attested her contemporaneous will, bequeathing some property to her grand-daughter. The court upheld it as a family arrangement binding on the adopted son.[3]

1437. A deed of release whereby the releasor simply undertakes to vacate the house may be operative as a *bona fide* settlement of a family dispute, even though it contains no words of conveyance.[4]

175. When a family arrangement may be set aside.

(1) A family arrangement cannot be set aside except for coercion, undue influence, fraud, misrepresentation, or mutual mistake.[5]

(2) In particular and without prejudice to the generality of the foregoing rule, it may not be set aside upon any of the following grounds:—

(*a*) That it was illegal;[6]

(*b*) That there was no consideration to support;[7]

(*c*) That it has transferred property to a person without any right;[8]

(*d*) That it was unfair and such as no court would support upon its merits;[9]

(*e*) That it was made by mistake of either party.[10]

(3) It may, however, be set aside on the ground that it was not bona fide or that there was no dispute.

(4) But before giving weight to these considerations due regard must be had to the time during which the arrangement has been acted upon or has remained unchallenged.[11]

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(1) *Mahadevi* v. *Padarath*, I.L.R. (1937) A. 817.

(2) *Umrao Singh* v. *Lachman Singh*, 33 A. 344 P.C.

(3) *Kashibai* v. *Tatta*, 40 B. 669; *Venkoba* v. *Rangánayaki*, (1936) M. 967.

(4) *Muthusami* v. *Govindasami*, 9 M.L.T. 342: 9 I.C. 267.

(5) *Bishamber* v. *Amar Nath*, (1937) (P.C.) 105; *Bhowani* v. *Juggernath*, 13 C.W.N. 309: 3 I.C. 241; *Yetchuri* v. *Yetchuri*, 30 M.L.J. 308: 33 I.C. 961; *Satya Kumar* v. *Satya Kumar*, 10 C.L.J. 503: 3 I.C. 247.

(6) *Jati Lal* v. *Beni Madho*, (1931) Pat. 280.

(7) *Kamalkumari* v. *Narendra*, 9 C.L.J. 19; *Satya Kumar* v. *Satya Kripal*, 10 C.L.J. 503.

(8) *Cook* v. *Wright*, 1 B. & S. 559 (570); *Jamna Prasad* v. *Durga Devi*, (1933) A. 138.

(9) *Rajunder* v. *Bijai Govind*, 2 M.I.A. 181 (204); *Bishambar* v. *Amar Nath*, (1937) P.C. 105.

(10) *Gordon* v. *Gordon*, 3 Swan. 400: 19 R.R. 230: 36 E.R. 910, explained in *Satya Kumar* v. *Satya Kripal*, 10 C.L.J. 503 (511).

(11) *Mantappa* v. *Baswantrao*, 14 M.I.A. 24 (37); *Helan Dasi* v. *Durga Das*, 4 C.L.J. 323; *Satya Kumar* v. *Satya Kripal*, 10 C.L.J. 503 (511).

Illustrations.

(*a*) *A* disputes *B's* legitimacy. He afterwards compromises his claim with *B* on the basis of legitimacy. *A* cannot afterwards repudiate the compromise on proof of *B's* illegitimacy.[1]

(*b*) *A*, *B* and *C* are three brothers. On a distribution of the family estate *C* receives an allotment of land in lieu of maintenance. He did not claim nor was allowed any share. *C* is bound by the arrangement.[2]

(*c*) *A* transfers to *B* property by mistake. *B* accepts it innocently. The transfer is valid.[3]

(*d*) *A* and *B* partitioned their property in mutual ignorance of their respective legal rights. The partition is binding.[4]

1438. Analogous Law.—Both a family arrangement and a partition are matters of contract. As such, they are liable to be set aside for the same reason as a contract.[5]

1439. Family Arrangement: Valid and Void.—The compromise in settlement of a family dispute, and an acceptance of a given distribution, instead of a general partition, are upheld by the courts as necessary to check litigation[6] and to preserve the peace of families. The only condition required to support it is that it must be a *bona fide* settlement of a family dispute, or in other words, there must be a dispute or the possibility of one and its settlement. If this is conceded, the court will not scan too closely the rights of the contending parties affected thereby. The fact that one party had yielded to claim in honest error is no ground for repudiating it when the error is discovered, unless the other party was an accessory. This is settled by Lord Eldon, L.C., who ruled that family arrangements without fraud must be established, though founded in mistake; but they would not be supported if founded on mistake of either party to which the opposite party was an accessory. A family arrangement, concluded in honest error is binding unless either party has been misled by the concealment of material things, for the family agreement requires communication of all material circumstances. So he said: "Where family agreements have been fairly entered into without concealment of or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then although the parties may have greatly misunderstood their situation and mistaken their rights, a court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair and founded upon falsehood and misrepresentation, a court of equity would have a very great difficulty in permitting such a contract to bind the parties."[7]

1440. In a settlement of a doubtful right, truth may be on either side but it is of the essence of a settlement that investigation is stopped and a settlement concluded to restore harmony. So where three sons, one of whom being a minor was represented by his father, effected a partition on the basis of which a suit was filed. It was, however, opposed on the ground that there was no partition but merely a working arrangement, in which no account was taken of the joint property, that it was partial and

(1) *Gajapathi* v. *Gajapathi*, 13 M.I.A. 497 (512, 513).

(2) *Mantappa* v. *Baswantrao*, 13 M.I.A. 24 (36).

(3) *Gordon* v. *Gordon*, 3 Swan. 400: 19 R.R. 230 explained in *Satya Kumar* v. *Satya Kripal*, 10 C.L.J. 503 (511).

(4) *Rajunder* v. *Bijai Govind*, 2 M.I.A. 181.

(5) S. 14, Contract Act (IX of 1872).

(6) *Hetnarain* v. *Modnarain*, 7 M.I.A. 311 (322).

(7) *Gordon* v. *Gordon*, 3 Swan. 400 (483): 36 E.R. 910 (917); followed in *Satya Kumar* v. *Satya Kripal*, 10 C.L.J. 503 (511).

incomplete and that there was a mistake in the scheme of division adopted at the private partition. The court, however, overruled all these objections holding that a family arrangement could not be set aside on any of the grounds urged.[1] So where the coparceners had agreed to admit the adopted son of a widow, who, under the Mithila law, was only entitled to the lady's *stridhan*, in the mistaken belief of law that he was a coparcener, the Privy Council refused to dissolve the settlement, holding that it was a mistake which could not prejudice the adopted son who was not an accessory.[2] So in another case, in which the plaintiff sued to set aside a partition on the ground of coercion, fraud, undue haste and gross inequality, the Privy Council found the first two facts not proved, and the other two sufficient to annul it.[3] So where the question was whether certain persons were entitled to the properties in dispute, their predecessors-in-title, being themselves illegitimate sons of their father, to whom they could not inherit, the Privy Council held the question immaterial on the finding that they had obtained their estate in a compromise or family arrangement, which proceeded on the basis of their legitimacy.[4]

1441. In another case, three brothers had entered into an agreement on the assumption that their family estate was impartible and subject to the rule of primogeniture. As such, the two junior widows, merely received land in lieu of maintenance. Later on, the estate being held partible, one of them sued for partition, but the Privy Council threw out his suit on the ground that he was bound by the family arrangement.[5] The same view was taken in another case in which one brother gave another a share out of his self-acquisition believing it to be joint.[6]

1442. Fraud: Misrepresentation.—Coercion, undue influence fraud and misrepresentation are sufficient to vitiate all transactions, however, solemn and formal or informal; since equity which upholds a settlement cannot make itself a privy to fraud by legalizing such a transaction, which is, however, not void but only voidable at the option of the defrauded party who is entitled to condone it.[7] The right enures to his legal representative,[8] but not to a stranger.[9] A party is not entitled to set aside an arrangement if he was let into it by the fraud of a third party, since no party can protect another against the fraud of a third party unknown to him. But where a family agreement was consented to, because the family solicitor wantonly withheld, from the party aggrieved, knowledge of her rights, but for which she would not have given her consent, the court cancelled it on the ground that the common solicitor had acted for both parties[10] *a fortiori* where such consent is obtained by misrepresentation

Clause (1).

(1) *Satya Kumar* v. *Satya Kripal*, 10 C.L.J. 503.

(2) *Rajunder* v. *Bijai Govind*, 2 M.I. A. 181.

(3) *Hetnarain* v. *Modnarain*, 7 M. I. A. 283 (321, 322).

(4) *Gajapathi* v. *Gajapathi*, 13 M.I.A. 497 (512).

(5) *Mantappa* v. *Baswantrao*, 14 M.I. A. 24 (36, 37). In *Greender* v. *Troyluckho*, 20 C. 373 P.C., the decision was given on the construction of the agreement.

(6) *Kedar Nath* v. *Ratan Singh*, 32 A. 415 (426) P.C.

(7) Ss. 19, 19-A, 20, Contract Act; Ss. 86, 88, 89, Trusts Act.

(8) *Govind* v. *Savitri*, 43 B. 173; *Sravan* v. *Kashiram*, 51 B. 133.

(9) Ss. 19, 19-A, Contract Act; *Mangaldas Shallesh* v. *Bechal*, 40 C.L.J. 67.

(10) Ss. 21, 22, Contract Act: *Roberts* v. *Roberts*, (1905) 1 Ch. 704 (710, 711), head-note inaccurate, *Stewart* v. *Stewart*, 6 Cl. & Fin. 911 (970); 7 E.R. 940 (964).

of one of the parties to the agreement.[1] But even where fraud or undue influence of the other party is wanting, cases do arise where the court would unhesitatingly set aside a deed, as it did in case in which it was clear from the face of the deed that the parties did not understand their rights, or the nature of the transaction, and that the plaintiff had surrendered an unimpeachable title without consideration, there being evidence of his gross ignorance, habitual intoxication, liability to imposition and want of professional advice. In this case, though the plaintiff had acquiesced in the settlement for five years and there was no direct evidence of fraud or undue influence, still the court set it aside holding "that the parties knew not what they were doing."[2] But the mere fact that the plaintiff had agreed to a family arrangement being then drunk and paternal authority was exercised was held no ground for avoiding it.[3] But this was a reasonable settlement, and it does not imply that cases may not occur in which the court will set aside an arrangement if it is found to be so inequitable that it could not in the name of equity do otherwise than set it aside.[4] Such is the case where there is no *bona fide* dispute, but the transfer is given the guise of a family arrangement.[5]

Mistake.

1443. But this is ignorane of one's rights as distinct from mistake as to which a family arrangement is a departure from the ordinary rule which avoids an agreement made by mutual mistake on a question of fact on a material circumstance though not one of law.[6] But a mistake of one to which the other party was accessory is little distinguishable from fraud and its resultant effect.[7] But a family arrangement entered into under a common belief of all parties that *A* was entitled to one moiety and *B* to the other moiety of property, whereas *B* was entitled to the whole, was upheld as to the moiety allotted to *A*.[8]

1444. Avoidance of Family Arrangement.—Since a family arrangement is upheld on the ground that it enures to the peace of the family that doubtful claims should be amicably settled, it follows that a transaction cannot be considered as a family arrangement where the doubts existing as to the rights alleged to be compromised are not presented to the mind of the party interested.[9]

Clause (a).

1445. An illegal act cannot be legalized by giving it the guise of a family settlement. As such, one reversioner cannot dispose of his *pes successionis* to another in consideration of a price; or otherwise as such right is untransferable in law.[10] Nor can a family arrangement be used as a shield to defeat or defraud a third party or otherwise disguise an act that is illegal.[11].

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(1) *Leonard* v. *Leonard*, 2 Ball & B. 171.

(2) *Dunnage* v. *White*, 1 Swans. 137 (152): 36 E.R. 329 (335).

(3) *Cory* v. *Cory*, 1 Ves. S. 19: 27 E.R. 864; *Cook* v. *Clayworth*, 18 Ves. 12: 34 E.R. 222.

(4) *Dangal Ram* v. *Jaimangal*, 5 Pat. 480.

(5) *Joga* v. *Salleyya*, (1923) M. 168.

(6) Ss. 20, 21, 22, Contract Act.

(7) *Gordon* v. *Gordon*, 3 Swan. 400 (473): 36 E.R. 910 (920, 921).

(8) *Heald* v. *Walls*, 39 L.J. Ch. 217.

(9) *Harvey* v. *Cooke*, 6 L.J. (O.S.) Ch. 84.

(10) S. 6 (*a*), Transfer of Property Act; *Sham Sundar Lal* v. *Achan Kunwar*, 21 A. 71; *Amrit Narayan* v. *Gaya Singh*, 45 C. 590 P.C.; *Joti Lal* v. *Beni Madho*, (1937) Pat. 280.

(11) *Ib.*, S. 53.

1446. Consideration.—A family arrangement cannot be supported on the ground that it is a valid contract. As such, it requires consideration to support it.[1] But as every promise and every set of promises form the consideration for eaach other[2] and reciprocal promises are considerations for each other[3] it follows that a family arrangement would be supported by consideration if it is the result of mutual promises or relinquishments.[4]

Clause (b).

No extraneous consideration is then required to support a family arrangement. As observed in a case approved by the Privy Council: "The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light rather than as conferring a new and distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the courts to uphold and give effect to such an arrangement."[5]

1447. The settlement of mutual dispute and the purchase of peace is in itself a sufficient consideration required to validate such an agreement.[6] The relinquishment by one is consideration for the relinquishment by the other,[7] or as Parke, B., said: "The agreement by each individual to give up part of his claim is a sufficient consideration."[8] The court will not consider the *quantum* of consideration too nicely in a family settlement even when there were no rights in dispute, if sufficient motive for the arrangement is proved.[9]

1448. Right Immaterial.—So it is immaterial that the arrangement has transferred property to one who had no legal right to it. As previously remarked, the difficulty of ascertaining the rights is a justification for the settlement. Even where the rights are plain, its proof or acknowledgment might be difficult. If a family settlement could be set aside on proof of legal title, no settlement would be made since the proof of legal title would entitle the parties to their legal remedies, and there would be no occasion for a private settlement which law encourages as being in the interest of peace and concord.

Clause (c).

1449. But there is nothing in a party giving up his exceptance in a family arrangement in which two joint brothers having no male issue executed a will, in which they provided that on their dying sonless, their widows and daughters should take their shares instead of the other taking it by

Rights given up.

(1) S. 10, Contract Act.
(2) *Ib.*, S. 2 (*e*), (*f*).
(3) *Mahammadinissa* v. *Bachelor*, 29 B. 428; *Ashidbai* v. *Abdulla*, 31 B. 271 (277).
(4) *Krishendra* v. *Debendra*, 12 C.W.N. 793; *Bejoy* v. *Girindra*, 13 C.W.N. 201: 8 C.L.J. 458; *Mahammadinissa* v. *Bachelor*, 29 B. 428; *Ashidbai* v. *Abdulla*, 31 B. 271.
(5) *Beharee Lall* v. *Mewa Koonwar*, 3 Agra 82 (84) cited and approved in *Khunni Lall* v. *Gobind*, 33 A. 356 (367) P.C.
(6) *Bejoy* v. *Girindra*, 8 C.L.J. 458: *Kamal Kumari* v. *Devi Narendra*, 9 C.L.J. 19: 1 I.C. 573.
(7) *Ashidbai* v. *Abdulla*, 31 B. 271 following *Mahammadinissa* v. *Bachelor*, 29 B. 428; *Norman* v. *Thompson*, 4 Ex. 755 (760).
(8) *Norman* v. *Thompson*, 4 Ex. 755 (760).
(9) *Krishnendra* v. *Debendra*, 12 C.W.N. 793; *Satya Kumar* v. *Satya Kripal*, 10 C.L.J. 503.

survivorship.[1] But this was an arrangement in which the course of devolution was altered because they themselves had renounced their own right which they were fully competent to do. But if they had, for example, provided that even should a son be born to either of them he would be bound by their arrangement and claim no right in his heritage, then the arrangement would have fallen through on the ground of its illegality. Such was the case of an arrangement entered into by the father and his two sons providing for the succession by survivorship *inter se* to certain property allotted to their shares, whereupon on the death of one of the sons the other claimed his share to the exclusion of his daughter, but the court held the provision for survivorship void as contravening the ordinary Hindu Law of inheritance.[2]

A reversioner whose father was a party to an arrangement with the widow from whom he had taken a benefit cannot repudiate it upon the reversion opening up when he became entitled to the whole estate.[3]

An arrangement between the widow and her husband's brother whereby the widow was given an absolute right over a definite portion of the estate and her brother-in-law was given the remainder could not be challenged as a transfer of a mere expectancy.[4]

1450. Unfair Arrangement.—Family arrangements are governed by a special equity peculiar to themselves and will be enforced, if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend. When the responsible members of a family agree to the arrangement, which is *per se* not unfair and has been arrived at without undue advantage being taken, the courts will be slow to interfere when subsequently, one of the parties wishes to have that arrangement set aside.[5] Such was held to be the case where one party received property twice as valuable as the other.[6]

Clause (d).

1451. Though unfairness *per se* is no blot upon an agreement, it is evidence of fraud, and where an arrangement is shown to be so unfair that one could not have accedded to it without the exercise of undue advantage or coercion, the court may cancel the arrangement, not because it was unfair but because it was fraudulent. So where there is inequality of position, mutual mistake or any of those elements which dissolve the most solemn acts of parties, the court will not be slow to give effect to its conclusions. But the inclination of the court is always against it, even though a minr be concerned.[7]

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(1) *Lakshmichand* v. *Mt. Anandi*, 45 A. 245 (250); *Sureshwar Miser* v. *Mt. Maheshram*, 48 C. 100 P.C.

(2) *Bageshar* v. *Mahadei*, 46 A. 525 (530) following *Tagore* v. *Tagore*, 18 W. R. 359; *Purna Shashi* v. *Kalidhan*, 38 C. 603 P.C.; *Kanti Chandra* v. *Ali-i-Nabi*, 33 A. 4.

(3) *Kanhailal* v. *Brijlal*, 40 A. 487 P.C.; *Hardei (Mt.)* v. *Bhagwan*, 24 C.W. N. 105 P.C.; followed in *Bahadur* v. *Ram Bahadur*, 45 A. 277 (280, 281).

(4) *Guljar* v. *Mohanlal*, 108 I.C. (N.) 440; *Chinta Ram* v. *Ram Samujh*, 99 I.C. (O.) 500.

(5) *Kermatulla* v. *Kermatulla*, 23 C. W.N. 118; *Hassan Bibi* v. *Fazal Kadi*, (1909) P.L.R. 139.

(6) *Bishambar Nath* v. *Amar Nath*, (1937) P.C. 105.

(7) *Kermatulla* v. *Kermatullah*, 23 C. W.N. 118.

1452. Unilateral Mistake.—So, again, the fact that the arrangement was due to a mistake of either side is no ground for rescinding a settlement any more than it is a ground for rescinding a contract.[1] So, where *A* believes *B* to be entitled to coparcenary right, which he, as the adopted son of a widow subject to the Mithila law, was not, his mistake being in no way induced by *B* cannot prejudice the latter and a settlement made with him cannot be set aside on that ground.[2]

Clause (e).

1453. Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and doubt, and wished to put an end to the disputes and to determine or avoid litigation.[3] If one or more parties having, or supposing they have, claims upon a given subject-matter or claims against each other, agree to compromise these claims, and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal footing and there is an absence of fraud or misrepresentation, the transaction is binding, although the conclusion at which the parties may have arrieved is not that which a court of justice would have arrived at had its decision been sought. The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, and that the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation, agree to divide the inheritance, it is no ground for setting aside the agreement that only one was heir, and that the other gave up the right which he really possessed. The fact that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim. It is enough, if, at the time of the compromise, he may have believed he had a claim, and that the parties have, by the transaction, avoided the necessity of going to law. To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties *bona fide* consider it to be so. It is enough to render a compromise valid, that there is a question to be decided between them. A compromise of doubtful rights will not be set aside on any other ground than fraud.[4] This is the rule of law regarding compromises generally. But the courts go still further in favour of upholding compromises by which family disputes are settled, as appears from the following passage in the same treatise: "The principles which apply to the case of ordinary compromises between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, but have proceeded from an error of all parties originating in mistake or ignorance of facts as to what their rights actually are, or of the points on which their rights actually depend."[5]

Mistake of Law.

1454. Arrangement When Set Aside.—A family arrangement may, however, be set aside if it was not *bona fide* or if there was no dispute, present or future, or

Clause (3).

(1) S. 20, Contract Act. *Martin Cashin* v. *P. J. Cashin*, (1938) P.C. 103.

(2) *Rajunder* v. *Bijai Govind*, 2 M. I.A. 181; *Martin Cashin* v. *P. J. Cashin*, (1938) P.C. 103.

(3) *Dal Bhanjan* v. *Kariman*, 16 Pat. L.J. 465: 57 I.C. 413.

(4) Kerr's fraud, 335 cited in *Ram Niranjun* v. *Prayag*, 8 C. 138 (141, 142).

(5) *Ib.*, p. 364.

on the ground of mutual mistake, inequality of position, undue influence, coercion, fraud or any similar ground, provided it is clearly established by evidence.[1] Where, for instance, two persons collude to the prejudice of a third, the latter may set aside the transaction as compassed to his prejudice. So where one party has taken advantage of the other, the court will not permit him to retain it even though it had received the sanctity of a family arrangement. Such was the case of the defendant who had made a settlement with his brother, plaintiff in the case, who believed that he was the illegitimate son of his parents, but which the defendant knew he was not, as he was aware of the private marriage of their parents before the plaintiff's birth, which fact he did not communicate to the plaintiff, whereupon the court set aside the settlement holding that it was the duty of the defendant to undeceive the plaintiff as to the fact of the marriage, and that if, thereafter, the plaintiff had decided for himself that the ceremony was not valid, and treating it as not a marriage *de jure*, had chosen to enter into the contract, there would have been no ground for the suggestion of the imposition.[2] In another case, a compromise was set aside at the instance of a minor because the court had sanctioned it under a misapprehension or mistake as to material facts.[3] There is nothing illegal in an agreement between expectant heirs to divide their expectancies and such agreements are not obnoxious to the rule against the transfer of a mere *spes successionis*.[4] Of course, parties cannot alter the incidents of a property by any agreement between them. They cannot, for instance, render partible property impartible by any family arrangement conferring the estate on the eldest son. An arrangement so made is said to be void as opposed to public policy, but there appears nothing illegal in such an arrangement.[5]

1455. When Acted Upon.—An arrangement materially gains in strength if it is acted upon by the party interested in challenging it. Such was the case of a brother who had received a maintenance allowance under a settlement made under the mistaken belief that he was not entitled to partition the family estate, which he erroneously believed to be impartible for about ten years, on which the Privy Council observed: "If this be a valid document and not open to challenge on the ground of fraud or upon any other ground, their Lordships would be slow to fail to give effect to a family arrangement of the kind thus expressed, followed as it has been by enjoyment and possession for a period of ten years."[6]

In this connection it would not be amiss to mention that relief on the ground of fraud or mistake can only be given if it is claimed within three years from when the fraud or mistake is known to the plaintiff.[7]

Whom it Binds.

176. A family arrangement binds both the parties and their representatives.[8]

Illustration.

A sets a claim as an adopted son of *B*, whereupon the widow in possession and two predeceased brothers of her husband *B* and *C* referred the dispute

(1) *Satya Kumar* v. *Satya Kripal*, 10 C.L.J. 503; *Lachmi* v. *Durga*, 40 A. 619; *Krishna* v. *Hemaja*, 22 C.W.N. 463.

(2) *Gordon* v. *Gordon*, 3 Swan. 400: 36 E.R. 910 (917).

(3) *Solomon* v. *Abdool*, 6 C. 687.

(4) *Ram Niranjun* v. *Prayag*, 8 C. 138 (145). As to Khojas, see *Jan Mahomed* v. *Datiu*, 38 B. 449.

(5) *Muthusami* v. *Muthusami*, 27 I.C. (M.) 3.

(6) *Mantappa* v. *Baswant Rao*, 14 M. I.A. 24 (37); *Hasan Bibi* v. *Fazal Kadir*, (1909) P.L.R. 139: 4 I.C. 954.

(7) Articles 95, 96, Limitation Act.

(8) *Kanhai Lal* v. *Brij Lal*, 40 A. 487 F.B.; *Chunna Lal* v. *Swami Prasad*, (1935) R. 418.

to arbitration, who awarded *A* nothing but divided the estate into four parts, one of which was allowed to the widows of *B* and *C* respectively. *B's* widow transferred her share to *A*. On the widow's death, when the succession opened, *A* claimed the remaining three shares as reversioner. But the previous family arrangement to which he was a party disentitled him to make the claim.[1]

1456. Analogous Law.—It has already been stated that in making a compromise it is competent to the father to represent his minor sons,[2] the manager the joint family, the guardian his ward,[3] and it is equally competent to the widow in possession of her husband's estate to make a settlement binding on the reversioners[4] and their representatives.[5] But where, of course, the effect of an arrangement creates a perpetuity or contravenes any other rule of law, as where it alters the law of inheritance by setting up an artificial rule of devolution of property, the court cannot ignore the law and uphold the agreement. So where the members of a joint family agreed to a partition, providing for survivorship *inter se*, they cannot validly contract that on the death of the last survivor, his brother should take the estate to the exclusion of his daughter who would be his natural heir.[6]

1457. Stranger's Rights.—It is a well-known principle of law that a stranger not a party to a contract acquires no rights to enforce it from a mere fact that the parties contracting have agreed to meet his claim. So if in a contract between *A* and *B*, *B* agrees to pay a sum of money to *C*, *C* cannot recover the money from *B* because there is no privity of contract between him and *B*. But this rule is subject to four exceptions, namely, (*i*) where the contract charges the money to be paid out of immovable property; (*ii*) when the contract between *A* and *B* creates a trust in favour of *C*; (*iii*) where the money is due to *C* under a marriage settlement, partition or other family arrangement; (*iv*) where *B* afterwards agrees to pay the money to *C* direct, or becomes estopped from denying his liability to pay him personally.[7]

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(1) *Kanhai Lal* v. *Brij Lal*, 40 A. 487 P.B.

(2) *Ram Das* v. *Chabildas*, 12 Bom.L.R. 621; *Bishen Singh* v. *Jawala Singh*, (1911) P.W.R. 3: 8 I.C. 776.

(3) *Natesa* v. *Rama*, (1911) 2 M.W.N. 154: 10 I.C. 221.

(4) *Kunnilal* v. *Govind*, 33 A. 356 P.C.; *Ram Naresh* v. *Sadhu Saran*, 28 I.C. (A.) 585.

(5) *Sumera* v. *Mormuket*, (1935) A. 632.

(6) *Bageshar Rai* v. (*Mt.*) *Mahadei*, 46 A. 525 (529) following *Kanti Chandra* v. *Ali-i-Nabi*, 33 A. 414.

(7) *Subbu Chetti* v. *Arunachalam*, 53 M. 70 F.B.; followed in *Jagadamba* v. *Bibhootibhooshan*, 60 C. 767; *Jang Bahadur* v. *Rana Uma Nath*, (1937) O. 99.

CHAPTER XIII.

PARTITION.

1458. Topical Introduction.—The right of partition postulates a later development of archaic law. As stated before, the primal society was tribal and all that the tribe acquired was held in common without any right of alienation or division. The disruption of tribes into family groups marked a distinct advance in social evolution, but the incidents of tribal ownership continued and so Usanas declares that land was "indivisible among kinsmen even to the thousandth degree."[1] As the families grew and became unwieldy and social conditions brought about greater security, the necessity of partition became inevitable. We have then the text: "Land passes by six formalities; by consent of townsmen, of kinsmen or neighbours and of heirs, and by gift of gold and water." "In regard to the immovable estate, sale is not allowed; it may be mortgaged by consent of parties interested,"[2] that is to say, townsmen, neighbours, kinsmen and heirs were all interested in its disposal, for they were all, at one time, joint owners of the tribal domain. As time advanced their hold on the land relaxed, and the kinsmen alone formed a group who jointly held and enjoyed the common land. Yet another stage separated even the kinsmen but the separation in possession was not recognized as any separation of titles. So Brihaspati ordains: "Separated kinsmen as those who are unseparated are equal in respect of immovables, for one has not power over the whole to make a gift, sale or mortgage."[3] But the same process which had put the townsmen and the neighbours out of account equally sufficed to place the separated kinsmen out of the family and expanded the individual rights of property, but the same texts which still recorded the history of the past had to be reconciled with the growing rights of property. As the communities became more scattered, the law of convenience dictated the recognition of family rights. Individual effort began to be prized and a distinction became perceptible between individual acquisition and communal wealth. This is recognized in the following text of Brihaspati: "He among them who has made an acquisition, may take a double portion of it."[4] This was the first recognition of the incentive to individual enterprise, but it was half-hearted and eaten up by the exception. "But if the common stock be improved, an equal division is ordained."[5] But the march of economic laws may be slowed, it cannot be thwarted. As the value of property grew and a keener competition for existence stimulated industry, the right of each member to separate his share could no longer be resisted. But this was not universally acknowledged. For instance, in Malabar a coparcener has even now no right of partition, though the coparcener is entitled to his self-acquired movable property during his lifetime, which, on his death, lapses to the *tarwad*.[6]

(1) Cited in Mit., I-IV-26.
(2) Anon., cited in Mit., I-I-31, 32.
(3) Cited in Mit., I-I-30.
(4) Brihaspati, XVII-42, cited in Mit., I-IV-29.
(5) Yad. II-121, cited in Mit., I-IV-30.
(6) *Govindan* v. *Sankaran*, 32 M. 252 (360) F.B., following *Kallati* v. *Palat*, 1 M.H.C.R. 162.

In places, however, where the communal rights yielded to familial rights, the community did not loose its hold upon such property. There then arose the right of pre-emption. Such is the right of pre-emption in the Punjab where the right was too well established to be shaken by the smaller families. But in more advanced sections of society, both the communal and the familial rights have yielded to individual ownership. Such is the law of the Dayabhag in Bengal, where a coparcener enjoys rights in *quasi*-severalty even when he is a member of a coparcenary. But under the Mitakshara his rights are more medieval though, here again, the presidencies of Bombay and Madras have adopted a view which recognizes the right of a coparcener to alien his share for value. But the right of alienation, though closely linked to the right of partition, is yet distinct. The right of partition was the first to be forced for recognition. The right of alienation came in later. But they were both rights of property and have reacted upon one another. Take, for instance, the case of Bengal where male and female coparceners have alike the right to demand partition. And here the coparceners enjoy the largest latitude of alienation.

1459. With the first concession of the right of partition, the shares were unequally divided. "The portion deducted for the eldest is the twentieth part of the heritage, with the best of all the chattels; for the middlemost, half of that; for the youngest, a quarter of it."[1] But this practice was not uniform, since Manu declares that in a partition after the death of the father and mother, "the eldest brother may take the patrimony entire, and the rest may live under him as under his father,"[2] thus foreshadowing the rule of primoneniture which still survives in custom and is ordinarily applied to Jagirs, Rajas, Zemindaris, chieftainships and principalities. When the right of unequal division could no longer be tolerated, the custom changed but the written law could not be altered. This is how equality of partition became established. An unequal partition is admissible in every period. How then is a restriction introduced, requiring that sons should divide only equal shares? The question is thus answered: True this unequal portion is found in the sacred ordinances; but it must not be practised, because it is abhorred by the world; since that is forbidden by the maxim 'practise not which is legal, but is abhorred by the world, (for) it secures not celestial bliss;[3] as the practice of offering bulls is shunned on account of popular prejudice, notwithstanding the injunction 'offer to venerable priest a bull or a large goat'; and as the laying of a cow is for the same reason disused, notwithstanding the precept[4] 'slay a barren cow as a vistim consecrated to Mitra and Varun.' Therefore, unequal partition, though noticed in the codes of law, should not be practiced, since it is disapproved by the world and is contrary to scripture. For this reason, a restriction is ordained, that brothers should divide only in equal shares."[5]

1460. The history of the Mitakshara law of partition is thus an innovation on the ancient law. At first the right to divide rested with the father. It could not be enforced against his will. But later on it was recognized that what was right for the father to do was equally right for the son to demand. The only objection that could be taken to such

(1) Manu, IX-112.
(2) Manu, IX-105.
(3) Yad., according to Mitra Misra in the Virmitrodaya, but ascribed to Manu in Balam Bhatt's commentary. It has not, however, been found either in Manu or Yadnavalkya's Institutes; Celebrooke's Note to Mit., I-III-4.
(4) Veda—Subodhini and Balambhutt—Code. Note to Mit., I-III-4.
(5) Mit., I-IV-7.

enforced partition is prejudice to the father's after-born issue. As to this the Mitakshara said: "While the mother is capable of bearing more sons and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does, nevertheless, take place by the will of the son."[1] But the son's right against the father is conditioned by the Mitakshara on the following facts: (*i*) It might be made by the father; (*ii*) against the father, if the father is addicted to vice and the mother is past child bearing. But after the father's death, partition could be had as a matter of course.[2] This text is now explained away as referring to the father's self-acquisitions.

Partition defined.

177. (1) **Partition is the intentional severance of coparcenary interests by members of a joint family,[3] or by the widow when entitled thereto.[4]**

(2) An unequivocal expression of an intention to separate such interest may amount to partition.[5]

(3) Partition may be effected by the definition of rights or by the division of property by metes and bounds.[6]

Explanation 1.—**An unequivocal expression of an intention to separate referred to in clause (1) may be either explicit or implied by conduct.[7]**

Explanation 2.—**Partition being the severance of joint status is distinct from a transfer and a family arrangement as defined in section 173.**

Illustration.

A files a suit for partition against *B*, a joint member of his family. It operates as a separation.[8]

1461. Analogous Law.—The following text bear on the subject of partition:—

Narad.—"Where a division of the paternal estate is instituted by sons that becomes a topic of litigation called by the wise partition of heritage."[9]

Mitakshara.—"Partition[10] is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate."[11]

Virmitrodaya.—"Partition is the adjustment of the proprietary right into specific shares."[12]

Dayabhag.—"Partition is the allotment of separate portions of the family property to the co-sharers corresponding to the shares already owned by each. By partition an allotment is made in respect of the share of a coparcener."[13]

Raghunandan.—"Partition is a distributive adjustment by lot or otherwise of the property of relatives vested in them, over the whole wealth, in right of the same relation, upon the extinction of the former owner's property."[14]

Mayukh.—"Even where there is a total absence of common property a partition is effected by the mere declaration, 'I am separate from thee,' for partition is a particular condition of the mind and the declaration is indicative of the same."[15]

Saraswati Vilas.—"Without any formality partition can be effected by mere intention."[16]

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(1) Mit., I-V-8; *Krishna* v. *Sami*, 9 M. 64.
(2) Mit., I-II-7.
(3) *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 (87) P.C.
(4) *See* Hindu Women's Right to Property Act, 1937.
(5) *Girjabai* v. *Sadashiv*, 43 C. 1031 (1045) P.C.
(6) *Appovier* v. *Rama*, 11 M.I.A. 75 (91, 92).
(7) *Girjabai* v. *Sadashiv*, 43 C. 1031.
(8) *Kawal Nani* v. *Prabhu*, 39 A. 496 P.C.
(9) Narad, XIII-1.
(10) Vibhag.
(11) Mit., I-I-4.
(12) Mitra Misar's Virmitrodaya, I-36.
(13) Cited in Mitra's Joint Family and Partition (2nd Ed.), 303.
(14) Dayatatwa, cited in Col. Dayabhag, I-I-8.
(15) Ch. IV, S. 3 (Mandlik), 38.
(16) Setlur's Tr., 122.

1462. The Hindu Law of Partition has been materially altered by the statute law which prescribes a special procedure for the partition of revenue-paying estates by the Collector.[1] And the Partition Act of 1893[2] generally empowers the court to sell the whole or any portion in order to prevent inconvenient divisions.

Partition of Revenue-paying Estate.

The effect of these statutes is to modify the procedure, leaving the rights to be determined by Hindu Law.

1463. Gautam treats partition as one of the sources of property[3] and this view is echoed by the Mitakshara. This does not mean that before partition property does not vest in any one, nor does it mean that before partition none of the coparceners have any interest in the joint property. All that Gautam means is that, before partition, the right of a coparcener was indeterminate and that partition defines and perfects it.

1464. What is Partition.—The term "partition" involves the severance of undivided interests in common property. The very word "coparcener" implies a right to the division of property. Cunningham defines partition as the process by which members of a joint family become separate, and cease to be coparceners.[4] But this definition is too narrow, since it is now settled that "a definite and unambiguous indication by one member of his intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect, the intention must be unequivocal and clearly expressed."[5] This was pointed out by the same Board as far back as 1866 when referring to an argument that a partition deed was ineffectual to convert the undivided property until it has been completed by an actual partition by metes and bounds, Lord Westbury observed: "That the contention confounded the division of title with the division of the subject to which the title is applied." He then added: "When the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim, the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."[6] This view has been since reiterated by the same Board in other cases[7] in one of which they said: "Separation from the joint family involving the severance of joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct

Cl. (1); Expl. 2. Meaning of Severance.

(1) Bengal Act V of 1897, supplemented by rules framed by the Board of Revenue U.P. Act III of 1901; C. P. Act II of 1917, Ch. XI (Ss. 161-186); Punjab Act XVII of 1887, Ch. IX; Bom. Acts VI of 1888 and V of 1879 (Ss. 113, 117), subject to the provisions of Bom. Act V of 1862; Mad. Act II of 1864 (Ss. 45, 46); Mad. Act I of 1866; Assam Reg. 1, 1886, Ch. VI.

(2) Act IV of 1893, cited in the Appendix.

(3) Gautam, X-39; 2 S. B. E. 228, cited with approval in Mit., I-I-18.

(4) Hindu Law, p. 136.

(5) *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 (87) P.C.; *Balkrishna* v. *Ramkrishna*, 53 A. 300 P.C.

(6) *Appovier* v. *Rama*, 11 M.I.A. 75 (89, 90).

(7) *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 (87) P.C.; *Balkrishna* v. *Ramkrishna*, 53 A. 300 P.C.; *Girja Bai* v. *Sadashiv*, 43 C. 1031 P.C.

from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified shares separately from the others without being subject to the obligations which arise from the joint status, whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement amongst the parties or on failure of that by the intervention of the court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharer can question it nor the court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the court has simply to given effect to his right to have his share allocated separately from the others."[1]

The first essential condition of partition then is that it must be intended. The intention may be inferred from conduct, act, or declaration showing a determination to effect severance from the joint family.

Severance.

1465. Such severance must be to determine the joint status, thus distinguishing partition from a mere family arrangement for convenience of management or possession. The severance may be of title, status, or possession but it must be with the intention to effect a severance.

The fact that a mere severance of interest does not constitute partition, if such severance was not expressly or impliedly intended to, have that effect, is the *ratio decidendi* of many cases. Such a case arose where the plaintiffs sued the defendants for partition. The parties had long been separate in mess and residence, and as to estate, the plaintiff's ancestors received some land from the ancestors of the defendants by way of *sir* upon the income of which they maintained themselves. This *sir* did not correspond to the extent of the share which the plaintiff's branch would have received if there had been a partition. It was proved that there was a family custom according to which different members of the family, on living separate, received similar allotments of *sir* for maintenance which were increased according to exigencies. There was such an increase at one time to the lands given to the plaintiff's branch, whereupon the Privy Council held that there had been no partition, and as to the bar of limitation by the defendants the court held that the proceeds of the *sir* were payments by the defendants which kept alive the plaintiff's claim.[2]

Clause (2).

1466. Declaration of Intention.—It was at one time held that two things were at least necessary to constitute partition, namely, the shares must be defined, and there must be distinct and independent enjoyment of those shares.[3]

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(1) *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1047, 1048) P.C.

(2) *Ranjit Singh* v. *Koer Gujraj Singh*, L.R. 1 I.A. 9: 3 Sar. P. C. C. 304.

(3) *Sheo Dyal* v. *Judoonath*, 9 W.R. 61; *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (156), in which Bhashyam Ayyangar, J., held that a mere declaration was insufficient and that what was required was some further overt act, namely, the giving him "some trifle" out of the family property.—*Ib.*, p. 156, citing Mit., I-II-11, 12; Manu, IX-207; Yad., II-117. So Yadnavalkya says: "The separation of one who is able to support himself and is not desirous of participation may be completed by giving him some trifle" (II-117). But the contrary stated in the text is now too well established to admit of any controversy. These and the follow-

But as already stated, the Privy Council have in a series of cases laid down that neither the first[1] nor the second condition is by any means a pre-requisite of a completed partition[2] and that even an unequivocal expression of intention clearly expressed may amount to partition.[3] But the expression of such intention must be to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, that is, the expression must unequivocally create a present separation and not merely a contemplated separation.[4] "The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct it will be for the court to determine whether it was unequivocal and explicit."[5] Such was held to be the case where one of the two co-sharers who constituted the joint family "left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin" and the court treated "the fact of his borrowing money for his maintenance, as well as making a will as indicating at all events that he himself considered that a separation had taken place."[6]

1467. The same view has been taken by the Privy Council,[7] with the result that their Lordships have committed themselves to two somewhat opposing views. In the first place, they have affirmed that the mere institution of a partition suit may effect severance, if it amounts to an unequivocal and unmistakable intention to become separate;[8] yet if the suit is afterwards withdrawn, it has not the same effect. These views suggest the following queries. If the mere institution of a suit is equivalent to the unequivocal declaration of intention, which must be presumed, then how does its subsequent withdrawal affect that intention, since the only logical outcome of withdrawal must be to leave the parties separate. There can be no reunion because reunion needs an agreement to reunite. Nor can the unequivocal intention be construed to be revocable. If the institution should suffice to determine jointness, it should do so equally even if the plaintiff is a minor. but in his case unquestionably it cannot have that effect[9] (§ **1716**). Again, if the severance is complete with the institution, what happens if the suit is dismissed, and what is to become of the manager's authority, and who is to manage the estate without an accredited manager? Lastly, if it is the date of severance, there should be no vari-

ing cases must then be taken as overruled by the Privy Council; *Ambika Dat* v. *Sukhmani*, 1 A. 437; *Debee Pershad* v. *Phool Kuari*, 12 W.R. 510 (institution of suit insufficient); *contra* in *Joy Narain* v. *Girish Chunder*, 4 C. 434 P.C.; *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1045) P.C.

(1) *Palani Ammal* v. *Muthuvenkata*, 48 M. 254 (257) P.C.

(2) *Appovier* v. *Rama*, 11 M.I.A. 75; *Doorga Pershad* v. *Kundun*, 21 W.R. 214 P.C.; *Ranjit Singh* v. *Koer Gujraj Singh*, L.R. 1 I.A. 9; *Chidambaram* v. *Gauri*, 2 M. 83 P.C.; *Joy Narain* v. *Girish Chunder*, 4 C. 434 P.C.; *Ram Pershad* v. *Lakhpati*, 30 C. 231 (253) P.C.; *Bal Kishen* v. *Ram Narain*, 30 C. 738 P.C.; *Parbati* v. *Naunihal*, 31 A. 412 P.C.; *Suraj Narain* v. *Iqbal*, 35 A. 80 (87) P.C.; *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1045) P.C.; to the same effect, *Tej Protap* v. *Champo*, 12 C. 96; *Radhachurn* v. *Kripa Sindhu*, 5 C. 474 (477); *Phul Kauri*, (*In re*), 8 B.L.R. 388-*note*; *Sundra* v. *Arunachalam*, 39 M. 159.

(3) *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1045) P.C.; *Girdhar* v. *Sri Krishna*, 39 M.L.J. 18: 56 I.C. 293 P.C.; *Kasem* v. *Jorawar Singh*, 31 M.L.T. 46: 18 N.L.R. 127 P.C.; *Bal Krishna* v. *Ram Krishna*, 53 A. 300.

(4) *Babaji* v. *Kashi Bai*, 4 B. 157.

(5) *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1050) P.C.

(6) *Jag Narain* v. *Girish Chunder*, 4 C. 434 P.C.

(7) *Kedar Nath* v. *Ratan Singh*, 32 A. 415 P.C., followed in *Palani Ammal* v. *Muthuvencata*, 48 M. 254 (258) P.C.

(8) *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1051) P.C., approving *Vato Koer* v. *Rawshun Singh*, 8 W.R. 52.

(9) *Jethanand* v. *Kewal Ram*, 79 I.C. 505: (1926) S. 216.

ation of shares consequent upon subsequent births and deaths in the family. The true rule would seem to be that the institution of a suit is only a manifestation of an intention to separate; but so long as its withdrawal is possible, it is not irrevocable, and therefore, not necessarily destructive of jointness.[1]

1468. Of course, it is a question in each case whether the act and conduct of a co-parcener was so unequivocal as to manifest clearly the intention to become separate. Such act and conduct must be the expression of his own volition. It must not be a submission to the judgment of another. It must in effect say "I separate," and not that "I will separate if you so will it." Consequently, while the mere institution of a suit, coupled with a declaration of the plaintiff's determination to become separate, may amount to a partition, there can be no partition where the plaintiff, being in doubt as to his legal status, the matter is left to the judgment of the court, as where he applies for insolvency.[2] Where, for example, the plaintiff sued the defendant, his adoptive father, for a declaration of the invalidity of a mortgage executed by the latter on the ground that in a previous partition between him and the defendant the mortgaged property had fallen to his share. He then filed a petition asking for partition, should the court hold the parties still joint. He withdrew this prayer and applied for the withdrawal of his suit with liberty to institute a fresh suit for partition which was allowed. He then claimed to be separate on the strength of his amended claim; but the court held that his conduct did not constitute such an unambiguous expression of intention as to effect a severance of status between him and his father.[3]

1469. But where two brothers, being members of a joint Mitakshara family, executed an agreement whereby, after reciting that the declaraants had remained joint and undivided and in commensality up to a certain date, and that portions of their properties, both movable and immovable, had been partitioned between them, they provided for the partition of the remaining joint properties by certain arbitrators appointed in that behalf, the court held the agreement of itself to amount to a separation of the brothers as a joint family and extinguished all rights of survivorship between them.[4] And so it has been held by the Privy Council that, although a suit by a member of a joint Hindu family against his co-sharers for a separate share of the joint estate be not in terms a suit for partition, yet if it appears that the intention of the plaintiff was to obtain partition in the right of a coparcener it does not require the consent of the other coparceners to complete it. Severance of interest may be effected by an indirect act, such as the sale of one's coparcenary interest to another.[5] But in Northern India, where a sale of undivided interest is not permitted, partition cannot be presumed from a mere sale, though it is evidence from which partition might be inferred. Where the members of a joint family agreed in writing that all the movable and immovable properties were to be divided as from the date of the agreement and that from that time forward separate accounts were to be kept by the coparceners, and the profit or loss, subsequent thereto,

(1) *Raghunandan* v. *Mahabir*, 96 I.C. 448: (1926) Pat. 545.

(2) *Venkatarayudu* v. *Sivaramakrishnayya*, 58 M. 126 (135).

(3) *Veni* v. *Nellappa*, 11 M.L.W. 611: 67 I.C. 800, explaining *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 (87) P.C.: *Kawal Narain* v. *Budh Singh*, 39 A. 496 (499) P.C.

(4) *Tej Protap* v. *Champa*, 12 C. 96.

(5) *Soundra* v. *Arunachellam*, 29 M. L.J. 816.

was on no account to be binding on the other coparceners, the agreement was held to have effected a division in status, though there was no actual division of property by metes and bounds.[1] The giving of notice or the institution of a suit would amount to such partition. So where a coparcener sent a notice to the manager demanding that his share be partitioned for which he instituted a suit, pending which he died, and the question arose whether he died joint or separated in estate, the Privy Council said: "It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October, 1908, coupled with this suit, and that the acts amounted to a separation with all its legal consequences."[2] So partition is complete where the coparceners enter into an agreement in which they declare each member entitled to a definite fractional part of the whole estate.[3]

Intention Material.

1470. Partition by metes and bounds is not then necessary to complete partition.[4] What is necessary is intention. So whether an agreement for the division of profits is merely an arrangement for convenience or a partition must depend upon the intention of parties to be gathered from the language of the instrument, though in construing instruments, undue stress should not be laid on the words actually employed. As was said in a case: "Looking at the state of knowledge among even fairly educated Hindus, as to the exact principles of their own law (a point on which I do not mean to draw a comparison between them and the people of any European country at all to the disadvantage of the Hindus) looking to this fact, and to the inveterate habit of the natives to have accounts of the most important kinds drawn up by mere scribes, neither acquainted with law nor trained to precision of language, I have a strong repugnance to hold parties bound to a legal consequence arising from the use of particular terms, where surrounding circumstances appear to show that the parties had no such intention as that consequence would indicate, and that, in truth, the consequence was unforeseen."[5] The decision in this case was upheld on appeal by the Privy Council who, referring to the agreement, observed that the statement that the four cosharers were in possession of equal shares of which they appropriated and enjoyed the profits in proportion to their respective shares pointed to an appropriation and enjoyment of the profits inconsistent with that which is the normal state of enjoyment of a joint and undivided Hindu Family, and that their resolve to have the shares mutated in accordance with their actual possession and enjoyment "appeared to their Lordships to be strong *prima facie* evidence of the intention to hold the undivided shares as the separate property of each coparcener. It may not be conclusive but at all events, it is strong *prima facie* evidence of such intention." They then added that, though the deed did not declare that after the agreement the family was to be divided, at the same time, there was a statement consistent with their continued indivision and that, therefore, it must be

(1) *Umayorupagam* v. *Palanarayana*, 28 I.C. (M.) 908; *Appovier* v. *Rama*, 11 M.I.A. 75 (91).

(2) *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1045) P.C., following *Vato* v. *Rowshun*, 8 W.R. 82.

(3) *Phuljhari Kooer, (In re)*, 17 W. R. 102.

(4) *Mahabeer* v. *Kundun*, 8 W.R. 116, affirmed O.A. *Doorga Pershad* v. *Kundun*, 21 W.R. 214 P.C.

(5) *Mahabeer* v. *Kundun*, 8 W.R. 116 (123) affirmed O.A. *Doorga Pershad* v. *Kundun*, 21 W.R. 214 P.C.

presumed that the agreement was only consistent with partition and inconsistent with continued jointness.[1]

It is thus clear that a mere definition of interest with the intention to separate would constitute partition. "Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers."[2]

1471. Division of Rights.—It is seen that an intentional severance of joint interests amounts to partition. It has also been seen that such severance may be effected by a mere verbal declaration unaccompanied by any overt act, from which it follows that partition may be effected by a mere division of rights without definement of shares[3] and any physical division by metes and bounds. So Lord Westbury said: It is necessary to bear in mind the twofold application of the word 'division'. There may be a division of right and there may be a division of property. And thus after the execution of this instrument, there was a division of right in the whole property, although in some portions that division of right was not intended to be followed up by actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.[4] And later on he said: "Then if there be conversion of the joint tenancy of an undivided family, into a tenancy-in-common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may, at any time, be claimed by virtue of the separate right."[5]

Clause (3).

So an agreement that the joint property shall thenceforth be enjoyed by the various members of the family in certain defined shares, specified in their application to the Collector for mutation of names, was held to amount to a partition.[6]

1472. The mere institution of a suit for partition may be regarded as an unequivocal expression of such intention[7] and has been held to amount to partition.[8] But such intention cannot be inferred from a suit for a mere declaration of the plaintiff's right to a share in the estate of his father, since such a suit would not be inconsistent with an intention on his part

Institution of Suit.

(1) *Doorga Pershad* v. *Kundun*, 21 W. R. 214 (216) P.C.; following *Appovier* v. *Rama*, 11 M.I.A. 75; to the same effect, *Ranjit Singh* v. *Koer Gujraj Singh*, L.R. 1 I.A. 9.

(2) *Appovier* v. *Rama*, 11 M.I.A. 75; *Doorga Pershad* v. *Kundun*, 21 W.R. 214 P.C.; *Ram Pershad* v. *Lakhpati*, 30 C. 213 (253) P.C.; *Suraj Narain* v. *Iqbal*, 35 A. 80 (87) P.C.; *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1045, 1048) P.C.; *Deo* v. *Dwarkanath*, 10 W.R. 273; *Kailash* v. *Kashi*, 24 C. 339; *Kedar* v. *Romoni*, 7 I.C (C.) 884 (886).

(3) *Venkatapathi* v. *Venkatanarasimha*, (1936) P.C. 964 (967).

(4) *Appovier* v. *Rama*, 11 M.I.A. 75 (91, 92); *Parbati* v. *Naunihal Singh*, 31 A. 412 (422) P.C.

(5) *Appovier* v. *Rama*, 11 M.I.A. 75 (92).

(6) *Parbati* v. *Naunihal Singh*, 31 A. 412 P.C.; *Suraj Narain* v. *Iqbal*, 35 A. 80 P.C.; *Girja Bai* v. *Sadashiv*, 43 C. 1031 P.C.; *Anurago* v. *Darshan*, (1938) P.C. 65; *Ramdhin* v. *Bisheshar*, 3 O. L.J. 508: 37 I.C. 114; *Sikhamani* v. *Ammani*, 40 I.C. (M.) 36.

(7) *Joy Narain* v. *Joy Narain*, 4 C. 434 (437) P.C.; *Tandayuthapani* v. *Raghunath*, 35 M. 339; *Kawal Nain* v. *Budh Singh*, 39 A. 496 (498) P.C.; *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1045) P.C.; *Ramalinga* v. *Narayana*, 45 M. 489 P.C.

(8) *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 P.C.; *Kawal Nain* v. *Budh Singh*, 39 A. 496 (498) P.C.; following *Girja Bai* v. *Sadashiv*, 43 C. 1031 (1045) P.C.

to obtain a declaration of his being entitled to a joint interest in a joint estate.[1]

1473. But if the intention to separate is clearly averred in the plaint, the fact that the suit was dismissed on the erroneous ground that the plaintiff had failed to prove that his father had ill-treated and refused to maintain him would not pervent the separation coming into effect.[2] The case would, of course, be different if the plaintiff had withdrawn his suit, the withdrawal of which would have *prima facie* amounted to the withdrawal of his declaration that he was separate[3] (§ **1466**). A question may arise whether the institution of a suit for partition by one member has necessarily the effect of dissolving the joint family, not only as to the member suing, but also as to the members sued. That it could not have that effect if a member went out of the family after taking his share on terms, is obvious and it is now so held.[4] But then it is said that the case is otherwise where a coparcener files a suit for a general partition which has necessarily that effect.[5] But it is difficult to see why it should have that effect without the other coparceners intending to divide *inter se*. The case would of course, be different if the other coparceners agree to a general partition, or that at least they acquiesce in it. In one case the Privy Council said: "There is no presumption, when one coparcener separates from the others, that the latter remain united. In many cases, it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other coparceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all."[6] But the mere incidental fixation of any coparcener's share is not partition, and there can be no partition *nobus vobus* of all, merely because one member goes out of the family. But this does not mean and it does not imply that the partition of one creates any presumption as to the separation of the rest. All it does is to destroy the presumption of their jointness so that the question whether they had also separated or continued to remain joint can no longer be the subject of presumption, and must depend upon proof.[7]

1474. Since intellectual partition is completed on a mere expression of an intention to separate, the fact that the parties thereafter continued to live together and enjoy their share in common might affect the mode of enjoyment, but apart from re-union, it cannot restore the previous status of jointness.[8] It has been held that where there has been a separation but not a division by metes and bounds, a member may sue for joint possession on the basis of his divided status.[9] But it may be doubted whether the court would decree joint possession to a plaintiff who on his own showing was entitled to separate possession.

A had three sons—one by his first wife, and two by his second wife. He executed a will by which he authorized his executors to effect a partition among his sons when the eldest of them attained the age of

(1) *Debee Pershad* v. *Phool Koeree*, 12 W.R. 510, explained in *Joy Narain* v. *Joy Narain*, 4 C. 434 (437, 438) P.C.

(2) *Kawal Nain* v. *Budh Singh*, 39 A. 496 (499) P.C.

(3) *Kedar Nath* v. *Ratan Singh*, 32 A. 415 (426) P.C.; *Palaniammal* v. *Muthuvenkatachala*, 33 M.L.J. 759: 43 I.C. 833.

(4) *Parsotam* v. *Jagannath*, 41 A. 361.

(5) *Rupan Rai* v. *Subh Karan*, 41 A. 207 (210).

(6) *Bala Bux* v. *Rukmabai*, 30 C. 725 (736) P.C.; *Jatti* v. *Banwari Lall*, 4 L. 350 P.C. *Balkrishna* v. *Ram Krishna*, 53 A. 300 P.C.

(7) *Balkrishna* v. *Ramkrishna*, 53 A. 300 P.C.; following *Palani* v. *Muthuvenkatachalla*, 48 M. 254 P.C.

(8) *Ram Pershad* v. *Lakhpati*, 30 C. 231.

(9) *Sheodan* v. *Bal Karan*, 43 A. 193.

majority. The executors did as they were directed. Properties were divided into three shares—one of which was allotted to the eldest son and two to the other two sons. The deed of separation provided that if any property was left undivided it should be divided into three shares by the three parties, and that in future the parties should have no connection in respect of property except relationship by blood. It was held that these provisions effected a severance in interest as between the sons of the second wife also, though their property was kept together without any division.[1] It is quite competent to the members of a joint family to have a completely divided status even though the division of the properties by metes and bounds is actually effected only in respect of certain items of property.[2]

Effect of Minor's Suit.

1475. It being now settled that the mere filing of a suit for partition amounts to the unequivocal declaration of intention which law regards as a sufficient partition in law,[3] the question arises whether the same rule would hold good where the plaintiff is a minor. On this subject two views are possible and both have received support. One is that the minor is no exception to the rule since he makes his declaration through his next friend[4] and the other is that since the partition of his share is discretionary with the court, there can be no partition till the court uses its discretion in his favour.[5] But this view ignores the fact that partition may be effected out of court, and the minor suffers from no impediment of procedure if he exercises his election through his qualified mouth-piece.

The fact that a coparcener is a minor does not prevent the rest of the major coparceners from effecting a partition.[6] And even as regards a declaration, it has been held that where the other coparcener is a minor, it may be communicated to his natural guardian, and in his absence, to his *de facto* guardian,[7] who would represent him in a partition suit.[8]

1476. Effect of an Award.—An award is equivalent to a judgment whether it has passed into a decree or not. It is binding upon the parties.[9] In cases where it directs partition to be effected it dissolves the joint family and from the moment of its date, it severs their joint interests.[10] Of course, where the award directs a repartition, parties are entitled to it.[11]

1477. Dayabhag Law Distinguished.—The rule of law stated in the clause is stated to be inapplicable to a Dayabhag family, "because although

(1) *Komalambal* v. *Krishnasamy*, 2 M.W.N. 310: 10 I.C. 385.

(2) *Segu* v. *Segu*, 2 M.W.N. 467: 12 I.C. 704.

(3) *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 P.C.; *Sundararajam* v. *Arunachalam*, 39 M. 136 (159) F.B.; *Venjapuri* v. *Panchamuthu*, 35 M.L.J. 609: 45 I.C. 621.

(4) *Krishnaswami* v. *Pulukarappa*, 48 M. 465 followed in *Sri Ranga* v. *Srinivasa*, 50 M. 866; *Ram Narain* v. *Makhna*, (1935) A. 875; *Atul Krishna* v. *Nandanji*, (1935) Pat. 275 (*Per* Agarwala, J., pp. 287, 288) F.B. *Krishna Lal* v. *Nandeshwar*, (1918) Pat. 91: 4 Pat. L.J. 381: 44 I.C. 146.

(5) *Ganapathy* v. *Subramanyam*, 52 M. 845; *Chelimi* v. *Subhamma*, 41 M. 442 (445), followed in *Lalta Prasad* v. *Mahadeoji*, 42 A. 461 F.B.; *Ram Narain* v. *Makhna*, (1935) A. 875; *Chhota Bhai* v. *Dadabhai*, 36 B.L.R. 738; *Hari Singh* v. *Pritam Singh*, (1936) L. 504.

(6) *Parbati* v. *Nannihal Singh*, 31 A. 412 P.C.; *Bhagwati* v. *Bhagwati*, 35 A. 126; *Bali* v. *Girji*, 9 N.L.R. 111: 20 I.C. 563.

(7) *Kali Prasad* v. *Ram Ratan*, 5 O.L.J. 747: 49 I.C. 67.

(8) *Kamepella* v. *Venkataswamy*, 33 M. L.J. 746: 43 I.C. 130.

(9) *Newaz Khan* v. *Alam Khan*, 18 C. 414; *Lal Das* v. *Lala*, 11 Bom. L.R. 20; *Bhaurao* v. *Radhabai*, 33 B. 401 (403); *Shantilal* v. *Munshilal*, 56 B. 595.

(10) *Bhaurao* v. *Radhabai*, 33 B. 401 (403, 404).

(11) *Duri* v. *Jadpatri*, 33 M. 246.

as regards the enjoyment of the family property there is no difference between a Dayabhag joint family and a Mitakshara joint family, there is this substantial difference between the two, that in the latter case, the coparceners hold as joint tenants, while in the former, they hold as tenants-in-common. The ascertainment of the shares in the one case affords no indication of an intention to destroy the unity of the family, because such shares are already determined by the law. In the other case, however, the definition of such shares would afford a very strong indication of partition, and would ordinarily amount to partition, unless the strongest proof was afforded of an intention to remain united in estate or to become reunited. It may be further pointed out that in the case of a Dayabhag family, even the division of income for the convenience of the different members would not, in the absence of intention, amount to the division of the family."[1] There is, however, no distinction in principle between the two schools. The question is one of intention in both cases and it is for the court to decide whether conduct in a given case is a sufficiently unequivocal expression of an intention to separate.

178. No writing is required to effect partition,[2] which may be orally made provided that if it relates to immovable property[3] it must be accompanied by change of possession,[4] and if it is reduced to writing, which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property, it must be stamped and registered.[5]

Form.

Illustrations.

(*a*) *A* and *B* divide their property in 1918. Next year *A* desiring to mortgage his share to *C*, *C* demands evidence of his separation. *A* and *B* reduce it to writing. The writing, though it relates to immovable property over Rs. 100 in value, is not compulsorily registrable because it is a written memorandum of a past partition.

(*b*) *A* and *B* having a valuable estate agree to divide it by exchanging lists of the properties which fall to the share of each party. The lists require registration, if they were intended to evidence partition.[6]

(*c*) *A* and *B* appoint an arbitrator who delivers an award detailing the division of property. *A* and *B* both sign it in token of their acceptance. The award is converted into partition deed and must be registered if it affects land over Rs. 100 in value.

1478. Analogous Law.—The Transfer of Property Act provides that certain transfers therein mentioned should be in writing, but partition is not a transfer of any rights but is merely a change in the enjoyment of property. It is not an exchange,[7] and as such, the Transfer of Property Act does not affect a partition and there is no other statute which prescribes the necessity of writing. The Registration Act, however, provides for the compulsory registration of all documents which purport or operate to create, declare, assign, limit or extinguish any right, title or interest, whether vested or contingent, of the value of Rs. 100 or upwards to or in immovable property.[8] As a deed of partition is one such

(1) *Bata Krishna* v. *Gopal*, 5 C.L.J. 417 (422).

(2) *Sumera* v. *Mormuket*, (1935) A. 632.

(3) As distinct from partition of rights as to which *see* S. 177 (2).

(4) *Kishan Lal* v. *Lachmichand*, (1937) A. 456 (460).

(5) S. 17, Registration Act, XVI of 1908.

(6) *Ganpat* v. *Supdu*, 32 B. 509; *Sundaramma* v. *Kamakatiah*. 26 I.C. (M.) 514. In *Nihalchand* v. *Sasson*, (1912) P. L.R. 229: 15 I.C. 28: *Mahomed* v. *Mahomed*, (1917) P.R. 33: 38 I.C. 387, the lists were memoranda of a previously completed partition, and so their registration was considered unnecessary.

(7) *Satya* v. *Satya*, 10 C.L.J. 503: 31 C. 247.

(8) S. 17, Registration Act XVI of 1908.

document, it follows that if it purports or operates as such, it must be registered.[1]

"Purport" to be a Partition-Deed.

1479. The question then arises: what documents purport or operate to be a deed of partition? A document "purporting" to be a partition-deed must be executed as such. Its formality and language must conform to such deed, though it may fail of its effect. Such a document may recite an accomplished fact and be a mere written memorial of the past. It would not then require registration.[2] Then, again, a deed may operate as a partition, though in form it may be a will, agreement or award or a mere receipt, in all of which cases, if it creates a definite change of legal relation to the property of the person executing it, then it would be compulsorily registrable."[3] So where two coparceners by agreement appointed a sole arbitrator to effect partition of their joint ancestral property, and consented that the partition be effected by the arbitrator, by taking the bids of the parties for the property that would be accepted, and the award was thereon made and written upon the back of the said agreement, which was not registered, it was held that the document was intended to be and was regarded by the parties as an instrument, declaring rights over immovable property, and was consequently, compulsorily registrable.[4]

1480. A document may declare a right, though it may not be final, and parties may contemplate the reduction of its terms into another document.[5] So again, it is immaterial that the document is an award if it is countersigned by the parties in token of their acceptance of its terms which makes it their own contract.[6] So a document which, after reciting the allotment of lands, contained an agreement to act accordingly was held to be compulsorily registrable because it related to a partition transaction completed by the agreement contained therein.[7]

1481. Where a document recites a past partition and completes it by partitioning the remaining property, it would be compulsorily registrable if the property presently partitioned under it is of Rs. 100 or more in value.[8]

1482. Where a partition deed deals with property both movable and immovable, the fact that it is not registered cannot affect any immovable property comprised therein nor can the deed be received as evidence "of any transaction affecting such property."[9] This phrase is ambiguous and might either mean that it shall not be evidence of the partition so as to affect the immovable property therein mentioned which seems to be the meaning,[10] or that it is not evidence of the partition at all, because the deed affects immovable property even as regards the movable property,[11] or because the deed cannot be held partially admissible. The

(1) The contrary held in *Nem Roy* v. *Laimun*, 25 W.R. 376, is not good law. But a mere draft deed of partition is not compulsorily registrable—*Ib.*, 378.

(2) *Sakharam* v. *Madan*, 5 B. 232; *Vishnu* v. *Govind*, (1895) 3 B.P.J. 257; *Gangod* v. *Sham Gir*, (1905) P.L.R. 33; *Badhawa* v. *Hira*, (1884) P.R. 30.

(3) *Sakharam* v. *Madan*, 5 B. 232; *Anandrao* v. *Joti*, 24 B. 615.

(4) *Azimat Singh* v. *Kalwant Singh*, (1906) P.R. 71.

(5) *Lakshmamma* v. *Kameswara*, 13 M. 281.

(6) *Amarsi* v. *Dayal*, 9 B. 50; *Rattanchand* v. *Ghasita*, (1900) P.L.R. 459.

(7) *Ramachandra* v. *Dinkar*, 2 Bom L. R. 800.

(8) *Kachubai* v. *Krishnabai*, 2 B. 635.

(9) S. 49, Registration Act.

(10) *Thandavan* v. *Valliamma*, 15 M. 235.

(11) *Bua* v. *Gunga*, (1906) P.L.R. 119; *Sarbachand* v. *Chandsingh*, (1877) P.R. 84.

transaction being one and indivisible, it must stand or fall together, it being presumed that the division of the movables was not made without division of the immovables.[1] But it is submitted that a document may be admissible without being operative.

The documents executed in consequence of partition such as mutual releases would, of course, require to be registered.[2]

1483. Effect of Non-registration.—It is provided in S. 49 of the Registration Act that "no document required by S. 17 to be registered shall, if not registered, affect any immovable property comprised therein or be received as evidence of any transaction affecting such property."

Now, since the fact of separation is something different from the allotment of shares, it follows that the existence of an unregistered partition-deed is no impediment to the proof of the existence of a particular status. So where the question was whether a particular property claimed by the plaintiff to be joint family property was, at the date of suit, joint or separate and there was evidence that there was a partition in the family, which was recorded in an unregistered partition-deed, it was held that, though the terms of the partition could not be proved by parol, there was nothing to prevent the parties from proving *aliunde* the fact of separation.[3]

179. (1) The father of a joint family has the power to divide the family and its property, whether ancestral or self acquired, at any time during his life without the consent of his sons, and if he makes a division, it has the effect not only of separating him from his sons, but also the sons *inter se*[4] provided the partition was *bona fide* and not unfair.[5]

(2) The father's right of division of ancestral property is personal and cannot be exercised by will.[6]

1484. Analogous Law.—The relevant texts on the subject of this section are set out below :—

Manu.—"Either let them thus live together, or if they desire separately to perform religious rites, let them live apart; since religious duties are multiplied in separate houses, their separation is therefore legal and even laudable."[7]

Yadnavalkya.—"When the father makes a partition, let him separate his sons from himself at his pleasure and either dismiss the eldest with the best share, or if he chooses, all may be given equal shares."[8]

Mitakshara.—"If the father be alive, and separate from the grandfather, or if he have no brothers, a partition of the grandfather's estate with the grandson would not take place; since it has been directed, that shares shall be allotted in right of the father, if he be deceased: or admitting partition to take place, it would be made according to the pleasure of the father, like a distribution of his own acquisitions; to obviate this doubt the author[8] says: 'For the ownership of the father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels (which belonged to him).' "[9]

Ib.—"Supposing the father to be divided (from his coparceners) or to have no brothers, shall the estate, which has been inherited from the grandfather, not be divided at all with the grandson in that case, because it has been directed that shares shall be allotted in right of the father if he is deceased (and not otherwise); or, admitting partitions to take place (in that case), shall it be instituted by the choice of the father alone? In order to remove the two doubts, which might thus be enter-

(1) *Dhondo* v. *Gopala*, (1876) B.P. J. 123; *Pool* v. *Secretary of State*, (1886) P.R. 68; *Deoki* v. *Kala*, (1887) P.R. 76; *Lakshmamma* v. *Kameshwara*, 13 M. 281.

(2) *Latchumammal* v. *Gangammal*, 34 M. 72.

(3) *Chhotalal* v. *Mahakore*, 41 B. 466.

(4) *Venkatapathi* v. *Venkata Narasimha*, (1936) P.C. 264 (266).

(5) *Shiv Dyal* v. *Ram Jiwaya*, 12 L. 574; *Kandasami* v. *Doraisami*, 2 M. 317; *Aiyavier* v. *Subramania*, 40 I.C. (M.) 205; *Nirman* v. *Fateh Bahadur*, (1929) A. 963.

(6) *Brijraj Singh* v. *Sheodan Singh*, 35 A. 337 P.C.

(7) Manu, IX-111.

(8) Yad., II-122.

(9) Mit., I-V, § 5.

tained, the author says: 'For the ownership of father and son is the same in land, which was acquired by the grandfather, or in corrody, or in chattels (which belonged to him).' "[1]

Ib.—In such property, which was acquired by the paternal grandfather, through acceptance of gifts, or by conquest or other means (as commerce, agriculture, or service) the ownership of father and son is notorious; and therefore, partition does take place. For or because, the right is equal or alike, therefore, partition is not restricted to be made by the father's choice, nor has he a double share."[2]

Dayabhag (citing Manu).—"This text is an answer to the question, why partition among sons is not authorized, while their parents are living: namely, because they have not ownership at that time."[3]

Ib.—"Hence the text of Manu and the rest must be taken as showing that sons have not a right of ownership in the wealth of the living parents but in the estate of both when deceased."[4]

Ib.—"Thus there are two periods of partition: one, when the father's property ceases; the other by his choice while his right of property endures."[5]

Father's right to partition property at his pleasure.

1485. The right of partition originally belonged to the father. He could make a partition if he chose, but the sons had no right to demand partition. Such is the present law of Bengal which follows the Dayabhag in which the right of the son in the ancestral estate in the possession of his father is denied, his right to partition being admitted as arising only on his death.[6] On this subject, the Mitakshara and the Dayabhag are diametrically divergent, since the coparcenary interest of the Mitakshara son in his ancestral estate arises with his birth, while that of the Dayabhag son only arises on his father's death. It then follows that in Bengal while the father is alive, the son has no interest in the family property. Till then he is not its coparcener,[7] but is a mere dependent in his father's family and cannot claim a partition, or even maintenance out of the estate in his father's possession. But as soon as the father dies intestate, his right to partition against his brothers and nephews springs into being which he may enforce by partition. But so long as his father is alive, even the ascertainment and definement of his share would not amount to partition.[8]

1486. The father is vested under Hindu law with a power to make a partition of ancestral property without the consent of his sons,[9] though he cannot do so by a will[10] unless the disposition so made is accepted by the sons, in which case, it operates as a partition destroying their right of survivorship.[11] Where the father effects a general partition, it has not only the effect of separating him from the sons, but also the sons *inter se*.[12] Even where the actual allotment fails, the severance of

(1) Dr. Jolly's Tr. of Mit., I-V-5, correcting Colebrooke's Tr. as cited last, accepted as more accurate; *per* Sergeant, C.J., in *Apaji* v. *Ramchandra*, 16 B. 29 (35) F.B.

(2) Mit., I-V-§ 5.

(3) Dayabhag, I-I, § 15.

(4) *Ib.*, I-I, § 18.

(5) *Ib.*, I-I, § 38.

(6) *Ib.*, I-I, 1, §§ 1-26.

(7) *Ib.*, I-I, §§ 14, 18.

(8) *Bata Krishna* v. *Gopal Krishna*, (1906) 5 C.L.J. 417.

(9) *Balkishen Das* v. *Ram Narain*, 30 C. 738 P.C.; *Kedar Nath* v. *Jai Narain*, 40 C. 966 P.C.; 1 Str., H.L. 179; *Kandasami* v. *Doraisami*, 2 M. 317; *Karuppannan* v. *Bulokam*, 23 M. 16; *Vishalakshi* v. *Sivaramien*, 27 M. 577 F. B.; *Rooplal* v. *Lakshmi*, 29 M. 1; *Marugappa* v. *Palaniyandi*, 31 M.L.J. 147: 36 I.C. 507; *Rangaswami* v. *Sundararajulu*, 31 M.L.J. 472: 35 I.C. 52; *Singa* v. *Venkataramanna*, (1913) M.W.N. 1016: 23 I.C. 6; *Ganpat* v. *Gopal*, 23 B. 636.

(10) *Ibid.*, Mit., I-II-7, applies both to ancestral and self-acquired property of the father; *Nagalinga* v. *Subramania*, 1 M.H.C.R. 77; *Laljeet* v. *Rajcoomar*, 20 W.R. 336.

(11) *Jadunath* v. *Bhabuti*, 33 I.C. (O.) 785 and cases cited in ft.-note (6) of p. 598.

(12) *Venkatapathi* v. *Venkata Narasimha*, (1936) P.C. 264 (266).

status may still remain.[1] As to the effect of a devise when it comes into competition with an adoption, the Bombay High Court has held that the father's will prevails and cannot be set aside by a son adopted by his widow.[2]

Persons entitled to partition.

180. The following persons are entitled to claim partition of joint property:—

(1) Adult coparceners not disqualified from inheritance.[3]

(2) Issue of disqualified coparceners who are not themselves disqualified from inheritance.[4]

(3) A Hindu widow, inheriting her husband's estate under the provisions of the Hindu Women's Rights to Property Act, 1937,[5] her widowed daughter-in-law and her widowed grand daughter-in-law.

(4) Minor coparcener, if the partition of his share would advance or protect his interest.[6]

(5) Coparcener's transferee acquiring a partible interest in the joint property.[7]

1487. Analogous Law.—Theoretically, every coparcener is entitled to demand a separation of his share, which is commended by the text-writers, though a text of the Mitakshara,[8] has been the subject of a narrow construction by the Bombay High Court.[9]

1488. Who May Claim Partition?—Generally speaking, all coparceners are entitled to claim partition. But this rule is subject to three exceptions, two of which are textual and the third is due to cases. The texts declare a person who is disqualified to inherit, as equally incompetent to take a share. Such persons were those born deaf, dumb, or blind[10] or without limb or organ, such as those born idiots,[11] and eunuchs, or without leg, nose or tongue.[12] But most of these disabilities have now been removed by the legislature.[13]

Cl. (1). Adult coparceners.

1489. An heir disqualified from inheritance is equally disqualified to enforce or take a share in a partition, but the disqualification is personal while it lasts. If then a coparcener was excluded from participation by reason of his disqualification, its subsequent removal would entitle him to his share which he may claim from his

Cl. (2). Disqualified heir and his issue.

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(1) *Venkateshwara* v. *Mankayammal*, (1935) M. 775.
(2) *Shivappa* v. *Rudrava*, 57 B. 1 (17, 18, 37-39).
(3) *See* §§ 1488, 1489.
(4) *See* S. 307.
(5) Act XVIII of 1937, printed in the App.
(6) *Damodar* v. *Senabutty*, 8 C. 537, (540, 541); *Swamiyar* v. *Chhokalingam*, 1 M. H.C.R. 105; *Kamakshi* v. *Chidambara*, 3 M.H.C.R. 94; *Thangam* v. *Suppa*, 12 M. 401 (404); *Govind* v. *Moro*, (1875) B.P.J. 261; *Mahadev* v. *Lakshman*, 19 B. 99 (104).
(7) *See* S. 1497 *Post*.
(8) Mit. I-V-5, cited under S. 179 § 1484.
(9) *Apaji* v. *Ramachandra*, 16 B. 29 F.B. *Jivabhai* v. *Vadilal*, 7 Bom. L.R. 232; *Bhupal* v. *Tavanappa*, 46 B. 435 (437).
(10) *Mohesh Chunder* v. *Chunder Mohun*, 14 B.L.R. 273; *Charu Chunder* v. *Nobo Sundari*, 18 C. 327; *Murarji* v. *Parbati Bai*, 1 B. 177; *Hirasingh* v. *Gunga*, 6 A. 332 P.C.
(11) *Surti* v. *Narsindas*, 12 A. 530; *Ranbijai* v. *Jagat Pal*, 18 C. 111; *Hotchand* v. *Manganmal*, 8 S.L.R. 279: 29 I.C. 42.
(12) *Venkata* v. *Purushottam*, 26 M. 133.
(13) Act XII of 1928.

quondam coparceners.[1] On the other hand, if his disability was not congenital, then his interest which became vested in him on his birth could not be divested by his subsequent disability. So a coparcener who became a lunatic subsequent to his birth can, during his lunacy, maintain a suit for partition of his share in the joint property. He has vested rights in such property by birth, which are not divested by his subsequent lunacy.[2] It will be seen when discussing the laws of inheritance (**S. 307**), that a disqualification from inheritance is a personal disqualification which only affects the person disqualified and not his heirs; from which it follows that the son, grandson or great-grandson of such person if not disqualified, is competent to claim partition. It is immaterial if he was born after the death of his disqualified ancestor.[3] Even if he was born after partition, he will divest those in whom the estate has vested before his birth.

The question whether a person can enforce a partition against his grandfather during his father's lifetime was at one time a subject of judicial conflcit,[4] now settled by the Privy Council, who have upheld the inherent right of the son, the grandson and the great grandson to partition.[5]

Illegitimate Son.

1490. Since only coparceners are entitled to enforce partition the question whether an illegitimate son possesses that right depends upon his right in the family. It is settled that the illegitimate sons of the three regenerate castes are entitled to nothing beyond maintenance "if they be docile."[6] And in the case of a Shudra, it is now settled that an illegitimate son has the status of a son and is a member of the family and that the share ance.[7] He can, therefore, enforce partition as against his brothers,[8] though he has no right of partition against his father.

Adopted Son.

1491. It has already been stated that an adopted son is as regards his rights indistinguishable from an *auras* son though the *quantum* of interest is reduced in competition with him (**S. 63**).

The adopted son of a son, when an exclusive heir, succeeds to his grandfather's estate like a natural grandson. But in competition between the son and the adopted son of a predeceased natural son, the grandson by

(1) *Deo Kishen* v. *Budh Prakash*, 5 A. 509 F.B.; *Tirbeni* v. *Mhd. Umar*, 28 A. 247; *Moolchand* v. *Chata Devi*, I.L.R. (1937) A. 605 F.B.; *Hotchand* v. *Manghanmal*, 8 S.L.R. 279: 29 I.C. 42; *contra* in *Ram Sahyee* v. *Laljee*, 8 C. 149; *Ram Soonder* v. *Ram Sahyee*, 8 C. 919 dissented from.

(2) Gautam, XXVIII-42-43; 2 S.B.E. 301: "The male offspring of an idiot receives his father's share." To the same effect, Narad, XIII-22; Vishnu, XV-32-35; 7 S.B.E. 64; Yad. II-140-142 (Mandlik), 223; Smiriti—Ch. V-3; Saraswati Vilas, V-148 (Foulkes' Tr.) 31; *Dilraj Kuari* v. *Rikheswar*, 13 Pat. 712.

(3) *Ibid.*

(4) *See* Hindu Code (3rd Ed.), §§ 1757, 1760, pp. 879-881.

(5) *Masitullah* v. *Damodar*, 48 A. 518 P.C.

(6) Mit., I-XII-3; Dayabhag, IX-28; Mayukh, IV-29-31; *Chouturya* v. *Sabub Purhalad*, 7 M.I.A. 18; *Gajapathi* v. *Gajapathi*, 2 M.H.C.R. 369, reversed on a different point 13 M.I.A. 497; *Roshan* v. *Balwant Singh*, 22 A. 191 P.C.; *Packiriswami* v. *Doraswamy*, 9 R. 266.

(7) *Vellaiyappa* v. *Natarajan*, 55 M. 1 (15) P.C.

(8) *Sadu* v. *Baiza*, 4 B. 37 (44, 45), followed in *Jogendro* v. *Nityanund*, 11 C. 702 (714); *Jogendra* v. *Nityanund*, 18 C. 151 (155) P.C.; *Ramasaran* v. *Tekchand*, 28 C. 104 (204); *Parash Ram* v. *Sobha Ram*, (1878) C.P.S.C. Pt. No. 32; *Shcoraj* v. *Rambax*, (1883) C.P.S.C. No. 8.

adoption does not take the share of his father, but only the share which his father would have taken if he had himself been an adopted son [1] that is to say, on a partition between an adopted and a subsequently born *auras* son, the former takes a reduced share; otherwise they possess equal rights.[2] And even on partition the rule only applies to the twice born, and not to a Shudra in whose case the two share equally[3] (**S. 63**). Where a coparcener dies and his widow makes an adoption after partition of the property by the surviving coparceners the adopted son would be entitled to call upon them to make over to him a portion of the wealth equal to that which would have been taken by his father.[4] It was held by the Privy Council in a case decided upon the following facts: An impartible zamindari, the property of two undivided brothers, was in the possession of the elder brother. On his death, leaving a widow and no male issue, the younger brother became entitled by survivorship to the entire estate. The widow made a valid adoption to her husband and it was held that the adopted son was entitled to possession of the zamindari.[5]

Clause (4).

1492. Again, a minor coparcener is not, as of right, entitled to claim partition. This rule is based on no text, but is entirely the outcome of cases. His right to demand partition is conditional upon its being to his advantage, the view of law being that his interests are safe in a joint family and it is only when that presumption is rebutted by any special reason assigned to the contrary that he is allowed to sue for partition as of right. The rule is as previously observed, the outcome of decided cases in which it is laid down that a minor cannot leave his family unless it will be to his own advantage,[6] either by protecting or advancing his interest. But once such a suit is instituted it does not abate on the plaintiff's death.[7]

1493. His right to partition then depends upon the questions of necessity and benefit to him and his estate. Necessity for partition may arise if the manager is guilty or malversation,[8] or waste, or is hostile to the minor, denies his title or declares himself as holding adversely to him. Such was the case of the illegitimate son of a Shudra father who sued his father's son for a partition of his share, which the court decreed because the defendants has denied his title to any property.[9] It may be that though jointness may not prejudice the minor and yet partition may benefit him. In that case, partition cannot be refused.[10] On the other hand, it cannot be decreed upon grounds apprehended but not proved.[11]

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(1) Dat. Ch., V-25.

(2) *Nagindas* v. *Bachoo*, 40 B. 270 P.C.; *Pratap Singh* v. *Agar Singh*, 43 B. 778 (792) P.C.

(3) *Arumilli* v. *Arumilli*, 44 M. 656 P.C.

(4) *Sri Raghunadha* v. *Sri Brozo*, 1 M. 69 P.C.; explained in *Krishna* v. *Sami*, 9 M. 64 (78) F.B.

(5) *Sri Raghunadha* v. *Sri Brozo*, 1 M. 69 P.C.

(6) *Damodar* v. *Senabutty*, 8 C. 537 (540, 541); *Swamiyar* v. *Chhokalingam*, 1 M.H.C.R. 105; *Kamakshi* v. *Chidambara*, 3 M.H.C.R. 94; *Thangam* v. *Suppa*, 12 M. 401 (404); *Govind* v. *Moro*, (1875) B.P.J. 261; *Mahadev* v. *Lakshman*, 19 B. 99 (104).

(7) *Rangasayi* v. *Nagarathnamma*, 57 M. 95 F.B.

(8) *Swamiyar* v. *Chhokalingam*, 1 M. H.C.R. 105; *Mahadev* v. *Lakshman*, 19 B. 99 (104); *Bhola Nath* v. *Ghasi Ram*, 29 A. 373.

(9) *Thangam* v. *Suppa*, 12 M. 401 (404).

(10) *Bhola Nath* v. *Ghasi Ram*, 29 A. 373.

(11) *Bachoo* v. *Mankorebai*, 21 B. 51 (60); O.A. 31 B. 373 (379) P.C.

1494. The fact that the coparcenary comprises some minors is no obstacle to a partition.[1] The interest of the minor would, of course, be protected by his natural guardian, and in his absence, by his *de facto* guardian.[2] But though a minor is not represented in the suit, he would be bound by a partition if it does not prejudice his interest.[3] On coming of age, the partition of his non-age binds him, unless he can show that it was a fraud upon his rights, or that it was made to his conscious prejudice. The mere fact that it was unequal would not by itself vitiate the partition arrangement.

The minor's claim for partition must be distinguished from a partition in which a minor's share is involved.

1495. After-born Son.—Under Hindu Law, a child is presumed to come into existence from the moment of its conception. Consequently, where partition is effected while a co-parcener was in the womb, on his birth he becomes entitled to a share which he may claim by reopening the partition.[4] (**S. 197.**) But if the partition was completed before his conception he has no right against his separated brothers. So where the father of three sons, two of whom were minors made a partition giving his eldest son a third of the estate, retaining the other two-third himself on behalf of his two younger sons by his younger wife and five years after, another son was born to him by her, who sued the father and his three sons by the senior wife for a general partition claiming a fourth share of the entire estate, the court rejected his claim against the separated son adding: "The general rule of Hindu Law, as expounded by the Mitakshara, Mayuk and the Smriti-Chandrika is that a son born after partition has no claim on the wealth of his separated brothers. He has a preferential claim on the wealth of his parents. He can have a share of it with those brothers who lived in union with the father or were reunited with him. The separated brothers have no claim over this distributed parental share. A partition is limited to the interests of the person demanding it, and has no enforced general operation against those who desire to live in union."

"The somewhat vague texts of Vishnu and Yadnyavalkya which direct separated brothers to give a share to an after-born son, apply to sons who have no provision made for them and have further been explained by commentators as applicable only to the case of posthumous sons. In the present case, there has been no partition between the brothers. The father only cut off one of his sons with a separate provision, and retained the rest of the property in his own charge and management for the sons of his younger wife. All branches of the family gave effect to this understanding for twelve years. His claim can only be made against respondents Nos. 2 and 3 who lived with their father in union and with whom he himself has been all along living as a member of a joint family."[5]

1496. This case then establishes the rule that where the father separates only some of his sons, remaining joint with the rest of his family, an after-born son must look to this family for his share. He cannot make any claim against his separated kinsmen, unless his separa-

(1) *Balkishen* v. *Ram Narain*, 30 C. 738 (752) P.C.; *Kawal Nain* v. *Budh Singh*, 39 A. 496 P.C.; *Balkrishna* v. *Ram Krishna*, 53 A. 300 P.C.; *Dnyaneshwar* v. *Anant*, 60 B. 736.

(2) *Nallappa* v. *Balammal*, 2 M.H.C.R. 182.

(3) *Ajoodhya* v. *Manohar*, 3 Pat. L.W. 366: 40 I.C. 131.

(4) *Shivaji* v. *Vasant Rao*, 33 B. 267.

(5) *Per* Ranade, J., in *Ganpat* v. *Gopal Rao*, 23 B. 636 (643).

tion was a fraud on his right. The case is again not different even where there has been a general partition between the father and his sons, provided the father takes his legitimate share. The after-born son cannot then enforce a re-partition of the whole estate but must take his share from his father's allotment. But he is entitled to reopen partition if his father has reserved no share for himself. **S. 197 (2).**

Clause (5).

1497. Coparcener's Transferee.—The right of the coparcener's transferee to call for a general partition has already been the subject of extended discussion (§§ **1116-1119**). The purchaser of a coparcenary interest in the joint property is entitled to sue the other coparceners for partition, in which he is entitled to demand that the property which he had purchased as belonging to his vendor should, if possible, be given to him as his share.[1] (**S. 127**). But since a stranger cannot be permitted to reside in a portion of the family dwelling house, the purchaser is not entitled to a division *in specie*, but may be compelled to sell his share to the other coparceners.[2] And he cannot recover past profits before the suit any more than his assignor could have, if he had joined in the suit for partition.[3]

Clause 2.

1498. The widow's right of partition is statutory and will be found discussed in the Appendix where the Hindu Women's Rights to Property Act, 1937 will be found printed and commented upon.

1499. Dayabhag Family.—It has already been seen that the sons and grandsons in a Dayabhag family are not coparceners, but mere dependents with no right to partition or even maintenance against their father and grandfather, in whom the estate vests absolutely, and with full power of disposal by an alienation *inter vivos* or devise, from which it follows that it is open to the father to partition his property equally or unequally among his sons and he is then enjoined to allot to each of his childless wives a share equal to a son.[4] But she cannot initiate a partition among the sons,[5] and must make allowance for any property she may have received from her husband.[6] She is only entitled to a share on a general partition, and not when a partition of only one item of property takes place at the instance of a stranger,[7] and then only when it is completed.[8] Where two or more widows jointly succeed to their husband they possess a right of partition *inter se*.[9] (*See* **S. 181.**)

Co-widow's right to partition.

181. (1) A co-widow is entitled to the partition of her life-interest in her husband's estate.[10]

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(1) *Pandurang* v. *Bhaskar*, 11 B.H.C. R. 72; *Udaram* v. *Ramu*, ib., 76; *Mahabalaya* v. *Timaya*, 12 B.H.C.R. 138; *Dhulabhai* v. *Lala*, 23 Bom. L.R. 777; *Raghoonath* v. *Luckhun*, 18 W.R. 23: *Lochun* v. *Nemdharee*, 20 W.R. 170; *Bahoo Lall* v. *Juma*, 22 W.R. 116; *Annad* v. *Prankishto*, 3 B.L.R. (O.C.) 14; *Janoki* v. *Mothuranath*, 9 C. 580; *Bepin Bihari* v. *Lall Mohun*, 12 C. 209; *Vanjapuri*, v. *Panchamuthu*, 35 M.L.J. 609: 45 I.C. 62; *Panon* v. *Goma*, 43 B. 472. If of course, the transfer is not colourable—*Ramkrishna* v. *Parmeshwar*, (1935) P.C. 92.

(2) S. 4, Partition Act (IV of 1893); (*See* app.); *Vaman* v. *Vasudev*, 23 B. 73; *Trimbak* v. *Pandurang*, 44 B. 621.

(3) *Trimbak* v. *Pandurang*, 44 B. 621.

(4) Dayabhag, III-II, § 32.

(5) *Sorolab* v. *Bhoobun Mohun*, 15 C. 292.

(6) *Jodoonath* v. *Briji Nath*, 12 B.L.R. 385; *Jugomohun* v. *Saroda Moyee*, 3 C. 149.

(7) *Barahi* v. *Dekhamini*, 20 C. 682.

(8) *Sheo Dayal* v. *Judoonath*, 9 W.R. 61; *Tej Pratap* v. *Champa*, 12 C. 296.

(9) *Janoki Nath* v. *Mothura Nath*, 9 C. 580 (581) F.B.

(10) *Bhagwan Deen* v. *Myna Bai*, 11 M.I.A. 487.

(2) But such partition is not absolute and does not, in the absence of an express agreement to the contrary, determine her coparcenary right of survivorship.[1]

1500. Analogous Law.—This section deals with the interest which the co-widows acquire in their husband's estate by inheritance. As such, they are, in the strict sense, coparceners[2] possessing the right of survivorship to each other (*See* **S. 288**). As such, partition being an incident of the coparcenary right of co-widows they should *prima facie* be entitled to claim the right of partition which they do. But since their interest in their husband's property is limited, it follows that partition in their case must be necessarily modified by the nature of their interest in their husband's inheritance and the reversionary rights of others who are entitled to see that their interest is not prejudiced by the destruction or waste committed by the life-holders or their transferees. Again, since the partition of the interest of co-widows is not allowable, it follows that partition can only affect their mode of possession and enjoyment and cannot alter their title. In other words, the partition to which the co-widows are entitled is the partition merely of their life-estate which is their right to possession and enjoyment,[3] and this right belongs to all female heirs such as daughters[4] inheriting to their father.[5] Neither co-widows nor daughters can by their alienation alter the character of their qualified estate so far as concerns the right of survivorship or the rights of reversioners, but they may alienate their interests in the property or have that interest taken and sold in execution of a decree against them. They may also, subject to the same condition, demand a partition of the property. When their interests are transferred, it is obviously desirable that the transferees should be able to partition their transferor's interest.

1501. Widows have the right to demand partition of their husband's inheritance. The wife has no right of partition against her husband.[6] But as his heir she is entitled to the separation of her share in her inheritance against her co-widow.[7] Even as against her husband's co-parceners she is entitled to demand partition if his share was ascertained during his lifetime though he died before it could be served *in specie*.[8] Now she is entitled to demand partition under the Hindu Women's Rights to Property Act, 1937.

1502. Under the Mitakshara, as well as both under Mayukh and the Dayabhag,[9] it is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*. She can assign her right to any one she chooses. If he has already obtained the share by partition, she can alienate her interest in that share. But the assignment or alienation cannot take effect or have validity beyond her life-time. It

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(1) *Gajapathy* v. *Gajapathy*, 1 M. 290 (299, 300) P.C.

(2) *Bhagwan Deen* v. *Myna Bai*, 11 M. I.A. 487; *Gajapathi* v. *Gajapathi*, 1 M. 290 (299) P.C.; *Kola* v. *Muthayammal*, 21 M.L.J. 977: 12 I.C. 766; *contra* in *Sellam* v. *Chinnamal*, 24 M. 441 (443) is erroneous.

(3) *Bhagwan Deen* v. *Myna Bai*, 11 M. I.A. 487; *Gajapathi* v. *Gajapathi*, 1 M. 291 P.C., *Sundar* v. *Parbati*, 12 A. 51 P.C.; *Durga Dat* v. *Gita*, 33 A. 443; *Chittar Kunwar* v. *Gaura*, 34 A. 189.

(4) *Kanni Ammal* v. *Ammakannu*, 23 M. 504.

(5) *Ibid.*, p. 504.

(6) *Sunder Bahu* v. *Monhur*, 10 C.L.R. 79.

(7) *Mahadeo* v. *Daokoer*, 9 C. 53; *Diltor Koer* v. *Harku*, (1917) Pat. 225: 41 I.C. 631; *Govind* v. *Chandra*, 12 N.L.R. 100: 34 I.C. 675, distinguishing *Chander* v. *Murat Singh*, 7 C.P.L.R. 153.

(8) *Ram Joshi* v. *Lakshmi Bai*, 1 B. H.C.R. 189.

(9) *Padmamani* v. *Jagadamba*, 6 B.L.R. 134; *Janki Nath* v. *Mothura*, 9 C. 580.

is good so long as she lives. On her death, her interest in property ceases and the share goes to the surviving co-widow or co-widows as the case may be.[1] A co-widow is entitled to partition even if she has no more than a possessory title. So where on the death of their husband, his two co-widows took possession of the estate left by him, the deceased had before his death, adopted a boy, to whom also he bequeathed his property by will. The boy, however, died soon after the testator. The High Court dismissed the suit, holding that the widows could not enforce partition of their possessory title, but on appeal the Privy Council held that possessory title was sufficient to support a claim for partition.[2] The fact that after the death of her husband the widow was leading an immoral life is no ground for refusing her partition. As a matter of fact the court has no discretion in the matter.[3]

1503. But the partition to which co-widows are entitled is not an absolute partition destroying their right of survivorship to each other. As the Privy Council observed: "Two or more lawfully married wives take a joint estate for life in the husband's property, with rights of survivorship and equal beneficial enjoyment.[4] As to the mode of enjoyment, it has no doubt been decided,[5] that widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between them."[6] Their Lordships then went to cite cases to shew that though they could not enforce an absolute partition, they could, nevertheless, obtain separate possession and enjoyment of their shares leaving the title to each share unaffected and that such qualified partition did not destroy their coparcenary right of survivorship.

The principle applicable to co-widows would apply equally to two or more sisters inheriting to their father.[7]

The donee of a co-widow may equally enforce the same right of partition which belonged to his donor.[8] But since this partition is only of the life estate, it should not be made so as to prejudice the rights of the reversioners who are entitled to inheritance, if the partition is prejudicial to their rights, as where it would lead to waste or otherwise be injurious to the *corpus*.

1504. While the *quasi*-partition to which co-widow's, daughters and other limited owners[9] are entitled does not destroy the coparcenary, there is nothing to prevent them by express agreement between themselves to put an end to their

Clause (2).

(1) *Hari* v. *Vital*, 31 B. 360.

(2) *Sundar* v. *Parbati*, 8 A. 1, reversed O.A. 12 A. 51 (56), following *Armory* v. *Delamirie*, 1 S.L.C. (6th Ed.) 313 (in which the finder of a jewel was held to possess such property as will enable him to keep it against all but the rightful owner and therefore to maintain an action of trover) and *Asher* v. *Whitlock*, L.R. 1 Q.B. 1 (in which possessory interest was held to be devisable).

(3) *Sellam* v. *Chinnammal*, 24 M. 441 (443). In this case it has been erroneously held that co-widows inherit as tenants-in-common. That they do not do so is clear from *Gajapathi* v. *Gajapathi*, 1 M. 290 (299) P.C.; *Jijoyiamba* v. *Kamalakshi*, 3 M.H.C.R. 424; *Padmamani Jagadamba*, 6 B.L.R. 134; *Dalkoor* v. *Panbas*, 8 C.W.N. 658.

(4) *Jijoyiamba* v. *Kamalakshi*, (the Tanjore cases), 3 M.H.C.R. 424 (452); *Gajapathi* v. *Gajapathi*, 1 M. 290 (299, 300) P.C.

(5) *Jijoyiamba* v. *Kamalakshi*, 3 M.H.C.R. 424 (452); *Bhugwandeen* v. *Myna Bayi*, 11 M.I.A. 487.

(6) *Gajapathi* v. *Gajapathi*, 1 M. 290 (299, 300) P.C.

(7) *Balubai* v. *Tanu Bai*, 10 N.L.R. 51: 24 I.C. 808; *Kenni Ammal* v. *Ammakannu*, 23 M. 504. *See* S. 288.

(8) *Durga Dat* v. *Gita*, 33 A. 443; *Kailash* v. *Bitto*, 15 O.C. 223: 16 I.C. 471.

(9) *Kadungoth* v. *Kadungoth*, 12 M.L.J. 301: 16 I.C. 433; *Balubai* v. *Tanu*, 10 N.L.R. 51: 24 I.C. 808.

right of survivorship.[1] But this again cannot prejudice the reversioner, who may intervene in a suit of the co-widows to safeguard his interest against the possible acts of waste by the widow, provided he can show reasonable grounds for apprehending it.[2] This may result in a relief to the reversioner by the grant of an injunction or an appointment of a Receiver.[3] And if after the partition, a Hindu widow abuses her estate, she may be similarly restrained by a *bill quia timet* or a suit for injunction.[4] Where two daughters, jointly succeeding to their father's estate, effect an absolute partition and one of them dies, the reversioner cannot defeat survivorship by suing for possession of the share of the deceased. In such case, the partition has the effect of relinquishment of her estate, and all that the reversioner may claim is a declaration of the alienation as affecting his interest.[5]

1505. If two widows or two daughters, taking jointly the estate of their husband or father, made an agreement for separate possession and enjoyment, the arrangement cannot ordinarily deprive the survivor of the right to the whole estate or enable the ladies to confer a title on a third party which will not terminate at the latest with the life of that survivor. There can be no relinquishment by a Hindu female heiress of anything less than the entire interest.[6] Alinees from a co-widow may likewise obtain a decree for partition which will have effect during the lifetime of their alienor.[7]

As to the right of a co-widow to charge her interest, and its effect upon the survivor, *see* **S. 335**, *post*.

Female shares on partition.

182. Subject to any local law or usage to the contrary, and in cases arising before the 14th April, 1937 when the Hindu Wowen's Right to Property Act came into force, the following female relations are each entitled to a share on partition:—

(1) On a partition between the father and his sons, or between the sons, their mother and their grandmother are, between them, entitled to a share which, with the stridhan received from their husband or the father-in-law, must equal a son's share.[8]

(2) And unmarried daughters and sisters are entitled to a quarter of the son's or the brother's share.[9]

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(1) *Ramakkal* v. *Ramasami*, 22 M. 522; *Sudalai* v. *Gomati*, 23 M.L.J. 355: 16 I.C. 428; *contra* in *Durga Dat* v. *Gita*, 33 A. 443 (446); *Chittab* v. *Goura*, 34 A. 189; *Baldeo* v. *Bhagawanti*, 33 I.C. (A.) 259; *Shyamadas* v. *Radhika*, 22 C.W.N. 846: 47 I.C. 853; *Dulhin Parbati* v. *Baij Nath*, 14 Pat. 518.

(2) *Durga Nath* v. *Chintamoni*, 31 C. 214 (220); *Soudaminey* v. *Jogeta Chunder*, 2 C. 262; *Janoki Nath* v. *Mothura*, 9 C. 580; *Bepin Bihari* v. *Lal Mohan*, 12 C. 209; *Kailasha* v. *Bitto*, 15 O.C. 223: 16 I. C. 471.

(3) *Soudamoney* v. *Jogesh Chunder*, 2 C. 262; *Janoki Nath* v. *Mothura*, 9 C. 580, explained in *Durga Nath* v. *Chintamoni*, 31 C. 214 (221).

(4) *Hurry Doss* v. *Rungunmoney*, 2 Sevest 657; *Hurry Nath* v. *Upoornath*, 6 M.I.A. 433; *Durga Nath* v. *Chintamoni*, 31 C. 214 (221).

(5) *Ammaniammal* v. *Periasami*, 45 M. L.J. 2: 74 I.C. 58: (1924) M. 75.

(6) *Shyamadas* v. *Radhika*, 22 C.W.N. 846: 47 I.C. 853; *Dulhin Parbati* v. *Baij Nath*, 14 Pat. 518.

(7) *Durga Dat* v. *Gita*, 33 A. 443; *Baldeo* v. *Bhagawanti*, 33 I.C. (A.) 259.

(8) Yad., II-116, cited in Mit., I-II-8; *Jodoonath* v. *Brojonath*, 12 B.L.R. 385; *Sumrun Thakoor* v. *Chunder*, 8 C. 17 (19); *Kishori Mohan* v. *Moni Mohan*, 12 C. 165; *Purna Chandra* v. *Sarojini*, 31 C. 1065; *Poorendra* v. *Hemangini*, 36 C. 75 (84); *Kanhaiya Lal* v. *Gaura*, 47 A. 127; *Radhakishan* v. *Harkishan*, 98 I.C. (N.) 37: (1924) N. 55; *Hashem Sab* v. *Basappa*, 34 Bom.L.R. 1325.

(9) Manu, IX-V-118.

(3) On a partition between her sons, grandsons or great-grandsons, a widow is entitled to a share equal to that of her son.[1]

Exception.—**The wife or the widow in Southern India is allotted no share.**[2]

1506. Analogous Law.—The last section deals with persons who are entitled to claim, and, if necessary, enforce a partition of their share by suit. This section deals with the female members who are allotted a share on a partition being made, though they have no right to demand or enforce a partition and in cases, arising before the 14th April, 1937, since when the Hindu Women's Rights to Property Act, has come into force.

Their right is subject to local law and usage.

1507. The relevant texts on the subject[3] have since been superseded by the case-law on the subject.

The mother and grandmother is ordinarily entitled to a share equal to that of a son; but if she has received any *stridhan* or any other gift from her husband or father-in-law, it will reduce her share to that extent. This is in accordance with the texts[4] and is equally supported by judicial authority.[5] But no other property in her possession, as for example, the property she inherits as heir to her son, affects her right.[6]

On a partition between the sons, the mother is entitled to a share; but if she has received insurance money due on her husband's policy assigned to it, it must be credited against her claim for a share.[7]

1508. Female Sharers.—The share allotted to a female on partition is not in recognition of her inherent right, in which case she would have been a coparcener, but she is allotted a share from necessity arising from her marriage or maintenance. As such, neither the daughter, sister, wife or the mother can claim partition, though upon a coparcener claiming it, that right comes into existence and may be enforced like any other claim to partition, though it must await an actual partition by metes and bounds as distinct from a mere severance of status;[8] if, therefore, she dies bounds such partition, her heirs have no right to claim a share on her behalf, even if she dies after the peliminary decree but before it is made final.[9]

1509. Quantum of Share.—In order to determine the wife's or the mother's share, regard must be had to the right of unmarried daughters and sisters who are both entitled to one-fourth of the son's share.[10] Out

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(1) *Damoodar* v. *Senabutty*, 8 C. 537.

(2) *Subramania* v. *Arunachalam*, 28 M. 1 (8).

(3) Cited *in extenso* in Hindu Code (3rd Ed.), § 1780, pp. 890, 891.

(4) *Ib.*

(5) *Jodoonath* v. *Brojonath*, 12 B.L.R. 385; *Sumrun Thakoor* v. *Chunder*, 8 C. 17 (19); *Kishori Mohan* v. *Moni Mohan*, 12 C. 165; *Purna Chandra* v. *Sarojini*, 31 C. 1065; *Poorendra* v. *Hemangini*, 36 C. 75 (84); *Kanhaiya Lal* v. *Gaura*, 47 A. 127; *Radhakishan* v. *Harkishan*, 98 I.C. (N.) 37: (1924) N. 55; *Hushein Sab* v. *Basappa*, 34 Bom. L.R. 1325.

(6) *Jagomohan* v. *Sarodamayee*, 3 C. 149 (based on the text in the Dayabhag, Ch. III, S. II, § 31, followed in *Poorendra* v. *Hemangini*, 36 C. 75 (84); *Sarup Chand* v. *Pani*, 19 O.C. 240: 37 I.C. 198.

(7) *Shamdas* v. *Savitribai*, (1937) S. 181.

(8) *Pratapmull* v. *Dhanabati*, 63 C. 691 (700, 701) P.C. overruling O.A., *Dhanabati* v. *Pratapmull*, 61 C. 1056, approving *Sheo Dayal* v. *Jadoonath*, 9 W. R. 61 (62, 63); *Beti Kunwar* v. *Janki Kunwar*, 33 A. 118; *Raoji* v. *Anant*, 42 B. 535; *Jagabandh* v. *Rajendra*, 34 C.L.J. 29; *Bilaso* v. *Dina Nath*, 3 A. 88 (90) F.B.

(9) *Raoji* v. *Anant*, 42 B. 535.

(10) Manu IX-118; 25 S.B.E. 733, Vishnu XVIII-34, 35; 48 S.B.E. 73; Yad. II-124 (Mandlik), p. 217 Brahspati XXV-64; 33 S.B.E. 379; Katyayan, cited in Vyavastha Dharpan (2nd Ed.) 498; Virmitrodaya I-II-21 (Golap Shastri's Tr.). (81-85) Dig. p. 109; *Lochan* v. *Babai*, 5 N.L.R. 161.

of the residue the son's share can only be ascertained by deducting therefrom his mother's share which must be equal to his own.

On a partition between sons by different mothers, when more than one mother is alive, the property has first to be divided into as many shares as there are sons, and then to allot each surviving mother equal to that of each of her sons out of the aggregate allotted to them,[1] where a man has more than one wife, say wives *A* and *B*, a son (*c*) by *A* and four sons by *B*. On a suit by *A* each of the eight persons would take an equal share including *A* and *B*.[2] Similarly, where a man has two sons by one wife (*A*) and a son (*B*) by a predeceased wife who sues him for partition, each of the five persons is entitled to a one-fifth share including the wife *A*.[3] In a partition between a son and a grandson, being the son of a deceased son, the mother is entitled to a share equal to that of each of her husband's son.[4] But in a partition between a woman's son's sons, her own sons being dead, she is entitled to a share equal to that of a son's son.[5]

1510. The term mother includes a step-mother[6] and the term "grandmother" and "great-grandmother" includes step relations of the same degree.[7]

The share to females is allotted by way of maintenance[8] and is consequently, liable to reduction to the extent of any *stridhan* or any other gift from their husbands or fathers-in-law[9] but no other property in their possession, as for example, the property they may have inherited as heir to their sons affects their right.[10]

The shares allotted to the female heirs, being in lieu of maintenance it follows that the property so obtained is not their *stridhan*, but on their death reverts to their sons or their heirs.[11]

The mother is entitled to her share on a partition between the sons and the purchaser of the interest of one or more of them[12] but in a parti-

(1) *Kristo Bhabiney* v. *Asutosh*, 13 C. 39.

(2) *Dular Keori* v. *Dwarkanath*, 32 C. 234.

(3) *Jairam* v. *Nathu*, 31 B. 54.

(4) *Ram Peari* v. *Hari Dutt*, (1933) A. 562; *Babana* v. *Jagat Narain*, 50 A. 532.

(5) *Kanhaiya Lal* v. *Gaura*, 47 A. 127; *Vithal* v. *Prahlad*, 39 B. 373.

(6) *Vithal* v. *Prahlad*, 39 B. 372, (381); *Damodar* v. *Senabutt*, 8 C. 537; *Thakur Prasad* v. *Bhagabati*, 1 C.L.J. 142 (144); *Purna Chandra* v. *Sarojini*, 31 C. 1065; *Pratapsingh* v. *Dalip Singh*, 52 A. 596; *Mari* v. *Chinnammal*, 8 M. 107 (123) F.B.; *Subba* v. *Maula*, 47 I.C. (Pat.) 204; *Tegh Indar Singh* v. *Harnam Singh*, 64 L. 457; *Padamsing* v. *Sambransai*, 22 N.L.R. 28: 94 I.C. 791: (1926) N. 291; *Jairam* v. *Nathu*, 31 Bom. 54 (59); *Hosbanna* v. *Devanna*, 48 B. 468; *Damodar* v. *Uttamam*, 17 B. 271 (286, 287); *Har Narain* v. *Bishambhar*, 38 A. 83; *Sri Ram* v. *Harisharan*, 9 Pat. 338; *Suba Raut* v. *Maula*, 47 I.C. (Pat.) 204; *Bhashist* v. *Bindeswari*, 97 I.C. 289: (1926) Pat. 537; *Bhanrao* v. *Gangi*, 9 N.L.R. 170: 95 I.C. 734: (1926) N. 453.

(7) *Ib.*; *Peari* v. *Hari Dutt*, (1933) A. 562; *Sriram* v. *Hari Charan*, 9 Pat. 338.

(8) *Pratapmull* v. *Dhanabati*, 63 C. 691 (700) P.C.; *Jadoonath* v. *Brojonath*, 12 B. L.R. 385; *Sumru Thokoor* v. *Chunder*, 8 C. 17 (19); *Kishori Mohan* v. *Moni Mohan*, 12 C. 165; *Purna Chundra* v. *Sarojini*, 31 C. 1065; *Poorendra* v. *Hemangini*, 36 C. 75 (84); *Kanhaiya Lal* v. *Gaura*, 47 A. 127; *Radhakishan* v. *Harkishan*, 98 I.C. (N.) 37: (1924) N. 55; *Bilaso* v. *Dina Nath*, 3 A. 88 F.B.; *Beti Kuar* v. *Janki Kuar*, 33 A. 118; per Macpherson, J., in *Jodoonath* v. *Brojonath*, 12 B.L.R. 386 (389, 390); *Jugomohan* v. *Sarodamoyee*, 3 C. 149; *Kishori Mohan* v. *Moni Mohan*, 12 C. 165; *Jairam* v. *Nathu*, 31 B. 54.

(9) *Jugmohan* v. *Surdamayee*, 3 A. 149, based on the text in the Dayabhag, Ch. III S. II, § 31, followed in *Poorendra* v. *Hemangini*, 36 C. 75 (84); *Sarup Chand* v. *Pani*, 19 O.C. 240: 37 I.C. 198.

(10) *Sarola Dassi* v. *Bhuban Mohak*, 15 C. 292; *Sashi Bhusan* v. *Hari Narain*, 48 C. 1059 (1066); *Beti Kuar* v. *Janki Kuar*, 33 A. 118; *Raoji* v. *Anant*, 42 B. 535; *Manchharam* v. *Dattu*, 44 B. 166.

(11) *Gaya Prasad* v. *Girja Shankar*, (1924) O. 360.

(12) *Bilaso* v. *Dina Nath*, 3 A. 88 (90) F.B.; *Amrita Lall* v. *Manik Lall*, 27 C. 551: *Jogendra* v. *Fulkumari*, 27 C. 77.

tion between her son and his sons, she is not entitled to any share under the Mitakshara law as administered both in Bombay[1] and Allahabad,[2] though under the Dayabhag[3] and the Mithila laws[4] she is.

1511. The mother under the Bengal law is entitled to the same share,[5] which on her death goes back to the sons or their heirs.[6] This is also the Mitakshara law.[7]

The term "son" in the case of Shudras includes both legitimate as well as illegitimate sons since they are both entitled to shares. And so amongst them a mother is entitled to a share when the property is divided between the legitimate as well as the illegitimate sons of the deceased.[8] and in a partition between brothers who are the sons of different mothers, the step-mother, even if she is sonless, gets a share equal to the brother;[9] but the mother's share is, as already observed, subject to dimunition to the extent of the *stridhan* received, from her husband or father-in-law (§ 1506). Of course, the share allotted to the mother and the step-mother is in lieu of maintenance so that on the death of one it does not enlarge the share of the other but devolves on the sons.[10]

1512. Grandmother.—The grandmother's right to the same share as the mother, in a partition between her sons and grandsons, has been admitted in several cases,[11] but the contrary has been held in Allahabad in a case of partition between the father and his sons,[12] the court refraining from expressing any opinion as to what would be her right on a partition between her grandsons on the death of the son, though it was inclined to the view that she would be entitled to a share. It was, however, said that during her son's own lifetime, the mother of the father should look to her own son for support and maintenance.[13] The view proceeds upon the literal reading of the Mitakshara text before cited[14] in which on a partition between the father and his sons only his "wives" are allotted a share.

1513. The Unmarried Daughter or Sister.—The texts all favour the rights of the daughter and the sister to share at partition and this has been recogniz-

Clause (2).

(1) *Jamnabai* v. *Vasudeo*, 54 B. 417.
(2) *Sheo Narain* v. *Janki Prasad*, 34 A. 505.
(3) *Sibbosoondary* v. *Bussoomutty*, 7 C. 191.
(4) *Krishnalal* v. *Nandeshwar*, 44 I.C. (Pat.) 146.
(5) *Ganesh* v. *Jewesh*, 31 C. 262 (271, 272) P.C.
(6) *Sarola Dassi* v. *Bhuban Mobak*, 15 C. 292; *Sashi Bhushan* v. *Hari Narain*, 48 C. 1059 (1066).
(7) *Beti Kuar* v. *Janki Kuar*, 33 A. 118; *Raoji* v. *Anant*, 42 B. 535; *Manchharam* v. *Dattu*, 44 B. 166.
(8) *Manchharam* v. *Dattu*, 44 B. 166.
(9) *Dhanabati* v. *Protapmull*, 61 C. 1056 P.C.; *Padam Singh* v. *Subransai*, 22 N.L. R. 28: 94 I.C. 791: (1926) N. 291.
(10) *Gaya Prasad* v. *Girja Shanker*, (1924) O. 360.
(11) *Sibbosoondery* v. *Sussomuty*, 7 C. 191, followed *per* Mitter, J., in *Badri* v. *Bhugwat*, 8 C. 649 (652); *Purna Chandra* v. *Sarojini*, 31 C. 1065; *Mari* v. *Chinnammal*, 8 M. 107 (123) F.B.; *Vithal* v. *Prahalad*, 39 B. 372; *Kanhaiya* v. *Gaura*, 47 A. 127.
(12) *Sheo Narain* v. *Janaki Prasad*, 34 A. 505 F.B.; following *Radha* v. *Bachchaman*, 3 A. 118. To the same effect *Jamnabai* v. *Vasudeo*, (1930) B. 302.
(13) *Sheo Narain* v. *Janki Prasad*, 34 A. 505 (509, 510) F.B.; *Chummun* v. *Pranpat*, 29 I.C. (A.) 166, following *Radha* v. *Bachhaman*, 3 A. 118, dissenting from *Shibhsoondery* v. *Bussomutty*, 7 C. 191, on the ground that it was a *Dayabhag* case; followed in *Badri* v. *Bhagwat*, 8 C. 649. To the same effect, *Sheo Dayal* v. *Juddo Nath*, 9 W.R. 61.
(14) I-ii-8.

ed in several cases,[1] and is the view of the text writers.[2] A Hindu Judge referring to the subject said: "The texts I have referred to all prescribe the rule in the case of a partition among brothers. They do not deal specially with a case where there is only one brother and one or more sisters. But looking to the spirit pervading them and the object they are meant to conserve, it is clear that what holds good in the former case must hold good in the latter as well. To hold the contrary would be to make the undoubted and well-recognized right of sisters depend on an accidental circumstance entirely lacking in relevancy to the question of her right as a member of a joint family.[3] But Viramitroday says that the one-fourth share allotted to the daughter relates only to a partition made on the death of the father; should the partition be made during the father's life-time, the daughters "get whatever the father gives, for there is no particular text on the point."[4]

1514. Local Usage.—It is said that the widow or mother in Southern India is in practice never allotted her share in a partition.[5] This view is maintained in the Smriti-Chandrika[6] the correctness of which is, however, disputed in the Madhaviya.[7] It has been held that the view of Nand Pandit that the right of a mother to a share is not a right of heritage but a right to a provision has become established law in the Madras Presidency.[8] In this view, account is to be taken of property which she has already received and if it is insufficient for her maintenance, an allotment is to be made to her so as to provide her with a sufficiency for her wants which allotment could never be in excess of a son's share, but which would be less than a son's share if the property was so large that a son's share would more than suffice for her need.[9]

Southern India.

Partial partition.

183. (1) Partition may be general or partial.[10]

(2) Partition is general where all members join in partitioning their joint property.

(3) It is partial when some of them separate, leaving the rest joint, or where all divide only some of their joint property.[11]

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(1) *Lalljeet* v. *Raj Coomar*, 20 W.R. 336 (340); *Damoodur* v. *Senabutty*, 8 C. 537 (541), in which Mitter, J., allowed Rs. 1,124 of the estate valued at Rs. 3,000. As the members of the family were two widows, three son and a maiden daughter, the latter got one-fourth of what she would have received had she been a son; *Lochan* v. *Babai*, 5 N.L.R. 161 (168, 169), in which court allowed the fourth, following the text.

(2) 2 Strange H.L. 367, citing Sutherland and Colebrook, *ib.*, p. 313; Jolly's Tagore Lectures, 103, 104.

(3) *Lochan* v. *Babai*, 5 N.L.R. 161 (169); *Pagalia* v. *Vettor*, 22 M.L.J. 321: 13 I.C. 475. In *Ramasami* v. *Vengidusami*, 22 M. 113 (114), the court noticed the conflict of views, but was inclined to support Vidnyaneshwar's text.

(4) Viramitrodaya, (Setlur) II-338.

(5) Mayne H. L., 478.

(6) Ch. IV, Ss. 9-17.

(7) Daya Vibhag, S. 22; cited in *Mari* v. *Chinnammal*, 8 M. 107 (123) F.B.

(8) *Mari* v. *Chinnammal*, 8 M. 107 (123) F.B.

(9) Smriti Ch., IV-9, 17; cited, with approval, in *Mari* v. *Chinnammal*, 8 M. 107 (123) F.B.

(10) *Rewun Peirshad* v. *Radha*, 4 M.I.A. 137 (168); *Katama* v. *Raja of Shivaganga*, 9 M.I.A. 543 (614); *Chintaman* v. *Nowlukho*, I.C. 153 (161) P.C.

(11) *Aodjhya* v. *Mahadee*, 14 C.W.N. 221: 3 I.C. 9.

(4) Partial partition cannot be made otherwise than by the agreement of parties, except where it is otherwise indispensable or would be equitable or convenient to the parties without prejudice to the rights of the coparcenary.[1]

(5) Without prejudice to the generality of the foregoing general provision, such partition may be permitted in the following cases:—

(*i*) Where partial partition is permitted by any other law;

(*ii*) Where different portions of the family property are situate in different districts;[2]

(*iii*) Where the portion excluded is impartible;[3]

(*iv*) Where the portion excluded has already been partitioned or is the subject of a family arrangement;

(*v*) Where the portion excluded is not in the possession of coparceners;[4]

(*vi*) Where the portion excluded is held jointly with a stranger who has no interest in the family partition;[5]

(*vii*) Where the defendant has no interest in the portion excluded;[6]

(*viii*) Where the property was omitted or excluded from a previous partition.[7]

Illustrations.

(*a*) *A*, *B* and *C* are three joint brothers. *A* decides to separate. He cannot compel both *B* and *C* to separate from each other.

(*b*) *A*, *B* and *C* jointly own properties, *D* and *E*. *A* claims partition of *D*. He cannot do so unless *B* and *C* agree.

1515. Analogous Law.—The several clauses in this section are supported by case law. Hindu Law does not contemplate a partial partition. It contemplates either a complete jointless or a complete severance of joint interest.[8] It has no place for an intermediate stage in which some

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(1) *E.g.*, at the instance of an alienee —*Purushottam* v. *Atmaram*, 23 A. 216; *Iburamsa* v. *Thirunmalai*, 34 M. 259 F. B.; *Subba* v. *Aunatha*, 23 M.L.J. 64: 14 I.C. 524; or by agreement—*Appovier* v. *Rama*, 11 M.I.A. 75; *Ramalinga* v. *Narayana*, 39 M. 587, O.A.: 45 M. 489 P.C.; *Jogendra* v. *Jugobundhu*, 14 C. 122; *Venkayya* v. *Lakshmayya*, 16 M. 98; *Shiv* v. *Virappa*, 24 B. 128; other circumstances justifying partial partition—*Rajendra* v. *Brojendra*, 37 C.L.J. 191: 77 I.C. 790: (1923) C. 501.

(2) *Panchanun* v. *Shib Chunder*, 14 C. 835; *Ramacharya* v. *Anantcharya*, 18 B. 389; *Balaram* v. *Ramachandra*, 22 B. 922; *Abdul Karim* v. *Badruddeen*, 28 M. 316.

(3) *Parvathi* v. *Thirumalai*, 10 M. 334; *Mallikarjuna* v. *Durga Prasad*, 24 M. 147 P.C.

(4) *Narayan* v. *Pandurang*, 12 B.H. C.R. 148; *Krisayya* v. *Narasimham*, 23 M. 608.

(5) *Purshottam* v. *Atmaram*, 23 B. 597; *Jogendra* v. *Srish Chandra*, 1 I.C. 110; *Kailas* v. *Nityanand*, 3 I.C. 21.

(6) *Iburamsa* v. *Thiruvenkatasami*, 34 M. 269 (276, 277), F.B.

(7) *Jogendra* v. *Baladeb*, 35 C. 961; *Mukunda* v. *Jogesh Chandra*, 20 C.W. N. 1276: 1 Pat.L.J. 393.

(8) *Per* curiam in *Iburamsa* v. *Thiruvenkatasami*, 24 M. 269 (270) F.B.; *Subba Reddi* v. *Alagammal*, 18 M.L.T. 545: 31 I.C. 674; *Amrut* v. *Mukund*, 5 N.L.R. 152: 4 I.C. 238; W. and B.H. L. 700; Sm. Chan., XIV-10.

persons and property remain joint while the rest separate.[1] But such a state is both practical and possible though it cannot be demanded as of right.[2] As West and Buhler observe: "Though partial division is of very frequent occurrence in practice, the law books do not contain any special rules on the subject."[3] The law of partial partition is then based upon general principles and actual decisions which will be presently considered.

Partial partition may, it is said, be demanded as of right by the alienee of a coparcenary interest who may either sue for the separation of his share in a general partition or only take proceedings to have it ascertained in partition.[4]

1516. Partial Partition.—It has already been stated that Hindu Law contemplates a complete partition. It does not contain any rules for a partial partition, which owes its recognition to general principles and the decided cases, which have always refused to make a partial partition at the instance of one coparcener against others; nor is the rule confined to coparcenary property. Even where the parties are only co-sharers or tenants-in-common, partition of certain of the items only has been ordinarily refused,[5] though if it could be effected without much inconvenience to other sharers, a partial partition has not been held to be absolutely barred.[6] But it is an exception and not the rule. As was observed in a case: "A member of a joint family cannot, any more than a partner, introduce a stranger into the community; he cannot for his own benefit alienate or deliver to a stranger a particular portion of the common property without winding up the concern; and his interest is, therefore, a right to a share of the general assets after the common liabilities have been discharged, and not a right to a share of any specific property of the family. It has, accordingly, been frequently held, that his remedy is a suit for the partition of the whole family property, and not of specific property."[7] But in such partition, the court will endeavour to marshal the property as, if possible, to ensure delivery to the alienee of the specific property acquired by him.[8]

When refused.

1517. The other view has been maintained by a Full Bench of the same court which while refusing a partial partition to a coparcener, permits it to a stranger alienee.[9] In so holding the court followed the

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(1) *Hari Das* v. *Pran Nath*, 12 C. 566; *Jogendra* v. *Jagabandhu*, 14 C. 122.

(2) *Iburamsa* v. *Thiruvenkatasami*, 34 M. 269 (276, 277) F.B., following and explaining *Hardi Narain* v. *Ruder Perkash*, 10 C. 626 (637) P.C.; *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 (174) P.C.; *Amrit Rao* v. *Govind*, 9 N.L.R. 145; *contra* in *Parvati* v. *Ainuddeen*, 7 C. 577; *Ramasami* v. *Alagirisami*, 27 M. 361.

(3) W. & B. Hindu Law, p. 700.

(4) *Iburamsa* v. *Thiruvenkatasami*, 34 M. 269 (276, 277) F.B., following and explaining *Hardi Narain* v. *Ruder Perkash*, 10 C. 626 (637) P.C.; *Suraj Bansi* v. *Sheo Prasad*, 5 C. 148 (174) P.C.; *Amrit Rao* v. *Gobind*, 9 N.L.R. 145; *contra* in *Parbati* v. *Ainuddeen*, 7 C. 577; *Ramasami* v. *Alagirisami*, 27 M. 361.

(5) *Parbati* v. *Ainuddin*, 7 C. 577; *Ramasami* v. *Alagirisami*, 27 M. 361.

(6) *Radha Kanta* v. *Bipro Das*, 1 C.L.J. 40; *Syed Habibur Rasul* v. *Ashita*, 12 C.W.N. 640; *Uma Sundari* v. *Benode Lal*, 34 C. 1026.

(7) *Manaya* v. *Shanmuga*, 38 M. 684 (691); *Narayanaswami* v. *Tirumal*, 24 M.L.J. 79 (80); *Iburamsa* v. *Thiruvenkatasami*, 34 M. 269 F.B.; *Padata* v. *Madavarapu*, 2 M.W.N. 382: 12 I.C. (M.) 408.

(8) *Manjaya* v. *Shanmuga*, 38 M. 684 (692, 693); *Udaram* v. *Rama*, 11 B.H.C.R. 76 (82).

(9) *Iburamsa* v. *Thiruvenkatasami*, 34 M. 269 (276, 277) F.B.; to the same effect, *Hanumandas* v. *Valabhdas*, 43 B. 17; *Amrit Rao* v. *Govind*, 9 N.L.R. 145: 21 I.C. 590.

dicta of the Privy Council in which their Lordships held the alienee of a share "entitled to take proceedings to have it ascertained in partition."[1] But in all these cases, their Lordships were merely indicating the alienee's right and were not prescribing the procedure. In any case, as pointed out by the same court in another case, the alienee being clearly entitled to the equity, the fact that he sues for a partial partition should not be fatal to his suit. The other coparceners might be given notice and if they should prefer a general partition it should be decreed. The question is not one of principle but of procedure which would yield to convenience.[2] The rule applicable to such cases is that which governs partition between tenants-in-common and not that which regulates partition between members of an undivided family.[3]

1518. The true rule appears to be that while the purchaser has no right to maintain a partial partition, as held in some cases[4] his right is to have his share ascertained and he is entitled to sue for no more than the ascertainment of his share. If it then appears that this cannot be done without a general partition, the court should order it without driving the purchaser to another suit.[5] This course may be necessary if there are equities which the other coparceners have against the alienor, which can only be worked out in a general suit for partition and in working out those equities, the plaintiff's vendor, and hence the plaintiff, may be assigned a different item from the item he purported to buy or even a smaller share than what those items represented.[6]

There are no doubt cases in which the court has dismissed a suit for partial partition holding it untenable[7] there are those in which such suit was allowed,[8] while there are others in which the court is guided by equity and convenience.[9]

1519. Partial Partition Between Coparceners.—It has already been stated that coparceners cannot claim a partition partial as to the persons or the property as of right, though such partitions are sanctioned

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(1) *Hardi Narain* v. *Ruder Perkash*, 10 C. 626 (637) P.C.; *Suraj Bansi* v. *Sheo Pershad*, 5 C. 148 (174) P.C.; *Deen Dayal* v. *Jugdeep Narain*, 3 C. 198 (209) P.C.

(2) *Kali Charan* v. *Kiranbala*, 29 C. L.J. 404: 51 I.C. 948; *Srish Chandra* v. *Mania Chandra*, 23 C.L.J. 231: 33 I.C. 17; *Hari* v. *Venkata*, 34 M. 402.

(3) *Subba Row* v. *Ananthanarayana*, 23 M.L.J. 64: 14 I.C. 524; *Ram Mohanlal* v. *Mulchand*, 28 A. 39; *Padmamani* v. *Jagadamba*, 6 B.L.R. 134.

(4) *Iburamsa* v. *Thirwenkatasami*, 34 M. 269 F.B.

(5) *Ranku* v. *Hukmi*, (1916) P.W.R. 15: 35 I.C. 545.

(6) *Padala* v. *Madavarapu*, 2 M.W. N. 382: 12 I.C. 408; *Venkatarama* v. *Meera*, 13 M. 275; *Venkayya* v. *Lakshmayya*, 16 M. 98; *Radha Churn* v. *Kripa Sindhu*, 5 C. 474; *Parbati* v. *Ainuddeen*, 7 C. 577; *Haridas* v. *Pran Nath*, 12 C. 566; *Jogendra* v. *Jugabundhu*, 14 C. 122; *Palani* v. *Masakonan*, 20 M. 243.

(7) *Laljeet* v. *Ramcoomar*, 25 W.R. 353; *Chunder Nath* v. *Har Narain*, 7 C. 153; *Haridas* v. *Pran Nath*, 12 C. 566; *Jogendra* v. *Jugobundhu*, 14 C. 122; *Satyakumdr* v. *Satya Kripal*, 10 C.L. J. 503; *Doman* v. *Prokash Lal*, 18 I.C. (C.) 866; *Nanabhai* v. *Nathab Bai*, 7 B. H.C.R. (A.C.) 46; *Hari* v. *Ganapatrav*, 7 B. 272; *Vamanji* v. *Atmaram*, (1883) B.P.J. 337; *Barabi* v. *Deb Kamini*, 20 C. 682; *Hemadri* v. *Ramanikanta*, 24 C. 575; *Radha Kanta* v. *Bipro Das*, 1 C.L.J. 40; *Hobibur* v. *Ashita*, 12 C.W.N. 640; *Ram Mohanlal* v. *Mulchand*, 28 A. 39; *Shib Suhaye* v. *Nursingh*, 22 W.R. 352 explaining *contra* in *Nanabhai* v. *Nathubhai*, 7 B. H.C.R. (A.C.) 46.

(8) *Padmamani* v. *Jagadamba*, 6 B.L. R. 134; *Subba Row* v. *Ananthanarayana*, 23 M.L.J. 64: 14 I.C. 524.

(9) *Udaram* v. *Ranu*, 11 B.H.C.R. 76; *Shib Sahay* v. *Nursing*, 22 W.R. 352; *Hari* v. *Lakshmi*, 34 M. 402; *Subba Row* v. *Ananthanarayana*, 23 M.L.J. 64: 14 I.C. 524.

by usage and may be decreed by consent.[1] Apart from suit, it may be made by an agreement.[2] Where the members appointed arbitrators to effect a general partition but they effected only a partial partition, it was open to the parties to accept it, on which they would be bound.[3]

1520. But apart from consent or compromise, the court will not entertain a suit for a partial partition[4] unless some properties being previously partitioned, the suit relates only to those which remained undivided[5] or where some of the property is beyond the jurisdiction of the court, or where some of it is in the possession of a mortgagee or some other party and is, therefore, not available for partition.[6] In one case, the plaintiff sued for a partial partition which was not objected to, either in the courts below or in the grounds of appeal to the High Court; but the court permitted it to be argued, and dismissed the suit as incompetent giving, however, the plaintiff liberty to institute a fresh suit on the same cause of action.[7]

1521. The rule on the subject of partial partition between coparceners has been thus stated: "Though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family, yet by mutual agreement of parties, the partition can be partial either in respect of the property or of the persons constituting the family. And according to the usage and custom, the remaining members of an undivided family, from which one or more alone have become divided, continue as an undivided family in its normal state and not as members, who after partition, have *become reunited.*"[8]

1522. The separation of some members from the joint family has not necessarily the effect of operating as a general partition, though for the purpose of ascertaining the share of the outgoing member, it is necessary, to ascertain the share of every coparcener and in fact to effect a general imaginary partition.[9]

Presumptions.

1523. This fact supports the presumption that a partition is general both as to the person and the property.[10] But it is merely a presumption and may be disproved by proving the contrary.

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(1) *Chandar Shekhar* v. *Kundan Lal,* 31 A. 3; *Manjanatha* v. *Narayana,* 5 M. 362.

(2) *Rewun Prasad* v. *Radha,* 4 M.I. A. 137 (168); *Katama Nachiar* v. *Raja of Shivganga,* 9 M.I.A. 539 (614); *Chintaman* v. *Nowlakho,* 1 C. 153 (161); *Bhawani* v. *Juggernath,* 13 C.W.N. 309: 3 I.C. 241; *Satya Kumar* v. *Satya Kirpal,* 10 C.L.J. 503: 3 I.C. 247; *Gaurishankar* v. *Atmaram,* 18 B. 611; *Barugapalli* v. *Nandigam,* 10 M.L.T. 313: 10 I.C. 57; *Amrut* v. *Mukand,* 5 N.L.R. 152: 4 I.C. 236; *Gokal Das* v. *Chandi Bai,* 4 S.L.R. 225: 10 I.C. 967.

(3) *Kuppuswami* v. *Husala,* (1918) M.W.N. 683: 49 I.C. 89.

(4) *Laljeet* v. *Rajcoomar,* 25 W.R. 353; *Haridas* v. *Pran Nath,* 12 C. 566; *Jogendra* v. *Jugobundhu,* 14 C. 122; *Satya Kumar* v. *Satya Kripal,* 10 C.L. J. 503; *Doman* v. *Prakash Lal,* 18 I.C. (C.) 866; *Nanabhai* v. *Nathabai,* 7 B. H.C.R. (A.C.) 46; *Hari* v. *Ganpatrao,* 7 B. 227.

(5) *Gaurishankar* v. *Atmaram,* 18 B. 611; *Purushottam* v. *Atmaram,* 23 B. 597; *Ajodhya* v. *Mahadeo,* 14 C.W. N. 221: 3 I.C. (C.) 9.

(6) *Gorachand* v. *Basanta,* 15 C.L. J. 258: 12 I.C. 684.

(7) *Doman Lal* v. *Prokash Lal,* 18 I.C. (C.) 866.

(8) *Hoolas Kunwar* v. *Man Singh,* 3 Agra 37.

(9) *Palani Ammal* v. *Muthuvenkata,* 48 M. 254 (257) P.C.; *Hari Baksh* v. *Babulal,* 5 L. 92 P.C.; *Babanna* v. *Parawa,* 50 B. 815 (825), dissenting from *Ramchandra* v. *Tukaram,* 45 B. 914; *Singa Iyer* v. *Venkataramana,* 14 M.L.T. 555: 23 I.C. 6; *Sashi Bhusan* v. *Hari,* 25 C.W.N. 990.

(10) *Anandibai* v. *Hari,* 35 B. 293; *Parbati* v. *Maharaj,* 6 I.C. (A.) 795.

1524. There is no presumption that where some only of the members separate, the rest remain joint. An agreement among the remaining coparceners to remain united or to reunite must be proved like any other fact.[1] As their Lordships said: "It appears to their Lordships that there is no presumption when one coparcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other coparceners are or would be entitled to, and in this sense, the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact."[2] It must be noted that this case is no authority for the proposition that the separation of one member leads to a separation of all. All it says and means is that the separation of a single member destroys the presumption that the family is joint and that the remaining members cannot be presumed to remain joint. Whether they do so in fact must be proved like any other fact.[3]

Clause (4).

1525. **Case for Partial Partition.**—A case for partial partition arises where all the coparceners have alienated their interests, in which case, the alienee from one may sue the alienees from the rest for the severance of his share without a general partition.[4] Similarly, where one of several co-owners, who were in possession of different parcels of land, by mutual arrangement, transferred his share in a parcel which was in the possession of his co-sharers, the transferee was held entitled to sue for partition of that parcel as against them.[5] In another case, the court permitted the partition of a dwelling-house on the ground of convenience.[6]

Clause (5) (i).

1526. **Partial Partition Allowed by Other Law.**—The rule against partial partition is now a mere processual law. It is dictated by considerations of convenience and has not been adhered to in certain classes of cases in which, apparently, it was considered to lead to inconvenience.[7] But this does not mean that partial partition should be permitted as a matter of course. All it means is that the rule is not inflexible, but is subject to well-defined exceptions, the scope of which should not be enlarged except upon grounds of manifest convenience.[8]

1527. The rule of Hindu Law against a partial partition has been in several respects modified by the statute law relating to the partition of

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(1) *Balabux* v. *Rukhmabai*, 30 C. 725 P.C.; *Balkrishna* v. *Ramkrishna*, 53 A. 300 (306, 307) P.C.

(2) *Balabux* v. *Rukhmabai*, 30 C. 725 (736) P.C.; *Jatti* v. *Banwari* Lal, 4 L. 350 P.C.; *Balkrishna* v. *Ramkrishna*, 53 A. 300 (306, 307) P.C.; *Chidambaram* v. *Muthu*, 7 M.L.T. 95: 5 I.C. 764; *Nihal Devi* v. *Kishore Chand*, (1910) P. R. 97: 8 I.C. 999; *Surajpal* v. *Gajraj*, 10 C.L.J. 698: 26 I.C. 600; *Gadian* v. *Gadian*, 1 M.L.W. 799: 26 I.C. 43; *Balakrishna* v. *Raju*, (1915) M.W.N. 17: 27 I.C. 736.

(3) *Hari Baksh* v. *Babu Lal*, 5 L. 92 (102) P.C.; *Balkrishna* v. *Ramkrishna*, 53 A. 300 P.C.

(4) *Iburamsa* v. *Thiruvenkatasami*, 34 M. 269 F.B., followed in *Amrit Rao* v. *Govind*, 9 N.L.R. 145: 21 I.C. 590; *Kistna* v. *Venkata Lakshmi*, 20 M.L.J. 323.

(5) *Srish Chandra* v. *Maima Chandra*, 23 C.L.J. 231, 33 I.C. 17.

(6) *Kali Charan* v. *Kiran Bala*, 29 C. L.J. 494: 51 I.C. 948.

(7) *Manjaya* v. *Shanmuga*, 38 M. 684; *Sundara* v. *Krishnamurthi*, 31 M.L.J. 317: 35 I.C. 577.

(8) *Sundara* v. *Krishnamurthi*, 31 M.L.J. 317: 35 I.C. 577.

property. For instance, special provision is made in the various Land Revenue Acts, for the partition of revenue paying estates, of which partition can only be made as therein provided.[1] Ordinarily, these Acts recognize a mahal as a unit for partition and it may then be partitioned, though the family may own several mahals of which piecemeal partition is reprobated by Hindu Law.[2] Then again, partial partition may be rendered necessary by the limited local jurisdiction of the court. Where, therefore, only some of the property is situate within the local jurisdiction of the court, it would entertain a suit for partition of it, though it may not comprise the entire estate. Such a case may arise whether some property is situate outside British India, or outside the local jurisdiction of a District Court.[3] The same rule extends to the High Courts, which are, however, empowered, on leave being obtained, to entertain a suit in respect of all properties situate within and without their ordinary original jurisdiction[4] provided that some property is situate within the jurisdiction of the court.[5] Where a suit related to the partition of both movable and immovable property, the latter being situate wholly beyond the jurisdiction of the High Court, the court would refuse partition as to the immovable estate which lay beyond it.[6]

1528. If it is, however, necessary for the purpose of doing complete justice between the parties that a suit should be stayed pending the institution of a suit in the Court, within whose jurisdiction the immovable property is situate, it would adopt that course.[7] The court has no jurisdiction to grant leave for trial of a partition suit where all immovable property is situate beyond its jurisdiction. So where the plaintiff sued for partition of his share in the family property comprising both movables and immovables, of which the former were situate within, and the latter without the jurisdiction of the court, and the Registrar granted leave for trial of the whole suit, in the High Court, it was held that the High Court had no jurisdiction as to the lands, and that the leave to sue had been improperly granted by the Registrar. The suit as to the lands was accordingly dismissed.[8]

1529. Where It is Indispensable.—Again, partial partition is the only course possible where the rest of the property is in the possession of the mortgagee and is, therefore, not available for present division.[9] In one case it was suggested that where it is so it is still open to the plaintiff to sue for a

Clause (5) (ii).

(1) Bengal Act V of 1897; U.P. Act III of 1901; C.P. Act II of 1917; Punjab Act XVII of 1887; Bombay Act V of 1879 (Ss. 113, 117); Madras Reg. XXV of 1802 (Ss. 8, 9); Mad. Reg. II of 1803 (Ss. 17, 18, 20-24); Madras Act II of 1864 (Ss. 44, 46); Mad. Act I of 1876; Assam Reg. I of 1886 (Ch. 6).

(2) *Chunder Nath* v. *Hur Narain*, 7 C. 153; *Parbati* v. *Ainuddin*, 7 C. 577; *Mukunda* v. *Lehuraux*, 20 C. 379; *Barati* v. *Deb Kamini*, 24 C. 575, explained in *Radakanta* v. *Bipro*, 1 C.L.J. 40 (42); *Habibur* v. *Ashita*, 12 C.W.N. 640.

(3) *Punchanun* v. *Shib Chunder*, 14 C. 835; *Balaram* v. *Ramachandra*, 22 B. 922 (925).

(4) *Sarat Chandra* v. *Mahapet*, 37 C. 907 (911); *Matgaru Coal Co.* v. *Shragers, Ltd.*, 33 C. 824.

(5) *Seshagiri* v. *Rama Rau*, 19 M. 448.

(6) *Jairam* v. *Atmaram*, 4 B. 482; *Balaram* v. *Ramachandra*, 22 B. 922; *Seshagiri* v. *Rama*, 19 M. 448; *Abdul Karim* v. *Badruddeen*, 28 M. 216 (222).

(7) *Subha Rau* v. *Rama Rau*, 3 M.H.C.R. 376; *Pottaravy* v. *Audimula*, 5 M.H.C.R. 419; *Abdul Karim* v. *Badruddeen*, 28 M. 216 (223).

(8) *Seshagiri* v. *Rama Rau*, 19 M. 448; *Jairam* v. *Atmaram*, 4 B. 482.

(9) *Kristayya* v. *Narasimham*, 23 M. 608; *Balkrishna* v. *Hari*, 8 B.H.C.R. (A.C.) 64; *Narayan* v. *Pandurang*, 12 B.H.C.R. 148 (155); *Shivmurtappa* v. *Virappa*, 1 Bom.L.R. 620.

division of right, though he could not obtain its partition by metes and bounds. But the court held that the plaintiff being entitled to possession on partition cannot be compelled to sue for only a portion of the relief to which he is entitled.[1] Again, partial partition is inevitable where some of the property is situate in foreign territory.[2]

1530. Where Coparcener Affirms Alienation.—Where the right, title and interest of a member of a joint Hindu family in specific family property is sold in execution of a decree not binding on the remaining coparcener, it is competent to such other coparcener, if he chooses, to affirm the court-sale in respect of that portion of the property, and thus become divided in respect of such portion only of the family property, in which case, the purchaser is not driven to the necessity of enforcing his purchase by bringing a suit for a general partition of the whole of the family property. A joint family consisted of a father *A*, a son *B*, and the latter's son *C*. In execution of a decree against *B*, for purposes not binding on *A*, *B's* interest in a specific portion of the joint property was sold. Subsequently, *A* gifted his moiety in such portion in favour of *C* who sued the purchaser to recover such specific moiety. It was held that the father by making a gift of his moiety had in effect ratified the court-sale as effecting a partition of the property to which the sale related, between himself and his son under whom the purchaser claimed. The gift was really one made by a member of an undivided family who had become divided in respect of a portion of the family property, a moiety of which was the subject of the gift. Such a gift was valid. As regards *C*, he was entitled not merely to joint possession with the purchaser, but to the sole possession of the specific half claimed, if the specific half claimed was in excess of the fair half.[3]

Clause (5) (iii).

1531. The same view has been taken in other cases, which proceed upon the principle that though a coparcener is entitled to enforce a general partition, still it is only his right and he may choose to forego the advantage. Where, therefore, a stranger has acquired a coparcener's interest in a specific property it is for the other coparceners to affirm or interdict the act and claim by partition to recover from the stranger the property to which the alienation cannot extend.[4]

1532. Such a course is inevitable, since the stranger is not interested in a general partition and the coparcener does not want it either. So where one of two brothers sold his interest in a house and three shops to the defendant, whereupon the other brother sued him for their partition, but the purchaser resisted the suit on the ground that a suit for partial partition was untenable, the court overruled the contention, holding that the purchaser was not interested in the rest of the property and the vendor was entitled to the separation of his moiety from that sold off by his brother.[5]

1533. But this is the right of a coparcener against a stranger purchaser but not *vice versa*, unless necessitated by the circumstances of purchase. It is not a right which any coparcener can enforce against another: "At first sight it may seem strange that the purchaser may

(1) *Pattaravy* v. *Audimula*, 5 M.H.C.R. 419; *Narayan* v. *Pandurang*, 12 B.H.C.R. 148 (155), followed in *Shivmurtappa* v. *Virappa*, 1 Bom.L.R. 620 (625).

(2) *Moti Ram* v. *Kanhaiya Lal*, 2 L.L.J. 514.

(3) *Kedegan* v. *Periyan*, 13 M.L.J. 477, followed in *Iburamsa* v. *Thiruvenkatasami*, 34 M. 269 F.B.

(4) *Chinna* v. *Suriya*, 5 M. 196.

(5) *Ramcharan* v. *Jasodha*, 28 A. 50; *Luchmi Narain* v. *Janki Das*, 23 A. 216; *Subramanya* v. *Padmanabha*, 19 M. 267.

not bring a suit for partition in circumstances in which a member of the family other than the vendor may bring such suit. There are reasons, however, why the one suit for partial partition should be allowed and the other not. To allow the purchaser from one member of a family to bring a suit for partition of the particular property purchased might facilitate members of an undivided family in dealing with the property in fraud of the rights of the family. It is not unreasonable that the purchaser should have no greater powers against the family than his vendor. On the other hand, it is to the advantage of the family to be able to ascertain by partition the particular property which the purchaser may retain and to be freed from all relations with a stranger to the family. Nor is the ability to sue for a partition of the particular property altogether disadvantageous to the purchaser, for if all the family property were brought into the suit, it might turn out that the purchaser took nothing."[1] Of course, where the coparcener does not affirm the alienation, it is open to him to turn out the purchaser in a suit for ejectment[2]

Clause (5) (iv).

1534. Suit Between Stranger Alienees.—The same principle justifies a suit for partial partition between two stranger alienees of coparcenary interests, who, being each interested only in the specific item of property acquired by him, cannot create disruption of the joint family.[3] In such a case, each purchaser is only entitled to work out the rights, which he has acquired by his purchase. "The purchase of either vendee does not give him an equitable right if it was merely colourable to a marshalling of all the parts of the estate in his favour."[4]

The same rule extends to the partition of a property held by a joint family in partnership with a stranger who has no interest in a general partition of the family estate and who could not, therefore, be made a party in the family partition suit.[5]

1535. A suit for partial partition will lie where it is the only property left undivided. Such suit cannot be defeated by a plea that a partial partition cannot be claimed and that the entire property must be again thrown into the hotchpot.[6] "A whole village or a particular community may have a joint property in a right of common pasturage or a forest, and such common enjoyment may continue even after there has been a private partition among the members of any one or more of the component families. No intention to relinquish a part of the claim can be inferred by the mere non-inclusion of such a common claim in a family partition suit."[7] In such a case, it is clear that a coparcener may sue for the partition of his right against the other coparceners and strangers who may be jointly interested in partition. A *Vritti* was owned jointly by the two families of *A* and *B*. In 1881, the *Vritti* of *A* was partitioned among its members at the instance of one of its members *C*, who sued the other parceners of the family *A* and all members of the family *B* for partition of their joint *Vritti*. The

(1) *Subramanya* v. *Padmanabha*, 19 M. 267 (268), following *Venkatachella* v. *Chinnaiya*, 5 M.H.C.R. 166.

(2) *Venkayya* v. *Lakshmayya*, 16 M. 98.

(3) *Subharazu* v. *Venkataratnam*, 15 M. 234; *Iburamsa* v. *Thiruvenkatasami*, 34 M. 269 F.B.; *Hanuman Das* v. *Valabhdas*, 43 B. 17; *Srish Chandra* v. *Maima Chandra*, 23 C.L.J. 231: 33 I. C. 17.

(4) *Gadadhur* v. *Balvant*, (1883) B. P.J. 679, (680).

(5) *Purushottam* v. *Atmaram*, 23 B. 597 (601).

(6) *Gavri Shankar* v. *Atmaram*, 18 B. 611.

(7) *Purushottam* v. *Atmaram*, 23 B. 597 (601).

court held that the first partition did not bar the second and that the latter was not obnoxious to the rule against partial partition.[1]

1536. Other cases may be conceived where a partial partition might be maintained even as between coparceners. So, where some of the property had been previously partitioned, the rest being kept joint, there can be no objection to a suit for the partition of the latter. Nor can such suit be resisted on the ground that the entire estate should be re-partitioned.

1537. Partition of Omitted Items.—Partial partition is inevitable where it is necessary to complete a general partition. Such a case may arise where some items were omitted or excluded from partition. The same rule would hold good where by inadvertance, mistake, or fraud of any of the parties, some item was not brought to partition.[2] Of course, even where the family has in fact become divided, there is nothing to preclude a suit for partition, since every co-sharer, or co-owner of property is entitled to the severance of his share by partition.[3] But where once a partition is completed, properties, such as a common way, or roads for ingress and egress reserved as a common property cannot be made the subject of a fresh partition. The expression common way includes not only the ways so existing prior to partition, but also those created at the time of partition.[4]

Clause (5) (viii).

Since partial partition is an exception and not the rule, one result of such partition is to destroy the presumption of jointness, and he who avers that a partition was only partial and not complete has to prove it.[5]

1538. Legal Effect of Partial Partition.—The legal effect of a partial partition is not to break up the coparcenary altogether, since the members continue to remain coparceners as regards the undivided property with the right of survivorship *inter se* as before, the result being that on death of any member the property kept joint would descend not to his own representatives but would survive to the other members.[6]

So, where the husband died a separated member, leaving some property undivided, his widow was held to have no right to inherit to the latter.[7] But the case would have been different if the title being divided, such property was kept joint for enjoyment.[8]

184. In the absence of any contract to the contrary, coparceners are entitled to shares at partition according to the following rules:—

Distribution of Shares.

(1) Each member is presumed to represent himself and his sons whose share is included in the share allotted to him:[9]

(2) Brothers take equal shares; and the share of a brother who has died is represented by his sons; grandsons and great-grandsons:[10]

(1) *Purushottam* v. *Atmaram*, 23 B. 597 (598).

(2) *Jogendra* v. *Baladeb*, 35 C. 961; *Mukunda* v. *Jogesh Chandra*, 20 C.W.N. 1276: 1 Pat.L.J. 393.

(3) *Hazarilal* v. *Ram Lal*, 47 A. 746 (749).

(4) *Shantaram* v. *Waman*, 47 B. 389; *Sheo Ram* v. *Man Raj*, 99 I.C. (L.) 592: (1927) L. 107.

(5) *Beni Parshad* v. *Gur Devi*, 4 L. 252; *Sheo Ram* v. *Manraj*, 99 I.C. (L.) 592: (1927) L. 107.

(6) Wm. Macnaughten's Hindu Law, p. 53: followed in *Katama Natchiar* v. *Raja of Shivganga*, 9 M.I.A. 539 (608, 609); *Phoolbas* v. *Lalla Jogeshur*, 1 C. 226 P.C.; *Vaidyanath* v. *Aiyasami*, 32 M. 191.

(7) *Ram Bai* v. *Jogan*, (1871) B.P.J. 260: (1873) B.P.J. 35.

(8) *Raghubir Singh* v. *Moti*, 35 A. 41 P.C.; *Vaidyanath* v. *Aiyasami*, 32 M. 191; *Rakhmabai* v. *Joterao*, (1872) B.P.J. 296; *Timama* v. *Amchimani*, (1875) B.P.J. 257; *Saraj* v. *Desa*, (1881) B.P.J. 123.

(9) Yad. II-120.

(10) Mit. I-II-6 and texts and cases cited *post*.

(3) As between different branches of a family, shares are given *per stirpes*, and as between the sons of the same father, *per capita*. But this rule does not apply to a partial partition:[1]

(4) As between an adopted and an afterborn *auras* **son of the** *Dwijas*; **the former takes a fourth of the latter's share;**[2] **in a like competition amongst Shudras, they share equally.**

(5) As between a legitimate and illegitimate son of a Shudra; the letter takes half share of what he would take if were legitimate:[3]

(6) Provided that if the owner has died without a legitimate son, but left him surviving his widow, a daughter or a danghter's son, then his illegitimate son is entitled to a half share of the estate the other half being taken by the other relations.[4]

(7) Provided further that if he has left no such relations, then the illegitimate son inherits the whole estate.[5]

(8) The foregoing rules equally apply on a competition between an adopted and afterborn auras son and an illegitimate son of a Shudra.

(9) The shares of women and the lineal descendants of the owner entitled thereto under the provisions of the Hindu Women's Rights to Property Act, 1937 will be in accordance with the provisions of that Act as described in section 315.

1539. Analogous Law.—The mode of distribution stated in the section is supported by the following texts:—

Clause (1). **Yadnavalkya.**—"Among sons by different fathers the allotment of shares is according to the fathers."[6]

Mayukh (Quoting the last).—"The meaning is that supposing one father to have one son, another two, or third three, the division takes place by the number of the fathers only, not by the number of the shares."[7]

Katyayan.—"If an undivided younger brother dies, they should make his son a sharer of the inheritance if he has not obtained a livelihood from his grandfather. He should obtain the share of his father from his paternal uncle, or his (*i.e.*, uncle's) son. That very share would, indeed, be the legal share of all the brothers, or, even his son would receive a share; beyond such a son succession ceases."[8]

Mayukh (Quoting the last).—"The word *Anuj* ('younger brother') is intended to include even the elder brother."

Parasar.—"(Beyond) means the great-grandson, the sons, etc., of the grandson do not obtain wealth of the great-great-grandfather, if the father, grandfather, and great--grandfather have predeceased such great-great-grandfather who at his decease has left other sons or other nearer heirs alive. The meaning is that, in the absence of sons, grandsons, and great-grandsons and the like of the deceased, even he (the great-grandson) takes. And this does not refer to the undivided but to the reunited, as there is a text of Devala which says: 'Among family members who having been divided live together the second partition of the heritage takes place (even) up to the fourth in descent. This is the rule.'"[9]

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(1) *Per* Muttusamy Ayyar, J., in *Manjanatha* v. *Narayana*, 5 M. 362 (364, 365), to the same effect *Bhimul Dass* v. *Choonee Lal*, 2 C. 79; *Raj Narain* v. *Heeralal*, 5 C. 142.

(2) Datt. Chandrika (Suth.) V-17, 19, p. 139.

(3) Mit. I-XII-2 relied upon in *Kamalammal* v. *Visvanathaswami*, 46 M. 167 P.C.

(4) *Shesgiri* v. *Girewa*, 14 B. 282; *Meenakshi* v. *Appakutti*, 33 M. 226.

(5) Mit. I-XII-1, *Saraswati* v. *Mannu*, 2 A. 134.

(6) II-120.

(7) Cited and explained in *Umed* v. *Khushalbhai*, 11 Bom.L.R. 396.

(8) *Sundar Koer* v. *Rai Sham Krishen*, 34 C. 150 (161) P.C.; *Brij Raj Singh* v. *Sheo Dan Singh*, 35 A. 337 P.C.; *Umed Baber* v. *Khushalbhai*, 11 Bom.L.R. 396; 2 I.C. 426; *Alur* v. *Venkata*, 52 I.C. (M.) 614.

(9) Mandlik, H.L., pp. 44, 45. The construction of Devala is forced; *see* Mandlik, H.L., p. 45; W. & B., H.L. (2nd Bk.), p. 4.

Mitakshara.—"This unequal distribution[1] supposes property by himself acquired. But of the wealth descended to him from his father an unequal partition at his pleasure is not proper, for equal ownership will be declared."[2]

Clause (2).

"The author next propounds another period of partition for other persons making it, and a rule respecting the mode. 'Let sons divide equally both the effects and the debts after (the demise of) their two parents.'"[3]

"Therefore, unequal partition though noticed in codes of law, should not be practised, since it is disapproved by the world and is contrary to scripture."

"For this reason a restriction is obtained, that brethren should divide only in equal shares."[4]

Dayabhag.—"26. It might be argued, that the practice of equal partition is indispensable as the only mode authorized by law. For the brethren may consent to the deductions by reason of great veneration (for the eldest). An option exists like that of making or omitting partition."

"27. Accordingly, since persons of the present day (who are younger brothers) entertain no great veneration (for their elders) equal distribution is alone seen in the world; as also because elder brothers deserving of deducted allotments are now rare."[5]

1540. This rule is based upon the text of Vasisth as explained in the Dattak Chandrika,[6] in which, however, the Shudras are expressly ecxluded.[7] On a construction of these texts the Privy Council have held that amongst Shudras there is no distinction between an adopted and an *auras* son or sons and all share equally on partition.[8]

Clause (4).

But as regards the *Dwijas,* the rule propounded by Vasisth remains and on a partition between an adopted and an *auras* son, the former is only entitled to one-fourth of the latter's share. What this means has already been explained in Chapter V (*see* the commentary under section 63).

1541. Partition Per Stirpes.—In a partition, the shares are allotted *per stirpes* and not *per capita,* that is to say, each person represents not only himself but also his sons, and so the son takes his share through the father as being included in the share allotted to the father. But the parties may agree to depart from this rule by allotting a share to a member without incuding his son or sons in the allotment.[9] Consent by the members to a partition binds not

Clause (1).

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(1) Referring to Manu, IX-112: "The portion deducted for the eldest is the twentieth part of the heritage with the best of all the chattels; for the middlemost half of that; for the youngest a quarter of it."

(2) Mit., I-II-6, cited and explained in *Lakshman* v. *Ramchandra,* 1 B. 561 (568).

(3) Yad., II-118; Mit., I-III-7.

(4) Mit., I-IV-7.

(5) Dayabhag, III-II-26, 27.

(6) Dattak Chandrika (Suth.), V-17, 19, p. 139.

(7) *Ib.,* V-29, p. 142.

(8) Shudra Sons, both legitimate and illegitimate share equally. *Arumilli* v. *Arumilli,* 44 M. 656, approving *Raja* v. *Subbaraya,* 7 M. 253; *Baramanund* v. *Chowdhury,* 14 C.L.J. 182; *Asita* v. *Nirode,* 20 C.W.N. 901, overruling *contra* in *Gopalam* v. *Venkataraghavulu,* 40 M. 632.

(9) *Umed* v. *Khushalbhai,* 11 Bom. L. R. 396: 2 I.C. 426.

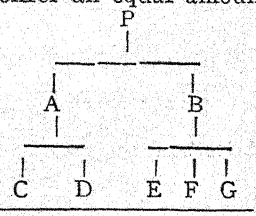
only the consenting members but also their sons, as they represent their respective branches of the family.[1]

Clause (2).

1542. Partition Between Brothers.—The simplest case of partition is that by the father among his sons, or by the sons among themselves. In each case, all share equally, the archaic law as to the greater share of the eldest son on the ground of primogeniture being now obsolete. It is declared in the texts and has been so held in several cases.[2] The father has no right to make an unequal distribution of his ancestral property,[3] whether movable[4] or immovable. It may be that in some localities or families the ancient custom of the right of primogeniture called *Jesthabhag* still lingers. In one case it was pleaded, but the court held the custom not proved,[5] and in anothr case it was held to be obsolete.[6]

1543. Now, suppose that before the partition some of the brothers were dead. If they left no issue then their shares would naturally devolve on the other coparceners by survivorship. But if they died leaving issue, the latter would take the same share which their father or grandfather would have taken if he were alive. In short, they do not take *per capita* but *per stirpes*. But if in the same case the family was subject to the Dayabhag law, then the deceased brother's share would be taken by his heir, devisee or assignee.

1544. In a Mitakshara family, the share of the deceased is not affected by his death if he left a male issue. "The rule is designed to ensure equality of partition in cases of vested interests held in coparcenary, and to carry out in those cases the principle that those who have capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares. In its simplest form, a joint family consists of a father and his sons, and it obtains a further development by each son becoming a father, and by each of the male descendants of that son having male issue in this turn. When, therefore, a joint family in an advanced stage of development is broken up by partition, regard is had to the successive vested interests of each branch; and on the division by the stock at each stage, a new branch intervenes, secures equal shares to those who were the sons of the same father and had capacity to confer an equal amount of spiritual benefit upon him."[7] If, for instance, *A* and *B*, two brothers, have each two and three sons *C* and *D*, and *E*, *F* and *G*, respectively, the fact whether *C* and *D* separate from their father *A* and uncle *B* or whether *A*, *C* and *D* separate from *B* and his sons would make no difference in the allotment, if at the time of parti-



(1) *Brij Raj Singh* v. *Sheo Dan Singh*, 35 A. 337 P.C.

(2) Mit. I-II-6; I-III-1-7; Dayabhag, III-II-26, 27; Mayukh, IV-II-11-17; Smriti Chandika, II-2, II-III-16-24; Dayakram Sangrah, VII-13; Viramitroday, II-I-11-14; Madan Ratna Pradip, cited in *Taliwar Singh* v. *Phulwan Singh*, 3 B.S.R. 402: 6 I.D. (O.S.) 974, F.N. (*a*), *ib.*, p. 976; *Bhyroochund* v. *Russomunee*, 1 B.S.R. 36: 6 I.D. (O.S.) 27, *Neelkaunt* v. *Mune*, *ib.*, p. 77; 6 I.D. (O.S.) 58; *Lakshman* v. *Ramchandra*, 1 B. 561.

(3) *Lakshman* v. *Ramchandra*, 1 B. 561: (566), *contra* in *Sudanund* v. *Bonomalee*, 1 Marsh 317 (320), dissented from in *Sudanund* v. *Soorjoo*, 11 W.R. 436.

(4) *Lakshman* v. *Ramchandra*, 1 B. 561 (567).

(5) *Sheo Buksh* v. *Putteh Singh (Heirs of)* 2 B.S.R. 340: 6 I.D. (O.S.) 616.

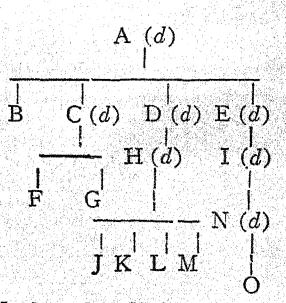
(6) *Rajangam* v. *Rajangam*, 39 M.L.J. 382: 57 I.C. 18.

(7) *Per* Muttusami Ayyar, J., in *Thangathanni* v. *Rama*, 5 M. 358 (364).

tion either or both the brothers die, since the share of each branch is a moiety and it must be distributed amongst the sons of *A* and *B*, with the result that while the two sons of *A* will each get one-fourth, the three sons of *B* will only get one-sixth each. If *B* died and with him two of his three sons, then the survivor will get a moiety of his own branch, but if *B* and his three sons were then alive, then they would all get the same moiety. This is division *per stirpes*, that is, a division according to the stocks.[1] If, after living separate from *A*, *B* wishes to effect a partition amongst his three sons, *E*, *F* and *G*, each of them will receive a fourth of the half, allotted to *B's* branch, *i.e.*, one-eighth per head. This is division *per capita*, *i.e.*, according to the number of the sons, the father being entitled to receive one equal share for himself.

The same rule will extend to the sons and grandsons and greater-grandsons of *E*, *F* and *G*. But since that is the limit of coparcenary right, if a person dies leaving him surviving his only great-great-grandson, the latter will take no interest in his ancestor's interest which will pass to his coparceners by survivorship.

1545. Such a case may be imagined in the following illustration: *A* dies leaving a son *B*, two grandsons *F* and *G*, and a great-great-grandson *O*. Here A's four sons constitute four different branches represented by their descendants but still *E's* branch takes nothing, since *O* being more than three degrees remote from the common ancestor is not his coparcener and therefore, *E's* one-fourth share in *A's* estate passes to *B*, *C* and *D*, the two latter being represented by their descendants. *A's* estate would then be divided into three parts, one-third being taken by *B*, one-third by *F* and *G*, *i.e.*, one-sixth each by *F* and *G* and the remaining third by *J*, *K*, *L* and *M* (*i.e.*, one-twelfth by each); that is to say, while each branch takes *per stirpes*, the individuals of each branch take *per capita*.



Now, in the same case, if the partition were made while *C* and *D* were both alive, then *C* and *D's* share would have been the same, but on a fourth division *inter se*, the shares of their descendants would have been correspondingly reduced.

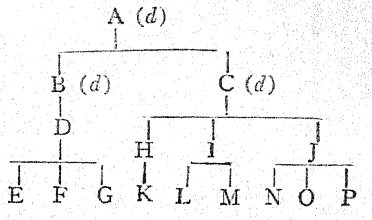
1546. Again, suppose in the last case that *A* had made a division amongst his two sons *B* and *C*, and *D* was born after the partition, what is then *D's* share? It is now settled that he can receive nothing from his separated brothers *B* and *C*[2] if his father had received a share; but if he had reserved nothing for himself, then *D* can claim a repartition from his elder brothers *B* and *C*, in which case their shares are liable to reduction[3] as previously stated.

After born son.

Since each father becomes the head of his own branch, it follows that there may be branches and sub-branches and while a person may take *per stirpes* in relation to his own ascendants, he may take *per capita* in relation to the members of his own branch.

(1) Mit., I-V-2; *Pragnarain* v. *Heeralal*, 5 C. 142.
(2) *Ganpat* v. *Gopal Rao*, 23 B. 636.
(3) *Krishna* v. *Sami*, 9 M. 64; *Chengama* v. *Munisami*, 20 M. 75; *Bishenchand* v. *Asmaida*, 6 A. 560 P.C.; *Ganpat* v. *Gopal Rao*, 23 B. 636; *Shivajirao* v. *Vasantrao*, 33 B. 267 (272).

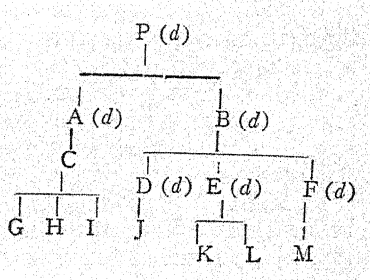
1547. Such a case is imagined in the next illustration. Here suppose all the coparceners are desirous of effecting a general partition of the estate of *A*. Now, since *A* left two sons *B* and *C*, his estate is divisible into two moieties, one moiety falling to each branch. Then out of *B's* moiety his sons and grandsons will each receive 1|4 of 1|2=1|8th. And as to *C's* branch his three sons will each take *per stirpes* 1|3rd of 1|2=1|6th, which will again be subdivided amongst their sons, *H* and *K* taking 1|12th each, while *I's* two sons will each receive 1|3rd of 1|6th=1|18th, and *J's* sons, each 1|4th of 1|6th=1|24th.



It may, however, be that some of the members prefer to continue joint while the rest desire to separate. In that case division follows the same principle. That is to say, an imaginary partition of all the members is made and the share of each coparcener ascertained, and the shares of those claiming partition are separated from those continuing to remain joint.

1548. Such a case arose in Madras,[1] where the court had to decide upon the following tree:—

In 1867 two of *C's* sons (say *G* and *H*) the two sons of *E* (*K* and *L*) and *M* the son of *F* sued the rest for partition. For the purpose of that suit the property was divided into twelve shares. Of the six shares due to *A's* branch, three were allotted to *G* and *H*. Of the six shares due to *B's* branch, two were allotted to the sons of (*viz.*, *K* and *L*) and two to *M*. The remaining five shares were enjoyed in common by the rest of the family, *viz.*, *C*, *I* and *J*, who remained in union.



In 1872 *C* died. In 1879, *I* sued *J* to recover his share of the family property claiming three-fifths of the whole. The Subordinate Judge had awarded him only a moiety on the ground that the present state of the family alone was to be considered in ascertaining the shares. But the High Court held that *I* was entitled to the three-fifths he had claimed, since the rule that as between different branches, division should be *per stirpes*, and as between sons of the same father, *per capita*, applied only to cases of general partition, and had no application to partial partition. Where a joint family in an advanced state of development is broken up by partition, regard must be had to the successive vested interests of each branch, and in order to secure equality of shares, division *per stirpes* at each stage when a new branch intervenes, is necessary. In other words, in such a state of family, the members held their shares in *quasi*-severalty so that on the death of *C*, *I* alone succeeded to his father's share to the exclusion of *J* whose interest was not enlarged by reason of his jointness with *I*.

(1) *Manjanatha* v. *Narayana*, 5 M. 362, followed in *Narayana* v. *Sankar Sah*.

185. Acts occasioning separation. **The following acts shall be deemed to effect the separation of a member from the coparcenary, namely:—**

(*a*) his conversion to an alien faith, such as Christianity or Muhammadanism;[1]

(*b*) his contracting a marriage under the provisions of the Special Marriage (Amendment) Act, 1923.

1549. **Analogous Law.**—The two clauses of this section correspond to Clauses (*iv*) and (*v*) of Section 124.

186. Proof of separation. **(1) Separation may be proved by any declaration, act or conduct of a party entitled to partition showing an intention inconsistent with jointness.[2]**

(2) In particular and without prejudice to the generality of the foregoing rule, separation may be presumed from the following facts:—

(*a*) Cesser of commensality and joint worship;[3]

(*b*) Separate enjoyment of portions of the property, or of their income;[4]

(*c*) Division of income:[5]

(*d*) Agreement to divide the income in definite shares;[6]

(*e*) Separate definement of shares;[7]

(*f*) Separate transactions of the coparceners between themselves and with others.[8]

Explanation.—**An act of a stranger such as attachment and sale of a coparcenary interest does not suffice to effect separation.[9]**

1550. **Analogous Law.**—This section is supported by case law. Separation is distinct from partition in that it implies merely the determination of coparcenership which is, as stated in section 124, equally possible without partition. Separation is in fact the severance of coparcenary interest which may be voluntary or involuntary, and may or may not be accompanied by the allotment of a share, while partition is the voluntary severance of interest by the allotment of specific property in lieu of the share. There may be separation without partition, but there cannot be partition without complete, or at least, partial separation. As a rule separation refers to the severance of status, while partition to the division of property by metes and bounds.[10] There may be a complete separation and yet no partition, but if once there is a partition, separation would be presumed. This section deals with separation as distinct from partition. But there may be a notional partition or a real one. In the one case the partition is little distinguishable from separation.

(1) *Khunnila* v. *Govind*, 33 A. 556 P.C.; *Karimuddin* v. *Govind*, 31 A. 497 P.C.

(2) Mit., II-XII; Dayabhag, Ch. XIV; *Appovier* v. *Rama*, 11 M.I.A. 75; *Syed Kasam* v. *Jorawar Singh*, 49 I.A. 458: (1922) P.C. 353; *Ramalinga* v. *Narayana*, 45 M. 489; *Gurdhar Das* v. *Sri Krishna*, 18 A.L.J. 545: 56 I.C. 293 P.C.; *Girja Bai* v. *Sadasiva*, 34 C. (1031) P.C.; *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 P.C.

(3) *Tara Kumari* v. *Chuturbhuj*, 42 C. 1179 P.C.

(4) *Abdul Wahab* v. *Tilakdhari*, 46 C. L.J. 237 P.C.: (1927) P.C. 208.

(5) *Mohroo* v. *Ghanaoo*, 8 W.B. 385; *Malika Sahoy* v. *Gouree Sunkur*, 12 W.R. 287; *Cheyt Narayan* v. *Bunwaree*, 33 W. R. 395; *Raghunand* v. *Bunwaree*, 33 W. C. 425; *Murari* v. *Mukand*, 15 B. 201.

(6) *Ib.*

(7) It is inconclusive; *Ram Pershad* v. *Lakhpati*, 30 C. 231: (253) P.C.; *Ram Singh* v. *Tursa*, 17 C.W.N. 1085 P.C.

(8) *Ram Singh* v. *Tursa*, 17 C.W.N. 1085 P.C.

(9) *Secretary of State* v. *Rangasamy*, 39 M. 831: (834) F.B.

(10) *Makund* v. *Bala Krishna*, 54 I.A. 413: (1927) P.C. 224.

1551. It has already been stated that an unequivocal expression of an intention to separate may amount to partition.[1] In that connection cases have been cited illustrative of the rule stated in clause (1). "The true test of partition of the property, according to Hindu Law is the intention of the family to become separate owners."[2] If the parties intended to separate but in fact continued to live joint, it will be a legal separation. Such was the case of the four joint sharers who drew up a deed by which each was declared entitled to one-fourth share of the profits of a business, and each was thenceforward to contribute one-fourth to the payment of the revenue of the land which each was to possess to the extent of his share, and it was held that though the co-sharers continued to carry on the business jointly, the execution of the deed defining their shares had effected a legal partition.[3] The question in such cases is one of construction: What was the intention of those who submitted to the agreement? Did it merely alter the mode of enjoyment for convenience of management, or was it intended to sever the status? Not only the deed but the surrounding circumstances should be taken into consideration. If, for instance, there was no immediate necessity for the deed, but, nevertheless, the parties chose to define their rights it would be strong *prima facie* evidence to hold the undivided shares as the separate property of each coparcener.[4] The father possesses an absolute right to make a partition and a partition so made binds his sons, not because the sons are consenting parties to it, but because it is the result of a power conferred on him, though subject to certain restrictions in the interests of his family. A document which purported to be a *parikhat* (deed of partition) made by a father, by which he reserved a share to himself and said: "There shall hereafter exist between you (sons of the first wife on the one side and those of the second on the other) only a connection of friendship and no connection whatever in respect of property," it was held to be both in form and substance a partition effected by the father in the exercise of his power, though made in his last illness.[5]

1552. In another case, the father had three sons, one son by his first wife, two sons by his second wife. He executed a will by which he authorized his executors to effect a partition among his sons when the eldest of them attained the age of majority. The executors did so as directed. Properties were divided into shares, one of which was allotted to the eldest son, and the two shares to the other two sons. The words used in the deed were: "If any property had been left undivided, it would be divided into three shares by the three parties, and in future, the parties shall have no connection in respect of property except relationship by blood." It was held that these words effected a severance in interest as between the sons of the second wife also, though their property was kept together without any division.[6] Their Lordships have decided other cases the same way, even though some of the coparceners were then minors which they held to offer no impediment to a partition.[7]

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(1) S. 133.

(2) *Ram Pershad* v. *Lakhpati*, 30 C. 231 (253) P.C.

(3) *Mahabeer* v. *Kundun*, 8 W.R. 116, affirmed O.A. *Doorga Pershad* v. v. *Kundun*, 21 W.R. 214 P.C.

(4) *Doorga Pershad* v. *Kundun*, 21 W. R. 214 P.C. To the same effect, *Kulponath* v. *Mewah Lal*, 8 W.R. 302.

(5) *Kandasami* v. *Doraiswami*, 2 M. 317.

(6) *Komalambal* v. *Krishnasamy*, (1911) M.W.N. 3: 10 I.C. 385.

(7) *Balkishen* v. *Ram Narain*, 30 C.

A father executed a document which he called a will, whereby he allotted certain shares of the joint property to his sons, keeping no share for himself. He, however, added that if he found the sons mismanaging the property, he would cancel his deed to make a family arrangement which operated from its date. There was nothing in the deed, though it was called a will, to postpone its operations, and then the threat to cancel the shares was inoperative, being *in terrorem,* and did not suffice to prevent the partition operating *in praesenti.*[1]

1553. This view accords with that taken in numerous cases in this country and by the Privy Council. The underlying principle of all these is that if there is an intention to separate, separation may be effected by any overt act, even a declaration or a paper partition, without any change in the mode of living or a division by metes and bounds. On the other hand, there may be a division by metes and bounds and no intention to separate; such division, though it may be evidence of a family arrangement, falls short of a partition. So, again, a mere declaration to the effect that a certain member is the owner of a particular share, not accompanied by an intention to separate, would not constitute a separation of the joint property.[2]

1554. The question then arises how is such an intention to be proved. It is clear that where there is a document, the question of intention is one of construction which may be supported by the evidence of surrounding circumstances and conduct. But if the intention is clear, no evidence of conduct is even admissible. Moreover, such evidence is only relevant where the deed states that something remains to be done, as where it contemplates the mutation of names, the change of names of the different shops or other consequential acts which the parties treat as essential to complete a partition. Apart, however, from deeds, separation may be inferred from acts and conduct enumerated in clause (2).

1555. Cesser of Commensality.—Of these, the cessor of commensality and joint worship is important. As the Privy Council said: "Cesser of commensality is an element which may properly be considered in determining the question whether there was partition of joint family property, but it is not conclusive."[3] The evidentiary value of cesser of commensality must, naturally, depend upon the previous mode of life and occupation of the joint family. In a family possessing properties within a limited area, commensality is the rule and cesser an exception. But in a family with numerous members or with scattered possessions, it is usual for different members to assume management of different parcels of land which necessitates the cesser of commensality. When a family is large, and is scattered about in different places, it is natural that several members of the family should remain in possession of separate portions of the property for the sake of convenience. Mere separate management cannot give rise to the presumption that the family was divided.[4] So in the trading firms not only is there such

Clause (2) (a).

738. (751, 752) P.C. To the same effect, *Ram Pershad* v. *Lakhpati,* 30 C. 231 P.C.; *Raghubir Singh* v. *Moti,* 35 A. 41 P.C.

(1) *Mrijraj* v. *Sheodan,* 35 A. 337 (352) P.C.

(2) *Hoolash Kooer* v. *Kuasee Prashad,* 7 C. 369.

(3) *Anundee* v. *Khedoolall,* 14 M.I. A. 412; *Ganesh Dutt* v. *Jewach Thakurain,* 31 C. 262 (269) P.C.; *Jivubai* v. *Krishnaji,* 6 Bom.L.R. 351 (355); *Suraj Narain* v. *Iqbal Narain,* 35 A. 80 P.C.

(4) *Chabhila* v. *Jadabai,* 3 B.H.C.R. 87, followed in *Murari* v. *Mukund,* 15 B. 201 (204).

cesser, but branch firms carry on independent transactions to all outward appearances and the several branches are even mutually accountable to one another. But they remain still joint, as there is no intention to separate. Whether the cesser was or was not due to separation must then depend upon the circumstances of each case. Even in non-trading families, such differences are attributable to the incompatibility of female temperaments. In any case, separation cannot be inferred from the mere fact that various members of the family were living in separate houses all of which belonged to the family.[1]

Cesser of Joint Worship.

1556. The cesser of joint worship follows the cesser of commensality. In the unsophisticated orthodox families, joint worship is yet an index of jointness, though such families are fast disappearing with the advance of Western education, the result of which, however, is to loosen the tie of jointness both in commensality and in estate. In an orthodox household, the family deity is worshipped by all members of a joint family. Even if they separate in mess and residence, some arrangement is agreed upon for the joint worship of the household gods. But where this is not the case, it must be regarded as yet another circumstance in favour of the disruption of jointness.[2]

1557. Such was the case of two brothers, by name Gannu and Lalji, who first separated in mess owing to quarrels between their wives, and then gradually drifted away from each other till they became separate in mess, residence and business. On his separation from his brother, Lalji acquired a house site in exchange for his land and built thereon a house of his own, upon which the court said: "This separate acquisition of land for a house in lieu of a specific portion of the paternal land is an indication of an intention on the part of Lalji to separate himself and his family from his brother Gannu and the paternal house."[3] Lalji got his name separately recorded in the land records and began to make separate collections of his revenue, all of which facts strengthened the presumption in favour of separation which the court held proved by the conduct of the parties.

Relationship and Time Material.

1558. But another material element in considering the evidentiary value of such cesser is the relationship of the parties and the duration of their separation in mess and worship.[4] Upon these points no general rule can be laid down, but if it is clear that if the tie of relationship is distant and the parties have lived and acted for a long time as separated members, it cannot be held that their obvious conduct was inconsistent with their natural intention.[5]

An agreement between coparceners that their property was to be divided and that thenceforward they were to maintain separate accounts and were not accountable for the profits and losses of each other, is in itself a complete partition.[6]

Clause (2) (b).

1559. **Separate enjoyment.**—Long continued separation in mess and worship can seldom exist without separation in enjoyment of property or income. In

(1) *Sital Prasad* v. *Bansidhar*, (1882) A.W.N. 168.

(2) *Cannu* v. *Bhagwati*, 3 I.C. (C.) 234 (238).

(3) *Ib.*

(4) *Moro* v. *Ganesh*, 10 B.H.C.R. 444 (454).

(5) *Appovier* v. *Rama*, 11 M.I.A. 75 (90); followed in *Murari* v. *Mukund*, 15 B. 201 (204, 205); *Surbessur* v. *Gossain Dass*, 17 W.R. 210.

(6) *Umatorupagam* v. *Palanarayana*, 28 I.C. (M.) 908.

order to show separation, it may not be necessary to prove a formal partition, for it may be that a formal partition was never made, and if made it cannot be proved. In such case the only means of proving partition is by proof of separate enjoyment for a sufficiently long time so as to rebut the presumption of jointness. So where the parties were found to have been in possession of separate lands, enjoying their produce or collecting their rents, the court felt justified in presuming a separation.[1] Such presumption will gain in strength if the person in possession has no right to it, as for instance, she was a female who could only be suffered in possession if there was a separation[2] for it is only after separation that members realize their *quota* of rent from the same property.[3] In such and similar cases, separate appropriation would be very good evidence of a tacit agreement amongst the members to hold their property according to their separate shares.[4] So where four coparceners entered into an agreement to have their shares separately recorded in the Collector's registers, and to divide the income of their banking business in equal shares, which was done, the court held it to amount to a clear partition and this view was on appeal affirmed by the Privy Council.[5] Where the parties exercised ownership over the property in certain defined shares, of which the collections and management were separate, the court held the joint tenancy severed, though not immediately followed by a *de facto* actual division of the subject-matter.[6]

1560. The presumption arising from separate enjoyment would be considerably strengthened if it is found that one of the parties in possession of his lot had considerably improved it or had alienated it to other members of the family or to a stranger.[7] Separation may at times be an inference from conduct. It may be presumed that where a father, resident in India, having two sons by two wives, emigrated with one of them to Burmah, where he had settled down 32 years and acquired the bulk of his fortune, paying only occasional visits to his home where he saw his other wife and her son, whom he had not seen for 10 years before his death in Burmah, the court felt justified in presuming his separation from this son, with the result that, on his death, his estate would be inherited by his joint son, to the exclusion of other son.[8]

1561. Appropriation of Profits.—Separate appropriation of profits is good evidence of a tacit agreement amongst the members to hold their property according to their separate shares.[9] So where members of a family were shown to collect their *quota* of rent separately, it was held to be good proof of separation[10] being the very reverse of a common chest which is the one index of a normal joint family.[11] Where it is found as a fact that the collections

Clause (2) (c).

(1) *Abdul Wahab Khan* v. *Tilakdhari*, 44 C.L.J. 237: (1927) P.C. 208; *Adi Deo* v. *Dukharan*, 5 A. 532 (541).

(2) *Narayana* v. *Krishna*, 8 M. 214 (218).

(3) *Kalika Sahoy* v. *Gouree Sunkur*, 12 W.R. 287.

(4) *Cheyt Narain* v. *Bunwaree*, 23 W. R. 395 (397).

(5) *Mahabeer* v. *Kundun*, 8 W.R. 117, affirmed O.A. *Doorga Pershad* v. *Kundun*, 21 W.R. 214 P.C.

(6) *Mohroo* v. *Gunsoo*, 8 W.R. 385.

(7) *Anand Kishore* v. *Daiji*, 21 C.L.J. 296: 28 I.C. 280.

(8) *Raghubar Dayal* v. *Ramdularee*, 6 R. 367 (373).

(9) *Cheyt Narain* v. *Bunwaree*, 23 W.R. 395; *Mohroo* v. *Ghunsoo*, 8 W.R. 385; *Raghubanand* v. *Sadhu Churn*, 4 C. 425; *Murari* v. *Mukand*, 15 B. 201.

(10) *Kalika Sahoy* v. *Gouree Sunkur*, 12 W.R. 287.

(11) *Appovier* v. *Rama Subba*, 8 W.R. 1 P.C.; *Mahabeer* v. *Kundun*, 8 W.R. 116 (120).

and management are separate, only two inferences are possible, either that there had been a separation or that it was an arrangement for convenience of management. The latter would be presumed if the profits received by different members were unequal and there was a blending of the funds at times. But if the profits were in set order and received by members without mutual accountability it would be treated as a *prima facie* case of separation.[1]

1562. Agreement to Divide.—It has already been stated before that an agreement to divide has the effect of partition. Such agreement may be express or implied. When it is express, the question is one of construction. When implied, it is one for inference from the proved and admitted facts and circumstances of each case. The question whether a mere agreement to divide operates as partition was first settled in *Appovier's case*[2] in accordance with the current of existing decisions[3] and has been since followed in numerous cases.[4] The contrary laid down in some cases[5] can no longer be maintained. Where a party pleads separation but no express agreement to separate, the latter, if proved, cannot be put out of account.[6]

Clause (2) (d).

1563. Definement of Shares.—"A definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation in a Hindu family" and is by itself insufficient to rebut the natural presumption in favour of its jointness.[7] "The Collector's book is kept for purposes of revenue, not for purposes of title. The fact of a person's name being entered in Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person,"[8] But such entries may follow, indeed, they ordinarily do, the definement of

Clause (2) (e).

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(1) *Adi* v. *Dukharan*, 5 A. 532.

(2) *Appovier* v. *Rama*, (1866) 11 M. I.A. 75.

(3) *Prawn Kissen* v. *Ram Sundaree*, (1842) Fulton 110; *Bulakee* v. *Indurputtee*, 3 W.R. 41; *Badamoo* v. *Wazer Singh*, 5 W.R. 78; *Mahabeer* v. *Kundun*, 8 W.R. 116 (Jackson, J., *dubitante*), affirmed O.A. *Doorga Pershad* v. *Kundun*, 21 W.R. 214, (held that Jackson, J.'s doubt unjustified).

(4) *Kulponath* v. *Mewah Lall*, 8 W. R. 302; *Debee Pershad* v. *Phool Koeree*, 12 W.R. 510; *Bikramjeet* v. *Phoolhas*, 14 W.R. 340: (345); *Suraneni* v. *Suraneni*, 3 B.L.R. 41 P.C.; *Doorga Pershad* v. *Kundun*, 21 W.R. 214 P.C.; *Jog Narain* v. *Girish Chunder*, 4 C. 434 P.C.; *Raghubanundi* v. *Sadhu Churn*, 4 C. 425; *Madho* v. *Mehrban*, 18 C. 157 P. C.; *Budha Mal* v. *Bhagwan Das*, 18 C. 302 P.C.; *Ram Pershad* v. *Lakhpati*, 30 C. 231 P.C.; *Balkishen* v. *Ram Narain*, 30 C. 738 P.C.; *Parbati* v. *Naunihal Singh*, 31 C. 412 P.C.; *Girja Bai* v. *Sadashiv*, 43 C. 1031 P.C.; *Girdhar* v. *Krishna Dutt*, 39 M.L.J. 18: 56 I.C. 293 P.C.; *Amrit Rao* v. *Mukund Rao*, 15 N.L.R. 165 P.C.: 53 I.C. 866; *Ranjit Singh* v. *Gujraj*, L.R. 1 I.A. 9; *Kandasami* v. *Dorasami*, 2 M. 317; *Komalambal* v. *Krishnaswamy*, (1911) M.W.N. 310: 10 I.C. 385; *Adi* v. *Dhukaran*, 5 A. 532; *Ramlal* v. *Debi Dat*, 10 A. 490; *Chidambaram* v. *Nachiar*, 2 M. 83 P.C.; *Ananta* v. *Damodhar*, 13 B. 25; *Ramadhuri* v. *Bisheshar*, 37 I.C. (O.) 111.

(5) *Sheodyal* v. *Judoonath*, 9 W.R. 61, but see it explained by Wilson, J., in *Tej Protab* v. *Champa*, 12 C. 96; *Phuljhari* (*In re*), 17 W.R. 102; *Ambika* v. *Sukhmani*, 1 A. 437; *Babaji* v. *Kashi Bai*, 4 B. 157; *Sakharam* v. *Hari*, 6 B. 113 (decree insufficient); *Sudarsanam* v. *Narasimhulu*, 25 M. 149 (150) (Mere declaration insufficient, giving of "some trifle" necessary).

(6) *Kasan* v. *Jarawar*, (1922) 18 N. 127 P.C.

(7) *Gajendar* v. *Sardar*, 18 A. 176, cited with approval in *Nageshar* v. *Ganesha*, 42 A. 368 (381) P.C.

(8) *Bhagoji* v. *Bapuji*, 10 B.H.C.R. 187, cited with approval in *Nageshar* v. *Ganesha*, 42 A. 368: (380, 381) P.C.; *Kanha Lal* v. *Paul Sahu*, (1920) Pat. 305: 57 I.C. 353.

shares, which if unexplained, would be evidence of partition[1] and it will be strong if it is followed up by entries of separate interests in the revenue records.[2] The question in such cases is one of intention. Was the definement of shares made on the hypothetical basis of an assumed partition to define the interest of each coparcener, or did it follow an actual partition or an intention to hold the estate in severalty.[3]

1564. The rule was thus stated in *Appovier's case*:[4] "But when the members of the undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share which he may claim to receive and to enjoy in severalty, although the property itself has not become actually severed and divided." So, where two brothers Gannu and Lalji who were originally joint, owing to dispute between their wives, began to drift away from each other till finally they became separate in mess, worship and business. Lalji had built for himself a separate dwelling-house on a site acquired by him. He got his name separately entered in the land records and commenced to make separate realization of his income from which the court presumed separation[5] (§ **1557**).

1565. Of course, all these facts may be explained away as consistent with continued jointness. As the Privy Council observed: "It was contended on behalf of the appellants in the present suit that, although the decree in the suit of 1868, may have effected a separation *quoad* Tundan and Tukan, it left the plaintiffs united *inter se*: and that this might have been the legal effect of the decree is undeniable. But here again the conduct of the parties must be looked at, in order to arrive at what constitutes the true test of partition of property according to Hindu Law, namely, the intention of the members of the family to become separate owners."[6] This may be illustrated by the converse case. One Baijnath died leaving four sons, two by each of his two wives. His two sons by his junior wife were minors and she applied for a certificate for managing the property of her minor sons. A son by the other wife opposed the application on the ground that the family was joint. On the death of the father the names of all the four sons had been registered with specification of their respective shares and it was contended that this, coupled with the application for management, amounted to partition. But the court found that the shares of the brother had to be specified in compliance with provisions of the Land Registration Act and that the application for management had been made under an erroneous impression that such application was maintainable even as regards a member of a joint family. There was then a division of rights, without any intention to divide and the family was, therefore, held to be joint in spite of the definement of shares.[7]

1566. But, of course, the definement of shares would be sufficient to constitute partition if it is made with that intention. The Settlement and

(1) *Ram Pershad* v. *Lakhpati*, 30 C. 231 (253) P.C.; *Ram Singh* v. *Tursa*, 17 C.W.N. 1085 P.C.
(2) *Ram Lal* v. *Debi Dat*, 10 A. 490.
(3) *Sri Gobind* v. *Birj Kumar*, 6 I.C. (Pat.) 639 (669); *Sadananda* v. *Bailunth*, 2 Pat.L.J. 299.
(4) *Appovier* v. *Rama*, 11 M.I.A. 75.
(5) *Gannu* v. *Bhagwati*, 3 I.C. (C.) 234 (239).
(6) *Ram Pershad* v. *Lakhpati*, 30 C. 231 (253) P.C.
(7) *Hollash Kooer* v. *Kassee*, 7 C. 369.

other Revenue Officers sometimes allot shares of their own motion to the different members of the family with a view to maintain a record of all possible sharers. If this is not a voluntary act at the instance of the coparceners, it cannot constitute separation. But if the sharers get their separate shares recorded in the revenue papers, then it would clearly be evidence from which separation might be inferred.[1] But the mere mention of shares in the record of rights or in the mutation register[2] is not sufficient.[3] But in a case where half-brothers claimed a deceased brother's share in certain villages and lands against his widow, whose name, as also those of his half-brothers, had been separately recorded in the revenue records, and it was in evidence that the half-brothers had executed separate mortgages in respect of their respective shares, and they did not go into the witness box to explain how these transactions, though separate, were consistent with jointness, the Privy Council held that their acts were only consistent with the hypothesis of separation.[4] So, where, following up a quarrel, a coparcener applied to have his name separately recorded in respect of his defined share in the *Khewat*, the court held his conduct to amount to separation from the joint family[5] (§ **1532**).

1567. Purchase in Individual Names.—It is quite common in joint families to make purchases in the names of individual members, either for luck or in recognition of their coparcenery rights, and at times, it is to be feared, from a desire to provide against the rainy day in case the family debts should outgrow its assets. In any case, that circumstance alone raises no presumption of separation, though it is evidence which, when taken with other facts, may suffice to establish it. But of itself it is insufficient[6] (§ **1553**).

1568. These observations were, however, made in a case in which all members of the family were converts to Christianity. In that case it is clear that all may renounce the religion but continue to preserve their joint status.[7] The case would, however, be different, where while the family remains Hindu, only some of its members renounce Hinduism. In that case, it is possible that, by common consent of all the members, the family may still continue joint, but in the absence of such consent, conversion will be presumes to effect a severance.[8] (**S. 4.**)

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(1) *Heonee* v. *Dhurum*, 3 N.W.P.H. C.R. 108.

(2) *Ram Singh* v. *Thursa*, 17 C.W. N. 1085 P.C.

(3) *Jowar Dhari* v. *Narsingh*, 1 I.C. 899; *Gajendar* v. *Sardar*, 18 A. 176, cited with approval in *Nageshar* v. *Ganesha*, 42 A. 368 (381) P.C.

(4) *Ram Singh* v. *Tursa*, 17 C.W. N. 1085 P.C.

(5) *Sheo Deyal* v. *Lalta Prasad*, 23 O.C. 184; 58 I.C. 608.

(6) *Prankishen* v. *Mothoramohan*, 10 M.I.A. 403; *Gopee Krist* v. *Ganga Persaud*, 6 M.I.A. 53; *Luximan* v. *Mullar*, 5 W.R. 67 P.C.; *Cheetha* v. *Miheen*, 11 M.I.A. 369; *Amrit* v. *Gauri*; 13 M.I.A. 542; *Pran Nath* v. *Kashi Nath*, (1864) W.R. 169; *Kishen* v. *Janoke*, W.R. (F.B.) 3; *Deela* v. *Toofanee*, 1 W.R. 306; *Nilmoney* v. *Gunga*, 1 W.R. 334; *Gopee* v. *Bhagwan*, 12 W.R. 7; *Heera* v. *Bidyadhur*, 21 W. R. 343; *Jugodumba* v. *Rohinee*, 23 W.R. 422; *Ramphul* v. *Degnarain*, 8 C. 517; *Narayan* v. *Anaji*, 5 B. 130; *Cassumbhoy* v. *Ahmedbhoy*, 12 B. 280 (309); *Balaram* v. *Ramachandra*, 22 B. 922; *Subhayya* v. *Chellama*, 9 M. 477; *Subhayya* v. *Surayya*, 10 M. 251; *Gajender* v. *Sardar*, 18 A. 176.

(7) *Ghosal* v. *Ghosal*, 31 B. 25; dissenting from *contra* in *Tellis* v. *Saldhana*, 10 M. 69; following *Gajapathi* v. *Gajapathi*, 14 W.R. (P.C.) 33; *Lopez* v. *Lopez*, 12 C. 702 (706).

(8) *Kulada* v. *Haripada*, 40 C. 407 (418, 419); *Gobin* v. *Abdul Qayyan*, 25 A. 546 (573), reversed O.A. on a different point; *Karimuddin* v. *Gobind*, 31 A. 497 P.C.; *Khunnilal* v. *Gobind*, 33 A. 356 P.C., reversing O.A. *Gobind* v. *Khunnilal*, 29 A. 487.

Clause (2).

1569. **Independent Dealings.**—Independent dealings by a member with a stranger, and what is more, with another member of the family, showing mutual credits and debits, is a very strong index of separation.[1]

This may, however, be for the facility of accounting, as in the case of banking families with several shops who trade with one another on independent footing though at the close of the year their profits and losses are amalgamated with those of the head shop which prepares a consolidated balance sheet to indicate the progress of business. It is, however, against the rules of coparcenership that the widow should succeed to her husband. Where it is so, and the other coparceners have dealings with her as the heir of the husband, it raises a strong *prima facie* case of separation.[2] The mutual dealings between *quondam* coparceners are, of course, far more conclusive than coparceners' dealings with outsiders. But even in this case, it is evidence, which must vary in degree according to circumstances. Suppose, for instance, that a family banker opens independent accounts with different coparceners who deal with him taking advances and making payments independently of each other, it would be evidence that each had a separate chest which would destroy one symbol of jointness. So again, the longer such dealings continue the stronger would be the presumption against jointness. On the other hand, it may be that such dealings are merely resorted to for convenience and in the interest of the joint family. But this must be proved. It cannot be presumed.

Explanation.

1570. **Stranger's Seizure Ineffectual.**—The last clause states a rule which is a necessary corollary of the main principle that intention is the sole test of partition. Where therefore, there is no intention to separate, an act of the stranger in seizing and selling the undivided interest of a coparcener in execution of a decree against him has not the effect of legal partition.[3] The case would, however, be different where the coparcener voluntarily sells away his share in all the coparcenary property, in which case, the joint tenancy in respect of the share alienated is put an end to, and the alienee becomes a tenant-in-common with the remaining coparceners.[4]

1571. **No Separation.**—It is, of course, obvious that a mere intention to separate cannot have the effect of a separation, unless such intention is expressed so as to disclose an unequivocal intention of separation. This is a question of fact dependent upon the circumstances of each case. The mere separation from commensality does not, as a necessary consequence, effect a division of the joint undivided property,[5] though it is a circumstance which is *prima facie* evidence of separation. Even a formal division between some members would not operate as separation of the rest *inter se*, unless they had intended to separate. By an award, the property of a joint family consisting of an uncle and two nephews was partitioned, one share

(1) *Ram Singh* v. *Turasa*, 17 C.W.N. 1085 (1088) P.C.; *Gangabai* v. *Fakirgowda*, 54 B. 336 P.C.; *Munshi Ram* v. *Govinda*, (1915) P.R. 123: 26 I.C. 390; *Sukh Dial* v. *Mani Ram*, 27 I.C. 489: (1915) P.R. 29; *Jay Narain* v. *Kishun Dutt*, 3 Pat. 575.

(2) *Ram Singh* v. *Turasa*, 17 C.W.N. 1085 P.C.; *Sumundra* v. *Kale Charn*, 13 W.R. 199.

(3) *Secretary of State* v. *Rangasamy*, 39 M. 831 (834) F.B., overruling *Chinniyan, Re*, 2 Weir's Cr.R. 43; and following *Umay, Re*, 2 Weir's Cr.R. 43.

(4) *Soundra* v. *Arunchellam*, 29 M. L.J. 816; *Chinnu* v. *Kalimuthu*, 35 M. 47; *Srinivasa* v. *Krishnasamy*, 11 M.L. T. 312: 15 I.C. 354.

(5) *Suraj Narain* v. *Iqbal Narain*, 35 A. 380 P.C.

being allotted to the uncle and one to the nephews, but nothing was said as to the shares to be taken by the nephews individually, nor did they express any desire to separate. It was held that the partition did not effect any separation between the nephews *inter se*.[1] A converse case was that in which there was a partition but the separated member availed himself of the services of his near agnatic relations in the administration of his property, and at the same time, he gave them maintenance and paid the expenses of their marriage and other ceremonies all of which facts were natural and probable but could not prove jointness in estate.[2] Where members have been in joint enjoyment of the estate for several generations, the mere fact that the estate has never been partitioned, is no proof of its impartibility, nor can such a plea deprive a member of his vested right of partition.[3]

1572. Limitation.—Closely allied to the question of separation is that of exclusion. Though in a normal family the possession of one is the possession of all,[4] this presumption cannot be availed of by one against whom exclusion is proved. As exclusion for twelve years suffices to quiet a claim, otherwise good, for partition, the question whether separation amounted to exclusion cannot be ignored, though what fact converts one into the other cannot be generally stated in the form of an abstract proposition. It may, however, be premised that there can be no exclusion without denial of coparcenary right. Such denial may be express or implied as if the coparcener should demand maintenance and it is refused; or that the coparcener is expelled from the joint family.[5] Such a plea was taken in a suit for partition by the plaintiff whose claim was alleged to be barred by time on the ground that his father was alleged to have been expelled from the family for his misconduct. Both parties adduced voluminous evidence which the Privy Council rejected as equally untrustworthy. There remained the fact that for five years before the suit, the plaintiff had reappeared in the village and was recognized as a member of the family, which was held to be sufficient to support his claim to partition.[6]

1573. Where the title is clear, the court is loath to presume exclusion from a mere non-participation in profits of the joint property. The rule of the English common law that the entry and possession of one of several owners having a joint title enures for the benefit of all and is tantamount to a possession of them all[7] has been modified in England by statute,[8] but since there is no similar statutory modification of the common law applicable to this country, the English common law rule still obtains here,[9] the result being that while in England, possession is *prima facie*

(1) *Durga Dei* v. *Balmukund*, 29 A. 93.

(2) *Deoki Singh* v. *Anupa*, 10 C.W. N. 338 P.C.: 16 M.L.J. 109.

(3) *Durryao Singh* v. *Dari Singh*, 13 B.L.R. 165 (168) P.C.

(4) *Parmanand* v. *Krishna*, 14 C.L. J. 183: 12 I.C. 6.

(5) *Jeolal* v. *Loke Narayan*, 16 C.W. N. 466 P.C.: 15 I.C. 184.

(6) *Jeolal* v. *Loke Narayan*, 16 C. W. N. 466 P.C.: 15 I.C. 184.

(7) *Per* Wood, V.C., in *Thomas* v. *Thomas*, 2 K. & J. 79, 69 E.R. 70 (83), followed in *Codea* v. *Appuhamy*, (1912) A.C. 230 (236).

(8) 3 & 4 Wm., IV, C. 27, S. 12, under which the entry of one does no longer vest the possession in all. On the contrary, the statute makes the title of such person separate from the date of entry; *per* West, J., in *Dadoba* v. *Krishna*, 7 B. 34 (39); *per* Lord Macnaghten in *Corea* v. *Appuhamy*, (1912) A. C. 230 (236).

(9) *Per* Lord Macnaghten in *Corea* v. *Appuhamy*, (1912) A.C. 230 (236) (a case from Ceylon).

exclusive and adverse, possession here is never so treated if it can be traced to any lawful title. Even as between tenants-in-common, the possession of one is not necessarily adverse to the rest unless there is ouster.[1]

1574. This was settled by the Privy Council in an appeal from Ceylon in which a coparcener had set his possession as adverse to the rest upon which the Privy Council observed: "Entering into possession and having a lawful title to enter, he could not divest himself of that title by pretending that he had no title at all. His title must have enured for the benefit of his coproprietors....His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."[2]

Parties to partition.

187 (1) Any person entitled to claim partition may sue for it.[3]

(2) All persons entitled to a share therein are necessary parties.[4]

(3) But a person in possession of any property under the joint family is not a necessary party.[5]

Inclusion of property.

(4) Except as otherwise provided in this behalf, a suit for partition must relate to all property, partible at the time and subject to the jurisdiction of the court, in which the suit is instituted.[6]

(5) Where, however, such property is situate within the jurisdiction of more than one court, suits may be brought in the several courts possessing the requisite jurisdiction.[7]

Illustrations.

(*a*) *A*, *B* and *C* are coparceners. *D* is their mother who is also entitled to a share. *A* wishes to separate from *B* and *C*. He must sue both *B* and *C* impleading his mother *D*.[8]

(*b*) *A*, *B* and *C* are coparceners. *D*, the wife of a predeceased brother, is in possession of a village given to her out of the family estate in lieu of her maintenance. *A* sues for a general partition. *D* is not a necessary party as she has no right to a share.

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(1) *Gangadhar* v. *Parashram*, 14 B. 236; *Daudkhan* v. *Govinda*, 5 N.L. R. 41.

(2) *Corea* v. *Appuhamy*, (1912) A.C. 230 (236), followed in *Faizuddin* v. *Reju*, 21 C.L.J. 192; *Biseswar* v. *Bhagabati*, 24 C.L.J. 38: 35 I.C. 26; *Jogendra* v. *Baladeb*, 35 C. 961; *Ram Parson* v. *Kalab Husain*, 36 I.C. (A.) 100; *Ahmad* v. *Ramlal*, 37 A. 203; *Asghar* v. *Akbar Husain*, 36 I.C. (O.) 743; *Marian* v. *Kadir*, 29 I.C. (M.) 275.

(3) *Sheo Dayal* v. *Jadunath*, 9 W.R. 61; *Raoji* v. *Anant*, 42 B. 535.

(4) *See* Ss. 168, 170.

(5) *See* §§ 1864-1866.

(6) S. 16 (*b*) and Or. II, rr. 1, 2, C.P. Code; *Jogendra Nath Mukerji* v. *Jugobandhu Mukerji*, 14 C. 122, followed in *Doman Lal* v. *Prokash Lal*, 18 I.C. 866; *Rajendra* v. *Bojendra*, 37 C.L.J. 191: 77 I.C. 790: (1923) C. 501; *Venkayya* v. *Lakshmayya*, 16 M. 98; *Mukunda* v. *Jogesh*, 1 Pat.L.J. 393: 35 I.C. 370: 20 C.W.N. 1276; *Subramania* v. *Ramchandra*, 85 I.C. 503: (1925) M. 333; *Haridas Sanyal* v. *Pran Nath Sanyal*, 12 C. 566, followed in *Gourishankar Parbhuram* v. *Atmaram Rajaram*, 18 B. 611 (613); *Punchanun Mullick* v. *Shib Chunder Mullick*, 14 C. 835; *Balaram Bhaskarji* v. *Ramchandra Bhaskarji*, 22 B. 922; *Abdul Karim* v. *Badrudeen*, 28 M. 216; *Ramacharya* v. *Anantacharya*, 18 B. 389.

(7) Ss. 16 (*b*), 17, *ib. Punchanun Mullick* v. *Shib Chunder Mullick*, 14 C. 835; *Balaram Bhaskarji* v. *Ramchandra Bhaskarji*, 22 B. 922; *Abdul Karim* v. *Badrudeen*, 28 M. 216; *Ramacharya* v. *Anantacharya*, 18 B. 389.

(8) *Torit Bhoosun* v. *Tara Prosonno*, 4 C. 756.

1575. Analogous Law.—Partition suits are subject to the modern statutory procedure which has abrogated the Hindu processual law on the subject. "The ordinary rule is that if persons are entitled beneficially to shares in an estate, they may have a partition."[1] Section 179 enumerates those persons who are all entitled to sue for partition. It is not necessary that they should all jointly claim partition. Every member is individually entitled to the partition of his share, which he may put in suit. But persons merely entitled to a share at partition, are not entitled to sue for it. Nor are minors, who may, however, be allowed partition in certain cases already started (§§ **1492, 1493**).

1576. Every person interested in a partition suit must be impleaded either as a co-plaintiff or as a co-defendant, because a partition suit is not a suit *in rem* and will bind only those who are so impleaded, or whom they represent. Clause (4) follows the provisions of section 16 (*b*) and Order II, Rules 1 and 2 of the Code of Civil Procedure, 1908, and clause (5) follows those of Sections 16 (*b*) and 17 of the Code; and both the clauses are supported by the decided cases. If any co-sharer applies for a partition of a property he must make the other co-sharers defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes all rights which they would otherwise have to that portion, and, therefore, it is a decree against them, and in favour of himself."[2] This necessity for impleading all persons entitled to a share is obvious, since in a suit for partition by a person, a share cannot be ascertained without hearing the other sharers. The *quantum* of the plaintiff's share can only be determined with reference to the number of sharers and their respective shares.[3]

1577. Only sharers and not all possible claimants should be arrayed in a partition suit. For instance, in a partition between the father and his sons, the sons who have separated from their father have no shares.[4] They need not then be joined. The persons entitled to claim partition are set out in Section 179. They are necessary parties. So are the persons entitled to a share, such as the wife, mother[5] or grandmother, the unmarried sister[6] enunciated in Section 182. They are equally necessary parties.

Purchaser of undivided shares should also be impleaded.[7]

But a mere maintenance grantee is not a necessary or a proper party.[8] The case of mortgagees and lessees will be presently considered (§§ **1581-1582**).

1578. Necessary Parties.—In a partition between two or more branches of a family, the sons and grandsons of the several branches are not necessary parties, since they are sufficiently represented by the heads of each branch.[9] It is a general rule that all persons interested ought to be made parties to a suit, however numerous they may be, so that the court

(1) *Per* Lord Hobhouse in *Shankar* v. *Hardeo*, 16 C. 397 (405) P.C.

(2) *Nalini Kanta* v. *Sarnamoyi*, 19 C. W.N. 531 P.C.: 24 I.C. 294.

(3) *Ashidbai* v. *Abdulla*, 8 Bom.L. R. 758; *Pahaladi* v. *Luchmunbutty*, 12 W.R. 256.

(4) *Ganesh* v. *Gobind Rao*, (1898) B.P.J. 288.

(5) *Torit* v. *Taraprosonno*, 4 C. 756; *Laljeet* v. *Raj Coomar*, 20 W.R. 336 (340).

(6) *Laljeet* v. *Raj Coomar*, 20 W.R. 336 (340).

(7) *Pahaladhi* v. *Luchmunbutty*, 12 W.R. 256; *Laljeet* v. *Raj Coomar*, 20 W. R. 336 (340); *Nalini Kanta* v. *Sarnamoyi*, 19 C.W.N. 531; *Sadu* v. *Ram*, 16 B. 608; *Lakshman* v. *Gopal*, 23 B. 385 (393); *Vinayak* v. *Ramkrishna*, (1880) B.P.J. 180 (purchasers of coparcenary interest must be made parties to a family partition).

(8) *Sabta Prasad* v. *Dharmi Kurti*, 35 A. 107 (108).

(9) *Bishambhar* v. *Kanshi Parshad*, 13 L. 483.

may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the court may be safely executed by those who are compelled to obey them and future litigation may be prevented.[1] It is in obedience to this rule that in partition suits all known co-sharers must be before the court.[2] The term "known co-sharers" covers all who are known to have an interest in the property, and it is not limited to those whose names may have been recorded under any Act.[3] Where it cannot be ascertained with precision that any coparcener is alive, then both the unascertained coparcener and his legal representatives should be impleaded as defendants.[4] The owner of twelve annas share in a joint zemindari granted to the plaintiff a *mukarari* lease of his share in a small portion of land within the zemindari. The owner of the remaining four annas share granted *patni* of his share in the whole zemindari to the defendant. The plaintiff brought a suit against the defendant for partition of the small plot of land. It was held that such a suit was not maintainable without the Zemindars as parties, for if such a claim were allowed, the defendants might in respect of the same estate be subjected to many claims for partition at the suit of persons in the plaintiff's position.[5] So, where the plaintiff sued for the partition of certain *jamas*, to a half-share of which they were entitled as tenants under the owner *M* of a share of the proprietary title. The title to possession of the remaining half-share of the *jamas* was in *S*, the owner of the remaining half-share of the proprietary title. The proprietors as between themselves were undivided in respect of the *jamas*. The suit had been brought against *S* alone. The first court decreed the suit, but the lower appellate court set aside the decree and remanded the suit for the purpose of giving the plaintiff an opportunity to bring *M* on the record. It was held that *M* was, if not a necessary party, at least a proper party to the suit as his presence was necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in it.[6]

1579. It has already been stated that all persons entitled to a share in the property must be impleaded in a suit for its partition; since the separation of the plaintiff's share takes away all the right which they would have to that portion, and that a decree obtained by the plaintiff is thus necessarily a decree against them. If, therefore, a person was made a defendant and his share ascertained, though not partitioned off, he could not maintain another suit for recovery of a larger share on the ground that the previous suit did not allot him any share. If the apportionment of shares in the previous suit was wrong it was open to him to move for the correction of that error. But he could not ignore the decision of that suit which is *res judicata* against him.[7]

1580. Unnecessary Parties.—A widow in possession of properties in lieu of maintenance may or may not be a necessary party to a suit for

(1) Mitford on Pleading, p. 190, cited, *per* Sir Lawrence Jenkins, C.J., in *Chudasama* v. *Parbat Singh*, 28 B. 209 (213, 214); *Amrut* v. *Mukund*, 5 N. L.R. 152: 4 I.C. 236.

(2) *Pahaladh* v. *Luchmunbutty*, 12 W.R. 256 (259); *Kali Kanta* v. *Gouri Prasad*, 17 C. 906, followed in *Chudasama* v. *Partap Singh*, 28 B. 209 (214).

(3) *Chudasama* v. *Partab Singh*, 28 B. 209 (214) (a case under the Gujrat Taluqdar's Act, Bom. Act VI of 1888, S. 12 set out in 28 B. 209—note); *Uchhap* v. *Lakhan*, 9 C.P.L.R. 93.

(4) *Srinath* v. *Probadh*, 11 C.L.J. 580: 6 I.C. 244.

(5) *Parbati* v. *Ainuddin*, 7 C. 577 (580, 581).

(6) *Indu Bhushan* v. *Sailaja*, 7 I.C. (C.) 382.

(7) *Nalini Kanta* v. *Sharnamayi*, 19 C.W.N. 531 P.C.: 24 I.C. 294.

partition. She is not a necessary party if the partition does not affect her right, and no question of her right is to be determined in the suit.[1] But in an ordinary family partition when her right may have to be determined and a share allotted to her in lieu of maintenance, she is a necessary party and cannot be ignored. In a partition of tenancy rights, the landlord is not a necessary party.[2] But a permanent lease-holder, is a necessary party to a partition suit between two grantees[3] the decision being made on the ground that any other course would lead to multifariousness. In a partition of proprietary rights, the mortgagee of a share is not a necessary party since such mortgagee is on partition entitled to the share allotted to his co-sharer in lieu of that mortgaged to him.[4] In a suit for partition by *patnidars* against *dar-patnidars* under his *co-patnidar*, the *co-patnidars* must be made parties; but a *dar-patnidar* is not a necessary party.[5]

1581. Mortgagee.—It has already been stated that a "mortgagee is not a necessary party to a partition suit, but he may, and frequently, does obtain leave to attend the proceedings as a *quasi*-party."[6] In Bombay, it has been held that both the purchaser of a share and a mortgagee are proper and even necessary parties to a partition suit since their right may have to be decided and, if necessary, marshalled.[7] But the necessity for that joinder must depend upon something more than a mere possibility. For instance, if the mortgage is admitted, the joinder of the mortgagee would be wholly unnecessary.[8] On the other hand, where the *factum* or validity of the mortgage is disputed, the mortgagee may well be joined to support his title. So again, where the alienee from a coparcener claims his coparcener's share, he would be a necessary party,[9] and, *e converso*, where a co-sharer disputes his alienation.[10] The rule as to joinder is not inflexible but depends upon the *quantum* of interest possessed by the alienee and how far it is likely to be jeopardized by his absence from the suit.

1582. Lessee.—An ordinary lessee is not a necessary party to a partition suit between his lessors. But a permanent lessee may be regarded as a purchaser and will be entitled to similar privileges and subject to similar liabilities.[11] Such is a *mukarari*[12] or a *putni* lease in Bengal.[13]

1583. Partition Must Be Exhaustive.—"Once is a partition made."[14] Consequently, the plaintiff is ordinarily bound to bring his suit for a general

Clause (4).

(1) *Sabba Prasad* v. *Dharam Kirti*, 35 A. 107 (108); *Brojendra Nath* v. *Lalit Mohan*, 45 C.L.J. 41; (1927) C. 262. (Similarly, an idol is not a necessary party if there is no dispute about its rights).

(2) *Indu Bhushan* v. *Sailaja*, 7 I.C. (C.) 382.

(3) *Parbati* v. *Ainuddin*, 7 C. 577.

(4) *Narendra* v. *Saroda Kanto*, 6 I. C. 829.

(5) *Upendra* v. *Mhd. Faiz*, 12 C.W. N. 670.

(6) *Per* Sale, J., in *Khetterpal* v. *Khelal*, 21 C. 904 (909).

(7) *Sadu* v. *Ram*, 16 B. 608 (612): followed in *Ikbal Narain* v. *Suraj Narain*, 10 O.C. 33; *Mahadeo* v. *Bhawani*, 5 O.L.J. 193: 46 I.C. 281.

(8) *Ram Samugh* v. *Bikramajit*, 6 O. L.J. 142: 50 I.C. 876.

(9) *Dularam* v. *Badal Das*, 10 S.L.R. 34: 35 I.C. 478.

(10) *Mahadeo* v. *Bhawani*, 5 O.L.J. 193: 46 I.C. 281.

(11) *Dildar* v. *Bhowani*, 34 C. 878.

(12) *Bhagwat Sahai* v. *Bepin Behari*, 37 C. 918, P.C.

(13) *Uma Sundari* v. *Beande Lal*, 34 C. 1026; *Hemadri* v. *Ramani*, 24 C. 575 (581) F.B. (dissenting from *Mukundo* v. *Leurans*, 20 C. 379), followed in *Kishore* v. *Girdhari*, 1 Pat.L.J. 441: 20 C.W.N. 1306: 35 I.C. 861.

(14) Manu, X-47; *Dadajee* v. *Wittal*, Bom.L.R. 151; *Nanabhai* v. *Nathabhai*, 7 B.H.C.R. (A.C.) 46; *Narayan* v.

partition which should include all property then available for partition. The only exceptions to this rule are those enumerated in section 183.

1584 A member of an undivided family cannot sue his co-sharers for his share in a single item of joint property such as a house[1] or an undivided field. He must sue for a general partition.[2] But this does not mean that a person is bound to join in one suit a prayer for partition of all property held by him jointly with the other members of his family as well as with them and a stranger. The two causes of action are distinct for "it cannot be said that the claim of the plaintiffs to obtain their share of property owned jointly by them and *B* is founded on the same cause of action as their claim to obtain the share of property owned jointly by them and *B* and *C*. If the cause of action is founded on a refusal on the part of the defendants to divide, then the refusal in each case is that of different persons owning differnt rights. If it is founded on the right to claim a partition of what is joint, then that subject-matter is different, for the joint property of *A* and *B* is not the joint property of *A*, *B* and *C*."[3] Two other exceptions to the rule are furnished by (*a*) the properties being situate in different jurisdictions, and (*b*) where a portion of the property is not immediately available for partition by reason of its being in possession of a mortgagee, or because it was *inam*, the partition of which required the sanction of Government.[4] It follows that a coparcener cannot require another to account to him for the income of the joint property so long as the family continues joint. But if the family has become separate, there is, then, of course, no objection to a suit instituted by one for unauthorized receipts by the other. A formal partition is not necessary.[5]

1585. In such cases, the plaintiff may, but is not, bound to it institute several suits at the same time in order to bring all the family property into a single partition.[6] But as will be presently seen, all such properties must necessarily be taken into account in a satisfactory division of shares.[7] If, therefore, some of the property is situate beyond the jurisdiction of the court it may stay proceedings till the other property is satisfactorily disposed of, or in the case of the High Court, it may grant leave to include it in the same suit.[8]

Clause (5).

1586. Procedure in Partition Suits.—The plaintiff entitled to partition cannot sue for a mere declaration of his title[9] or for accounts of

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Nana, ib., p. 178; *Trimbak* v. *Narayani*, 11 B.H.C.R. 71; *Shivmurtappa* v. *Virappa*, 24 B. 128; *Anundi Bai* v. *Hari*, 35 B. 293; *Padmamani* v. *Jagadamba*, 6 B.L.R. 140; *Haridas* v. *Pran Nath*, 12 C. 566; *Jogendro* v. *Jugobundhu*, 14 C. 122.

(1) *Venkayya* v. *Lakshmayya*, 16 M. 98.

(2) *Nanabhai* v. *Nathubhai*, 7 B.H.C.R. (A.C.) 46; *Chyet Narain* v. *Bunwari*, 23 W.R. 395; *Haridass* v. *Pran Nath*, 12 C. 566.

(3) *Per* Parsons, J., in *Purushottam* v. *Atmaram*, 23 B. 597 (598, 599); *Kailash Chandra* v. *Nityanand*, 11 C.L.J. 384; *Jogendra* v. *Sirishchandra*, 1 I.C. 110; *Ram Dayal* v. *Uttim Matho*, 5 Pat.L.W. 122: 46 I.C. 255 (263); *Gangaya* v. *Venkatarayaliah*, 41 M. 454.

(4) *Purushottam* v. *Atmaram*, 23 B. 597, (600).

(5) *Penta* v. *Mudiya*, 19 M.L.J. 399: 4 I.C. 34 (head-note misleading).

(6) *Ramacharya* v. *Anantacharya*, 7 B. 272; *Purushottam* v. *Atmaram*, 23 B. 597 (600); *Mahalingam* v. *Natasen*, (1916) 1 M.W.N. 146: 32 I.C. 423.

(7) *Hari* v. *Ganpatrav*, 7 B. 272 922 (928); *Subbiah* v. *Thulasi*, 4 M.L.T. 527: 22 I.C. 44.

(8) *Padmamani* v. *Jagadamba*, 6 B. L.R. 134.

(9) *Shashi Bhushan* v. *Jotindra*, 38 C. 681; *Nalini Kanta* v. *Samamoya*, 19 C. W.N. 531 P.C.: 24 I.C. 294.

any or all of the properties,[1] though he may sue for joint possession,[2] or restoration of his previous *khas* possession.[3]

The first thing that the court has to see is that the suit is properly laid. In an ordinary suit for division of rights or enjoyment, when there is no question of exclusion from joint possession the court-fee of Rs. 10 should suffice.[4] The value for the purpose of the court's jurisdiction is the value of the plaintiff's share in the estate.[5]

1587. It is the duty of the plaintiff to sue and of the court to see that he has sued for a complete partition. If he has omitted to sue for it, it is his duty to explain. All coparceners must be impleaded in the suit whether they admit or object to partition. The plaintiff's right to partition depends upon his title and not upon the defendant's refusal to give him his share. He need not, therefore, state more than that he has a share and that he wishes for its separation.[6] But if the plaintiff is a minor, then he must show cause why his share should be partitioned; for he cannot obtain a partition as a matter of course (§§ **1492, 1493**). In addition to the coparceners, all persons claiming a right to a share, *e.g.*, the mother, the coparcener's alienee, or the idol to whom a share has to be allotted, would have to be impleaded—unless their right is admitted, in which case they need not be impleaded.[7]

1588. If the defendants admit the claim, and there is nothing to go before the Commissioner or the Collector, the Court may at once pass a final decree. It is not bound to decree the claim in two stages in every case. If the defendants contest the suit, it must be tried like any other suit. If the defence is that the plaintiff is suing for partition, while he is keeping back the property in his possession which must have been put into the hotchpot, the court may compel him to do so, or throw out his claim.[8] If the defendants wish their own shares to be ascertained and partitioned off they will be permitted to do so on payment of the requisite court-fee.[9] In such a case, the parties are in the position of cross claimants and each will have to prove his case and will be allotted his share.[10] Where the plaintiff's title is denied, the first thing he must do is to prove it. If he is found to have no share at all, there is no suit for partition and consequently, no necessity to determine the defendant's share.[11] But it is open to the plaintiff to claim partition or in the alternative, possession of the property bequeathed to him in his father's will. If the partition fails because he

(1) *Pirthu Rai* v. *Jowahir Singh* 14 C. 493 P.C.; *Gavri Shankar* v. *Atmaram*, 18 B. 611; *Ganpat* v. *Annaji*, 23 B. 144; but see *Penta* v. *Mudiya*, 19 M.L.J. 399: 4 I.C. 34.

(2) *Huloodhur* v. *Gooroo*, 20 W.R. 126. *See* cases cited in 1 Gour's Law of Transfer, (6th Ed.), §§ 822-830.

(3) *Watson & Co.* v. *Ramchand*, 18 C. 10 (21) P.C.; *Luchemeswar* v. *Manowar*, 19 C. 253 P.C. and cases cited in 1 Gour's Law of Transfer (6th Ed.), §§ 826-828.

(4) *Kirti Churn* v. *Aunath*, 8 C. 757; *Mohendro* v. *Ashutosh*, 20 C. 702; *Nandalal* v. *Kalipada*, 59 C. 315; *Bidhata* v. *Ramcharibat*, 12 C.W.N. 37; *Gill* v. *Naradarashavayya*, 43 M. 396; *Tarachand* v. *Afzal Beg*, 34 A. 184; *Asa Ram* v. *Jagannath*, 15 L. 531 F.B.; *Nana Nyun* v. *Mg. Uya*, I.L.R. (1937) R. 447.

(5) *Velu* v. *Kumaravelu*, 20 M. 289.

(6) *Mitta* v. *Neerunjun*, 22 W.R. 437; *Shama Soonderee* v. *Jardine Skinner & Co.*, 12 W.R. 160.

(7) *Brojendra Nath* v. *Lalit Mohan*, 45 C.L.J. 41: (1927) C. 262.

(8) *Mahbub* v. *Abdul*, (1912) P.L.R. 84: 13 I.C. 819.

(9) *Abu* v. *Amin*, (1875) B.P.J. 218; *Sadruddin* v. *Nooruddin*, 29 B. 79.

(10) *Khoorshed* v. *Nubee Fatma*, 3 C. 551; *Shivmurtappa* v. *Virappa*, 24 B. 128.

(11) *Ashid Bai* v. *Abdulla*, 8 Bom.L.R. 758; *Mewa Singh* v. *Basant Singh*, 28 C.L.J. 530 P.C.: 48 I.C. 540.

has failed to bring the property in his possession into hotchpot it is no reason for not investigating his alternative claim.[1] Where the plaintiff denies the existence of other properties the Court should direct an enquiry into the existence,[2] and if the plaintiff expresses his willingness to bring it into hotchpot, his suit should not be dismissed.[3] A suit for partition may be dismissed because the plaintiff was governed by the Aliyasantan Law which does not admit of the right to partition[4] though it admits of a family arrangement for the separate enjoyment of property.[5] *Prima facie*, however, all joint property is subject to partition and the onus of proof is on the party seeking to except any property from the general rule.[6]

1589. Even though the land is in the possession of tenants entitled to be in possession under subsisting leases, that would not be a bar to a partition of the property among the members of the family.[7] Where a coparcener's interest in coparcenary property is sold at the instance of his creditor, the balance of the sale proceeds does not cease to be coparcenary property and is, therefore, partible.[8]

The dismissal of a suit for partial partition does not bar another suit for a general partition of the property.[9]

A partition is limited to the interest of the person demanding it and has no enforced general operation against those who desire to live in union.[10]

Defences to a partition Suit.

188. A suit for partition may be defended on any of the following grounds, namely:—

(1) That the property in suit is not partible—

(*a*) because it is impartible; or

(*b*) because the parties are bound by a personal contract not to partition;[11]

(2) That the parties have made a family arrangement in lieu of the partition;[12]

(3) That there has already been a private partition which is final and exhaustive;[13]

(4) That the plaintiff's right of partition has become barred by time.

(5) That the plaintiff is disqualified to sue for partition because of his minority[14] or personal disqualification that precludes him from enforcing that right;[15]

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(1) *Ganshom* v. *Saraswati Bai*, (1892) B.P.J. 415.

(2) *Sri Mohan* v. *Mac Gregor*, 28 C. 769 (789).

(3) *Venkata* v. *Bhashya Karlu*, 25 M. 367 P.C.

(4) *Munda* v. *Timmaju*, 1 M.H.C.R. 380; *Timmappa* v. *Mahalinga*, 4 M.H. C.R. 28.

(5) *Sanku* v. *Puttamma*, 14 M. 289.

(6) *Luximon* v. *Mullar*, 5 W.R. 67 P.C.

(7) *Suryanarayana* v. *Sammana*, 25 M. 504.

(8) *Krishnaswami* v. *Rajagopala*, 18 M. 73.

(9) *Jogendra* v. *Jugobundha*, 14 C. 122.

(10) *Ganpat* v. *Gopal Rao*, 1 Bom.L. R. 123.

(11) *Rup Singh* v. *Bhubhuti*, 42 A. 30; *Anandchandra* v. *Pran Kisto*, 3 Beng.L. R. (O.C.) 14; *Jotish Chandra* v. *Rathika*, 60 C. 1078, contra *Ramalinga* v. *Ranganatham*, 57 M. 405.

(12) *See* Ss. 185-187.

(13) *See* S. 195 and comm.

(14) *See* § 1492.

(15) *See* § 1489.

(6) That the plaintiff has renounced or surrendered his coparcenary right or transferred or parted with his interest therein.[1]

1590. Analogous Law.—It has already been stated that Manu and other law-givers commend partition as multiplying religious duties.[2] They do not encourage jointness. Nor does the modern law. It is therefore manifest that the father cannot refuse partition to his adult son on the ground that it would be unfair to his future issue.[3] But, of course, if the property is itself impartible, it is another matter.[4]

A partition may, however, be postponed, though it cannot be prevented by an agreement *inter partes*. Such agreement does not bind any but those entering into it. It may also be more effectively prevented by a family arrangement or an implied partition. The subject of family arrangement has already been considered.[5]

1591. Agreement Against Partition.—There is some conflict between the decided cases, more apparent than real, as to the validity of an agreement against partition. There can be no doubt that the parties cannot by agreement make a partible estate impartible, since impartibility must arise out of a special tenure or a general family or local custom.[6] Moreover, an agreement never to divide certain property would be invalid on the ground that it alters the ordinary incident of property and tends to create a perpetuity,[7] though it may bind the actual contracts, if it is an agreement for specified time and made for a definite purpose.[8] As was observed in a case: "The right of a co-owner to have partition of his share is incident to the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right, and, therefore, not enforceable."[9] "It may be that at one time the decree for partition may cease, circumstances may again occur which made it desirable and necessary that partition should take place."[10] The fact that the agreement against partition was the subject of an award makes no difference.[11] As the Privy Council put it: "The arbitrator had no power to make property which was divisible by law indivisible for ever."[12]

Clause (3).

1592. In other words, an agreement against partition is unenforceable even as between the immediate parties to it, unless it is supported by consideration and is otherwise reasonable and proper and intended for the beneficial enjoyment of the joint property. Even then the agree-

(1) *Rangasami* v. *Sundararamanjulu*, 31 M.L.J. 472.

(2) Manu, IX-111.

(3) *Kawal Nani* v. *Budh Singh*, 39 A. 496 P.C.

(4) *Ekradeshwar* v. *Janeshwari*, 42 C. 582 P.C.; *Sethuramaswami* v. *Meruswami*, 34 M. 470: O.A. 41 M. 296 P.C.

(5) S. 206.

(6) S. 206; *Ramalinga* v. *Virupakshi*, 7 B. 598; *Vinayag* v. *Gopal*, 21 B. 458: O.A. 27 B. 353 P.C.; *Pirojshah* v. *Mani Bhai*, 36 B. 53 (56).

(7) *Jafri Begam* v. *Ali Raza*, 23 A. 383 (392) P.C.; *Mukerji* v. *Afzool Beg*, 37 A. 155; *Sakhawab Ali* v. *Abu Said*, 22 O. C. 100: 52 I.C. 73; *Ramalinga* v. *Virupakshi*, 7 B. 538; *Piroj Shah* v. *Mani Bhai*, 36 B. 53; *Anand* v. *Prankisto*, 3 B. L.R. (O.C.) 14; *Rajendar* v. *Sham Chunder*, 6 C. 106; *Shookmoy* v. *Manohari*, 7 C. 269.

(8) *Ramalinga* v. *Pakshi Khanapure*, 7 B. 538; *Radhanath* v. *Taruknath*, (1874) 3 C.W.N. 126 (128); *Jotish Chandra Narain* v. *Radhika Chandra*, 60 C. 1078; *Arumugha* v. *Ranganathan*, 57 M. 405 (410).

(9) *Chandar* v. *Kundanlal*, 31 A. 3 (4).

(10) *Mukarji* v. *Afzal Beg*, 37 A. 155 (158) following *Nasartullah* v. *Majibullah*, 13 A. 309; *Bisheshar* v. *Ram Prasad*, 28 A. 627; *Madan Mohan* v. *Bai Kanta*, 10 C.W.N. 839; *contra* in *Gulkandi* v. *Munni Lal*, 23 A. 219, dissented from. The statement in *Rup Singh* v. *Bhabuti*, 42 A. 30, is too wide.

(11) *Rup Singh* v. *Bhabuti*, 42 A. 30.

(12) *Jafri Begam* v. *Ali Raza*, 23 A. 383 (392) P.C.

ment does not bind the heirs and assignees of the parties,[1] not will it bind their minor sons, if it is found unfair and injurious to their interest.[2] This appears to be the dominant note of several cases.[3]

1593. Family Arrangement.—This has already been the subject of previous discussion (**Ss. 164-166**). A family arrangement as distinguished from a partition is an amicable settlement made by members of a joint family to avert the costliness and bitterness of a formal partition. Where, for instance, the sons desire to separate from their father and there is a dispute as to whether certain parcels of property are self-acquired or ancestral and there is no other means of settling the dispute otherwise than by the arbitrament of law, parties may give and take and execute mutual releases agreeing to hold what they have got thenceforward in severalty. It is a family arrangement and not a partition, because parties have agreed to a course without advertence to their legal rights. The motive of the settlement is the purchase of peace, and where there is a motive, the courts do not enquire into the sufficiency of consideration,[4] or disturb the arrangement on the ground of its inequality,[5] unless there was fraud or some other ground to vitiate it in law.[6] The arrangement binds both the parties and their issue.[7] This arrangement may extend to treating self-acquired property as joint or *vice versa*,[8] or it may be the culmination of a suit for partition in which the parties arrive at the settlement of a dispute which they desire to close.[9] Such settlement cannot be set aside upon the ground that it was accepted under a misconception of facts or an erroneous view of one's rights or that it has given to one party more than he was legally entitled to, which he would have recovered if he had taken the judgment of the court upon it.[10]

Partition Distinguished.

1594. Though a partition is confined to only specified relations, a family arrangement is not similarly limited. So the Privy Council said: "There can be no partition directly between grandfather and grandson while the father is alive. But it is a family arrangement, partaking so far of the nature of a partition that Udai Narayan receives a portion and is thenceforth totally excluded, and *quoad ultra*, Matadyal surrenders his interest to his grandson, who, on a complete partition among the whole family, would be entitled to one-fourth. Now, in such an arrangement, it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation to which the property was transferred should benefit by it. . . . The notions present to the mind of the head of joint Hindu family who is making a family arrangement are something very different from the notions present to the mind of an English testator when he makes

(1) *Rajendar* v. *Sham Chunder*, 6 C. 106; *Anand* v. *Prankisto*, 3 P.L.R. (O.C.) 14; *Anath Nath* v. *Mackintosh*, 8 B.L.R. 60; *Rup Singh* v. *Bhabuti*, 42 A. 30; *Duri* v. *Jadpatri*, 33 M. 246; *Arumugha* v. *Ranganathan*, (1933) M. 847.

(2) *Kishan Lal* v. *Lachmichand*, (1937) A. 456 (462).

(3) *Ramalinga* v. *Virupakshi*, 7 B. 538; *Subharaya* v. *Rajaram*, 25 M. 585; *Chundar* v. *Kundanlal*, 31 A. 3; *Srimohan* v. *Macgregor*, 28 C. 769 (786); *Muthuraman* v. *Ponnuswamy*, 29 M.L.J. 214: 29 I.C. (M.) 549.

(4) *Lakshmi Bai* v. *Ganpat*, 5 B.H.C. R. (O.C.) 128; *Upendranath* v. *Bindeshri*, 20 C.W.N. 210: 32 I.C. 468.

(5) *Rajuader* v. *Bijai*, 2 M.I.A. 181.

(6) *Ram Das* v. *Chabildas*, 12 Bom.L. R. 621 (624), S. 175.

(7) *Anand Rao* v. *Administrator-General*, 20 B. 450; *Ram Das* v. *Chabildas*, 12 Bom. L.R. 621 (627).

(8) *Kedar Nath* v. *Ratan Singh*, 32 A. 415 (426) P.C.

(9) *Kedar Nath* v. *Ratan Singh*, 32 A. 415 (426) P.C.; *Khunilal* v. *Govind*, 33 A. 356 P.C.

(10) *Birbhadra* v. *Kalpataru*, 1 C.L.J. 388 (405); *Helan* v. *Durga Das*, 4 C.L.J. 323 (331).

a gift to a class."[1] A family arrangement must, however, be distinguished from a division in status from which it may at times be indistinguishable. But it may be safely predicated that while a family arrangement carries with it no allotment of shares, an agreement for the continuance of jointness after the definement of shares is unmistakably a partition and not merely a family arrangement how-little-so-ever a change there might be in the external mode of living of the family.[2] So the partition remains a partition even though the document by which it is made should recite that in case of mismanagement or bad character of the sons, among whom the property was divided, the document would be cancelled. The clause in favour of cancellation is merely a threat and is, therefore, invalid.[3]

1595. It has already been seen that a family arrangement may be made without reference to or determination of the legal rights of the parties. The fact that a person has obtained, by a family arrangement, what he could never have obtained by partition is not blot upon its validity. Such, for instance, would be the grant of land by the holder of an impartible estate to the members of his family in the shape of maintenance or other grants. It may be that the grantee has no legal claim to maintenance, but the grant once made cannot be resumed on that account.

1956. Relinquishment.—It is open to a coparcener to relinquish his interest in the joint property. This he may do if he finds it overburdened with debts or otherwise subject to obligations which he may not care to face. So where the father of three sons had incurred considerable expense for the marriage of two of his sons for which he sold some of his properties gave them some cash and jewels and separated them from the family. The sons thereafter lived separately while the father and one son lived together. It was held that the transaction was a relinquishment by the separated sons of their interest in the remaining family properties.[4]

Clause (d).

Apart from direct relinquishment, the same result would follow from a coparcener renouncing his interest, if his renunciation is real and not merely nominal.[5]

1957. Release.—A party may relinquish his right, or execute a release which may be supported as a family arrangement.[6] But where a coparcener released his share in favour of the rest who were to pay the debts, it was held that the release was void though registered and that even S. 25 of the Contract Act could not save it. But the judgment appears to be unsound and proceeds upon the view that because the creditors could still hold him liable for the debt, the relinquishment failed for want of consideration.[7] But if the creditors could hold the coparcener liable they had their remedy against those who had taken his estate and undertaken to pay his debts.

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(1) *Bishenchand* v. *Asmaida*, 6 A. 560 (574, 575) P.C.

(2) *Raghubir Singh* v. *Moti*, 35 A. 41 (46) P.C.; *Jwala Prasad* v. *Janki*, 7 A. L.J. 975: 7 I.C. 905.

(3) *Brij Rai* v. *Sheo Den*, 35 A. 337 (352) P.C.

(4) *Rangasami* v. *Sundararajulu*, 31 M.L.J. 472: 35 I.C. 52.

(5) *Ramakrishna* v. *Parameshwara*, (1935) P.C. 92.

(6) *Sadashiv* v. *Trimbak*, 23 B. 146 (173) (the portion laying down that a minor's contract is merely voidable and not void is unsound); *contra* in *Appa* v. *Ranga*, 6 M. 71 (73) (release held void as made without consideration.)

(7) *Appa* v. *Ranga*, 6 M. 71 (73).

189. (1) **Every person entitled to a share may demand the partition of his share *in specie* and such partition may be made[1] except in the circumstances next following:—**

Mode of partition.

(2) Where the thing is by its nature indivisible,[2]

(3) Where its partition *in specie* will destroy its intrinsic value or be otherwise inconvenient,[3] or

(4) Where its sale is demanded and justified by the Partition Act, 1893.[4]

1598. Analogous Law.—*Prima facie* all property is partible *in specie* and must be so partitioned. "It is an elementary principle that in case of partition where several persons are co-owners or co-sharers of immovable property, partition should be effected between them by giving to each his share *in specie* as far as practicable."[5] "The right of each sharer is to his slice of the property, not merely its money value, and it is a matter of common experience that great importance is attached in this country to the possession of a share *in specie* by a co-sharer of property which has belonged to the family of which he is a member, or which has descended to him from an ancestor. The law gives effect to this sentiment as far as possible."[6] This rule is, however, subject to several exceptions, which may be stated: (1) If a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made; if on the contrary no partition can be made without destroying the instrinsic value, then a money compensation should be given instead of the share which would fall to a party by partition.[7] (2) if one of the coparceners wishes to keep the property entire, an opportunity should be afforded to him to do so, if he can agree on the subject with his coparceners.[8] If they cannot agree it may be sold under the Partition Act.

1599. From S. 4 of the Partition Act, the court will enforce the principle of equity in all partition cases, that when it is convenient to divide a property, it must be left in possession of the person in occupation, and the other person, who cannot conveniently get actual possession, compensated. So, where the defendants in a suit for partition were found to have built a dwelling house on a plot of 7 *cottahs* of land without opposition from the plaintiff, who was a stranger and owned only a one-tenth share in it and in an adjoining plot of 1 *bigha* 6 *cottahs*, the court disallowed the partition of the plots by metes and bounds, but gave the defendant option to buy up the plaintiff's shares at a proper valuation.[9] But convenience must raise a special equity against partition *in specie*.[10] A partition may be effected, in

Clause (4).

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(1) *Mahamed* v. *Haji*, 7 Bom.L.R. 482.

(2) *Mancharam* v. *Pranshankar*, 6 B. 298; *Sethurama* v. *Meruswamier*, 41 M. 296 P.C.

(3) *Ashanullah* v. *Kalikinkur*, 10 C. 675.

(4) *Cf.* S. 4, Partition Act (IV of 1893). *See* Appendix.

(5) *Mahamed* v. *Haji*, 7 Bom.L.R. 482.

(6) *Debindra* v. *Hari Das*, 7 I.C. (C.) 844; *Mahomed* v. *Haji*, 7 Bom.L.R. 482.

(7) *Ashanullah* v. *Kali Kinkur*, 10 C. 675.

(8) *Raj Coomaree* v. *Gopal Chander*, 3 C. 514.

(9) *Basunta* v. *Moti Lal*, 15 C.W.N. 555; *Debendra* v. *Haridas*, 7 I.C. 844.

(10) *Baja Khan* v. *Birju*, (1878) P.R. 15.

respect of each property, by metes and bounds as also by an interchange of separate or distinct properties, and it may similarly be effected by an auction sale of any of the properties, with the right of purchase restricted to those members of the family who have a joint interest therein, to be followed by a distribution of the sale proceeds realized from the same.[1]

1600. Religious Office.—The sacred texts treat hereditary offices, whether religious or secular, as naturally indivisible, but modern custom has sanctioned their partition such as can be had of such property, by means of performance of the duties of the office and the enjoyment of the emoluments by the different coparceners in rotation.[2] A deligious office such as that of a family priest is both inalienable and indivisible both because it includes a right of personal service as also on the ground of public policy. But a distribution of duties by rotation is, nevertheless, recognized as permissible as also the relinquishment of duties by one member in favour of other members of the same family, and, if so permitted by custom, even in favour of other persons of the priestly caste.[3]

1601. Such are also *Muths* which are associations of Sanyasis or celibates devoted to Divine worship who impart *upadesh* or religious instructions to deserving candidates. The house in which they live are also called *Muths*. They are in the nature of colleges for the performance of religious exercise and instruction and are by their very nature impartible and inalienable.[4] The *pattam* or office of dignity in a family governed by the Aliyasantan Law is indivisible and whether the family be divided or not, when no special arrangement has been made about it, the *pattam* descends to the eldest male of the surviving members of the family.[5] Priestly offerings are indivisible though members of a family may agree among themselves to throw their individual earnings into the common chest in which case the family earnings become their joint property and are as such partible.[6] Where a joint family consisting of three members asked for partition of their properties, consisting amongst others, of family books in which the names of pilgrims were recorded, it was held that the first step was actually to divide the books into three portions. In making such division, the guiding principle should be to ascertain the number of entries in each book, and it may be possible to give to each party a number of leaves containing as nearly as possible the same number of entries as to any other coparcener. The second step to be taken was to have certified copies prepared of the entries of these books and to give them to each of the parties. The result would be that each party would have one-third of the entries in original and two-thirds in certified copies.[7] There may still be things which are incapable of division; *e.g.*, flag, which each party should be held entitled to use,[8] or the family idol which its joint owners are entitled to worship by turns.[9]

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(1) *Jagmohan* v. *Kunwar Singh*, 75 I.C. 135: (1926) A. 70.

(2) *Mancharan* v. *Pranshankar*, 6 B. 298; *Trimbak* v. *Lakshman*, 20 B. 495 (501).

(3) *Rajaram* v. *Ganesh*, 23 B. 131; *Manghirmal* v. *Vithalram*, 5 S.L.R. 107; *Ramachand* v. *Utamchand*, (1937) S. 147.

(4) *Sethurama* v. *Meruswamier*, 41 M. 296 (305, 306) P.C.

(5) *Timappa* v. *Mahalinga*, 4 M.H. C.R. 28.

(6) *Narayan* v. *Chulban*, 15 C.L. J. 376.

(7) *Ibid*; *Ramachunder* v. *Chhabbu Lal*, 45 A. 445.

(8) *Ramachunder* v. *Chhabbu Lal*, 45 A. 445.

(9) *Pramatha Nath* v. *Pradhyamna*, 52 C. 809 P.C.; *Damodar* v. *Uttamram*, 17 B. 271 (288).

1602. **Service Inam.**—Inam villages granted by Government to the grantee and his male heirs for services rendered to the State, are not, by the Hindu Law in force in the Southern Mahratta country, distinguishable from other ancestral real estates and are divisible among the heirs of the grantee.[1] The enfranchisement of village service Inams does not alter its incidents since the enfranchisment has merely the effect of separating the land from the office and imposing thereon a quit-rent instead of the full assessment. The effect of enfranchisement on the issue of a title is to exonerate the inam from the conditions of service and convert it into ordinary property subject to the payment of quit-rent and not to resume the same from the family or person entitled to the hereditary office and to make a fresh grant of the same.[2]

1603. **Costs.**—As the plaintiff in a partition suit commences it for his own advantage, convenience and security and as the defendant, as joint owner, holds, his undivided share always subject to the right of the plaintiff to demand partition, the parties' costs of the suit up to the stage of the preliminary decree, and the costs of the partition should be divided between the parties in proportion to their respective shares in the estate.[3] If, however, there has been a frivolous contest, the party, by reason of whose opposition unnecessary costs are incurred, may be made liable.[4]

1604. **Partition Act.**—In making a partition, the court may resort instead of partition by metes and bounds. This Act will be found printed and annotated in the Appendix.

Mutual non-liability of account.

190. (1) On partition accounts must be made only of such a property as is available at the date of demand,[5] or division of status.[6]

(2) In the absence of fraud or misappropriation, the manager is not liable to account to the co-parceners for past transactions[7] or to pay them mesne profits in respect of property in his possession.[8]

(3) Provided that if partition is demanded and refused or a co-parcener is excluded from joint or separate possession to which he was entitled under an arrangement, he may be allowed mesne profits from the date of such refusal or exclusion.[9]

(4) Nor are the other members entitled to the cost of improvement or are accountable for the profits made from property in their separate possession.

1605. **Analogous Law.**—It is a general rule that partition must be made *rebus sic standibus*—as on the date of demand or the suit for partition, and that no claimant can demand an account of back profits of the properties pur-

Clause (1).

(1) *Bodhrao* v. *Nursingh*, 6 M.I.A. 426.
(2) *Gunaiyan* v. *Kamakchi*, 26 M. 339.
(3) *Shama Soondaree* v. *Jardine Skinner & Co.*, 12 W.R. 161 (163).
(4) *Dildar* v. *Bhowani*, 34 C. 878; *Shanmugam* v. *Mira*, 21 I.C. (M.) 746.
(5) *Pirthi Pal* v. *Jowahir Singh*, 14 C. 493, P.C.
(6) *Sri Ranga* v. *Srinivasa*, 50 M. 866; *Venkatarayudu* v. *Sivaramakrishnayya*, 58 M. 126; *Sarvothamma* v. *Govinda*, (1937) M. 11; *Sukhdeo* v. *Basdeo*, 57 A. 949.
(7) *Parmeshwar* v. *Govind*, 44 C. 459 and cases cited *post*.
(8) *Pirthi Pal* v. *Jowahir Singh*, 14 C. 493 P.C.
(9) *Shankar* v. *Hardeo*, 16 C. 397 P.C.

chased and sold by the manager prior to the date of claim,[1] it being assumed that all past transactions were consented to or acquiesced in, by the other co-parceners. As observed in a case: "The broad and general rule is that while there is a manager of a Hindu family, he and he alone is responsible, and that those who seek partition must take the estate as they find it when partition is asked for. That general rule has its exceptions engrafted upon it in favour of the minor, for it is said that the rule rests upon the acquiescence or presumed acquiescence of all adult members of the family in the management, and no such acquiescence can be presumed in the case of minors."[2]

1606. But this does not imply that a minor is entitled to call for account. The only occasion for accounts arises when the manager is shewn to have been guilty of fraud or misappropriation. Otherwise there is no liability to account for past transactions, though the court is justified in decreeing mesne profits as from the date of the suit up to the date of possession.[3] But this does not mean that there should be no accounts at all, that the coparceners are bound to accept the *ipse dixit* of the manager. The coparceners are entitled to challenge the manager's statement as to the existence of assets, but the inquiry must be confined to the existing assets[4] in the hands of the manager and of the other members. The parties have no right to look back and claim relief against past inequality and enjoyment of the members or other matters. All that they are entitled to shew is that the expenditure which the manager says has been incurred, has not been incurred or that the savings of the joint family funds have not been entered in the accounts.[5]

Clause (2).

1607. The manager is not a trustee accountable to the other co-parceners for his management and liable to them for his negligence and mismanagement. He is a coparcener himself and his position as a senior member of the coparcenership places him in a position of trust, but to whom the analogy of the trustee and *cestui que trust* cannot apply.[6] This does not mean that the manager is in no case liable to account for past profits made by him, or exempt him from making good any misappropriations proved against him. Where the manager is

(1) *Davitaram* v. *Narayanarav*, (1877) B. P. J. 175; *Narayan* v. *Nathaji*, 28 B. 201; *Pranjivan Das* v. *Ichharam*, 39 B. 734; *Balkrishna* v. *Muthusami*, 32 M. 271; *Chuckun* v. *Poram Chunder*, 9 W.R. 483; *Obhoy Chunder* v. *Paree Mohun*, 13 W.R. 75 F.B.; *Bhowani Prasad* v. *Jugger Nath*, 13 C.W.N. 309: 3 I.C. 241; *Parmeshwar* v. *Gobind*, 43 C. 459 (464, 465).

(2) *Haridas* v. *Narotam*, 14 Bom.L.R. 237 (247).

(3) *Shankar Baksh* v. *Hardeo*, 16 C. 397 P.C.; *Kanekrav* v. *Gurrav*, 5 B. 589 (595); *Ranganmani* v. *Kashi Nath*, 3 B. L.R. (O.C.) 1; *Lakshman* v. *Ramchandra*, 1 B. 561 (569), affirmed O.A. 5 B. 48 P.C.; *Sarothana* v. *Govinda*, (1937) M. 1.

(4) *Bhawani Prasad* v. *Juggernath*, 13 C.W.N. 309: 3 I.C. 241; *Parmeshwar* v. *Gobind*, 43 C. 459; *Balakrishna* v. *Muthuswamy*, 32 M. 271; *Tammi Reddi* v. *Gangireddi*, 45 M. 281 (287): *Lakshman* v. *Ramchandra*, 1 B. 561 P.C.; *Konerrav* v. *Gurrav*, 5 B. 589; *Nanabhai* v. *Nathubhai*, (1880) B. P. J. 154; *Vithoba* v. *Govind*, (1890) B.P.J. 322; *Narayan* v. *Nabaji*, 28 B. 201.

(5) *Tammireddi* v. *Gangireddi*, 45 M. 281 (287).

(6) *Arumilli* v. *Subbharayadu*, 44 M. 656 (663) P.C.; *Shivji* v. *Datu*, 12 B. H.C.R. 281; *Damooder Das* v. *Uttamram*, 17 B. 271 (277); *Ramnath* v. *Gothuram*, 44 B. 179; *Hari Das* v. *Narotam*, 14 Bom.L.R. 237: 14 I.C. 769 (minor may obtain back profits *sed quere*, see *Srinivasa* v. *Thiruvengadatha*, 38 M. 556); *Parmeshwar* v. *Gobind*, 43 C. 459; *Bhowani* v. *Jaggernath*, 13 C.W.N. 309: 3 I.C. 241; *Ajodhya* v. *Mahadeo*, 14 C. W.N. 221: 3 I.C. 9; *Balkrishna* v. *Muthusamy*, 32 M. 271; *Lachman Das* v. *Nanakchand*, 70 I.C. (L.) 810: (1923) L. 20.

found guilty of fraud, the court may pass a personal decree against him for the amount defrauded by him.[1] And even apart from fraud, the Privy Council upheld a decree in which the High Court had debited the manager with certain items in his account with interest at 6 per cent., on the ground that he had "misapplied" them.[2] But this does not imply that the manager is in an ordinary case liable to pay interest on the sums received by him, though he had failed to invest them which he might and ought to have done. In other words, no back profits or interest can be charged for his nonfeasance as distinct from his misfeasance.[3] Where the manager is found guilty of fraud, the court may pass a personal decree against him for the amount defrauded by him.[4]

1608. Again, though the manager is not accountable for past profits except where he has been guilty of fraud, misappropriation, or gross reckless waste,[5] still where he is charged with suppression of assets, he may have to account for them, and evidence will be admitted against him of what were the properties and their value to be debited against him on the severance of shares.[6]

1609. Past Profits from Exclusion or Demand.—Since the possession of one is the possession of all, no coparcener can claim mesne profits from the manager for a period preceding the date of partition, even if a part of the assets consists of a joint family trade.[7] The only exception allowed are when a coparcener was disturbed in his possession of any specific share of property to which he was entitled under a family arrangement, when he becomes entitled both to profits and partition.[8] Mesne profits would be allowed as a matter of course where the members hold their property in *quasi*-severalty. Such are coparceners in Bengal,[9] But even under the Mitakshara, the position of the manager might be reduced to that of an agent, in which case, he would clearly be accountable to the other members. But such a case is only conceivable in a *quasi*-coparcenary, which is a creature of contract and not one of law.[10] Even in a normal family, accounts might be ordered where one member of the family has been entirely excluded from the enjoyment of the property.[11] So again, it is a case for account where a member has demanded his share and it has been improperly refused, since such demand is sufficient to constitute partition, the members refusing being taken to hold adversely to the claimant from the date of refusal. Since the institution of a suit for partition is such a demand, the plaintiff would be entitled to an account of mesne profits from that date[12] or from the date of refusal or exclusion, if not earlier.[13]

Clause (3) Mesne Profits.

(1) *Rama* v. *Raja Gopal*, (1913) M. W.N. 982: 21 I.C. 598.

(2) *Arumilli* v. *Subharayadu*, 44 M. 656 (663) P.C.

(3) *Yasobdra* v. *Samanthabadran*, 59 M. 154.

(4) *Rama* v. *Rajagopaul*, (1913) M. W.N. 982: 21 I.C. 598.

(5) *Tada Bulli* v. *Tada Bulli*, 42 B. L.J. 570.

(6) *Parmeshwar* v. *Gobind*, 43 C. 459; *Krishnayya* v. *Gnoravayya*, 41 M.L. J. 503 (509); *Sitaram* v. *Hanuman*, 8 Pat.L.T. 145: 100 I.C. 632.

(7) *Lingamuthu* v. *Ramanayya*, 13 M. L.W. 262.

(8) *Shankar Baksh* v. *Hardeo*, 16 C. 397 P.C.

(9) *Abhaychandra* v. *Pyari Mohan*, 5 B.L.R. 347; explained in *Balakrishna* v. *Muthusami*, 32 M. 271 (274).

(10) *Setrucherla* v. *Satrucherla*, 22 M. 470 (475) P.C.

(11) *Konekrav* v. *Gurrav*, 5 B. 589 ((595).

(12) *Krishna* v. *Subbanna*, 7 M. 564; *Balakrishna* v. *Muthusami*, 32 M. 271 (274).

(13) *Gangaram* v. *Sitaram*, 6 C.W. N. 698 P.C.; *Krishna* v. *Subbanna*, 7 M. 564; *Balakrishna* v. *Muthusami*, 32 M. 271 (274); *Ramasami* v. *Subramania*, 46 M. 47.

1610. But exclusion from mess and worship is not necessarily exclusion from the estate; since it may arise from personal differences. As the Privy Council observed: "Separation from commensality.... does not, as a necessary consequence, effect a division of the joint undivided property. A separation in mess and worship may be due to various causes, yet the family may continue joint in estate."[1] In this case, a joint brother had applied to the Collector for the mutation of names in respect of the joint estate, to which the plaintiff Suraj Narain had objected; but afterwards, in consequence of a compromise, he agreed that the mutation be effected in the name of Bakht Narain alone "as the head of a joint family, and the status of the family has continued joint up to date and shall remain so long as any dispute does not arise among the heirs." Owing to disputes, Suraj Narain withdrew from the joint family and went away to live at another place. He was offered an allowance which he rejected. He sued for partition and mesne profits; but the court disallowed the latter, holding that there had been no exclusion from the joint estate. This was a case of discontinuation of possession without exclusion. "In my view," said Fry, L.J., "difference between dispossession and the discontinuance of possession might be expressed in this way, the one is where a person comes in and drives out the other from possession; the other case is where the person in possession goes out and is followed into possession by other persons."[2] It need scarcely be added that any claim in respect of the revenue of a village or the like for a period anterior to the suit for partition must be included therein. It cannot be the subject of a separate suit.[3]

1611. Accounts of Private Dealings.—Where one coparcener had agreed to pay his debt due to another coparcener by setting it off against his share, it is a claim which may be adjusted in a suit for partition.[4] A member is not liable to bring to partition or to account for the profits of any property acquired by him with his own money since the preliminary decree for partition, unless it is shown that such acquisition was made from joint funds or is such as to impress upon it the character of joint property.[5]

191. In every partition provision should first be made for—

Provisions for debts, maintenance and ceremonies.

(*a*) **the payment of all family debts;**[6]

(*b*) **The payments of the father's debts by his son;**[7]

(*c*) **the maintenance of members entitled to it;**[8]

(*d*) **the thread and the marriage expenses of members payable by the joint family;**[9]

(*e*) **and such religious and other ceremonies for which the joint property is liable.**[10]

1612. Analogous Law.—At the threshold of partition stand certain family charges which must be first met before the coparcenership is

(1) *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 (88) P.C., following *Rewan Persad* v. *Radha*, 4 M.I.A. 137.
(2) *Rains* v. *Buxton*, 14 Ch. D. 537.
(3) *Vishnu* v. *Gangadhar*, 46 B. 823.
(4) *Khandubhai* v. *Balwant Rao*, (1898) B.P.J. 367.
(5) *Lachman Das* v. *Nanakchand*, 70 I.C. (L.) 810: (1923) L. 20.
(6) *Dwarka Nath* v. *Bungeshi*, 9 C.W. N. 879; *Bankeylal* v. *Durga Prasad*, 53 A. 868 F.B.
(7) *Satnarain* v. *Srikishen*, (1936) P. C. 277.
(8) *Srinivasa* v. *Tiruvengada*, 38 M. 556.
(9) Narad, IV-40; Mit. I-VII, 6; *Srinivasa* v. *Tiruvengada*, 38 M. 556.
(10) Mit., I-VII 3, 4.

broken up by partition. Of these the family debts, that is to say, such debts as are legally and properly payable out of the joint funds must be first met.[1]

Clauses (a), (b) Family debts by the father or manager.

1613. Shortly stated, there are debts incurred by the father[2] or by the manager for family necessity or benefit, and those incurred by the father and such as are not illegal or immoral. In a composite family consisting of sons and collaterals, it is manifest that while some debts might be binding on the joint family as a whole, there might be others which would be only binding on the sons. These would have to be apportioned in accordance with the liability of members, and the equity of each case. Where, for instance, the other co-parceners had agreed to pay the manager half the sum due on certain bonds, executed by the manager for family necessity, or for the purpose stated in the agreement, but it afterwards appeared that some of the bonds were executed for the personal benefit of the manager or for a purpose outside the agreement, it was held that it would be unjust and inequitable to give the manager a decree for half the amount in accordance with the agreement and that he should be treated as having forfeited his claim to the extent of the sum misapplied; and that his relief should be confined to his legitimate share of the balance outstanding.[3]

An account will also have to be taken of debts due to the family which will have to be partitioned as actionable claims.[4]

1614. The institution of a partition suit does not put an end to the management of the manager. He has to carry on the joint business till the decree effects the severance of interest. If, for example, after a partition suit is instituted, the managing member discharges certain debts and renews others even though time-barred on behalf of the family, the other members would be equitably liable to contribute to their discharge; since the manager, being liable for their repayment, has the right of contribution which he can enforce against the other members who have benefited by his management.[5]

Clause (c) Maintenance of members.

1615. Since certain female members of the family possess the right of residence and maintenance against the general estate, provision should be made for them out of the general assets before partition. For instance, the maintenance of the mother is chargeable on the general funds and not only on the share of her sons. Consequently, adequate provision should be made for it before the estate is partitioned.[6] And if it is partitioned without any provision being made, the claimant can ignore the partition and claim her right against the whole family.[7]

Clause (d) Provision for Thread and Marriage.

1616. The rule stated is in accordance with the following texts:—

(1) *Dwarka Nath* v. *Bungeshi*, 9 C. W.N. 879; *Tarachand* v. *Reeb Ram*, 3 M.H.C.R. 177 (181); *Bankey Lal* v. *Durga Prasad*, 53 A. 568 F.B.; *Krishnamurti* v. *Sundarmurthi*, 55 M. 558.

(2) *Atul Krishna* v. *Lala Nandanji*, 14 Pat. 732 F.B.

(3) *Premdai Koer* v. *Jagu*, (1921) M. W.N. 66.

(4) *Lakshman* v. *Ramchandra*, 1 B. 561.

(5) *Abraham Servai* v. *R. Muthirian*, 39 M. 288 (291); *Ramnath* v. *Goturam*, 44 B. 179 (183, 184); *Visvasankar* v. *Kasi*, 86 I.C. 225: (1925) M. 453.

(6) *Srinivasa* v. *Thiruvengada*, 38 M. 556.

(7) *Subrayudu* v. *Kamalavalli*, 35 M. 147.

Narad.—"40. For those whose intitiatory ceremonies have not been regularly performed by the father, those ceremonies must be completed by the brethren out of the patrimony.[1]

"41. If no wealth of the father exists the ceremonies of brethren must, without fail, be defrayed by the brethren already initiated contributing funds out of their own portion."[2]

To the same effect are the *placita* in Yadnavalkya,[3] the Mitakshara[4] and the Dayabhag.[5]

The text bearing on the subject of the sister's marriage expenses runs as follows:—

Mitakshara.—"5. In regard to unmarried sisters, the author states a different rule. 'But sisters should be disposed of in marriage, giving them as an allotment, the fourth part of a brother's own share.'"[6]

"6. The purport of the passage is this: Sisters also, who are not already married, must be disposed of in marriage, by the brethren contributing a fourth part out of their own allotments."[7]

1617. In a partition provision must be made for the expenses of the *upanayan* and marriage of male coparceners as well as for the expenses of the marriage of the unmarried sisters out of the family property, whether it is ancestral or separate, or self-acquired property of the father of the parties. A brother who has had his own marriage performed at the family expense is not entitled to object to a similar provision being made for the other brothers,[8] though after technical severance and before actual division, this obligation cannot be thrown on the joint family, but must be borne by the separated member.[9]

1618. The *quantum* of cost must depend upon the wealth and social position of the family. While the *Upanayan* and marriage of every coparcener is a necessary religious rite, and as such, a charge on the family estate, the same cannot be predicated of every female member of the family. For instance, while in a family comprising collaterals the marriage of sisters is a necessary charge on the joint estate, that of the coparcener's daughter is a charge upon his own individual share and cannot be deducted out of the joint fund.[10]

See this subject discussed in Chapter VII.

Clause (e) Ceremonial Expenses.

1619. The religious or other ceremonial expenses chargeable on the joint property must be arranged for before the partition of the corpus. Such are the expenses for the performance of the funeral and obsequial rites of the father,[11] and the mother,[12] the initiation ceremony of the brothers,[13] though not of their sons,[14] and indeed, any charities in accordance with the practice of the family. Where the father makes a partition

(1) Narad, IV-40, cited *per curiam* in *Srinivasa* v. *Thiruvengada*, 38 M. 556 (578), dissenting from *contra* in Smriti Chandrika, *ib.*, p. 579; and *Govindarazulu* v. *Davara*, 27 M. 206, following *Kameswara* v. *Veeracharlu*, 34 M. 422 F. B.; *Gopala Krishnamaraju* v. *Venkatanarasuraju*, (1912) M.W.N. 903.

(2) Narad, IV-41.

(3) Yad., II-125, cited in Mit., I-VII-3.

(4) Mit., 1-7-3, 4.

(5) Dayabhag, III-II-41; 3 Dig. 96, 97.

(6) Yad., II-125.

(7) Mit., I-VII-6.

(8) *Srinivasa* v. *Thiruvengada*, 38 M. 556 (576).

(9) *Venkatarayudu* v. *Sivaramakrishnayya*, 58 M. 126 (138, 139).

(10) *Jairam* v. *Nathu*, 31 B. 54.

(11) *Vappuluri* v. *Garinalla*, 34 M. 288.

(12) *Vaidyanatha* v. *Aiyasami*, 32 M. 191 (200).

(13) Mit., I-VII-3, 4: Dayabhag, III-II-41; 3 Dig. 96, 97.

(14) *Jairam* v. *Nathu*, 31 B. 54.

among his sons, he possesses the right to make such provision for charities as he may in his discretion consider necessary to a reasonable extent.[1]

1620. It was at one time held that the marriage expenses of a member incurred after the institution of a partition suit, but before the actual division, must be debited to the joint account and not to the individual coparcener concerned.[2] But this view has since been overruled by the Privy Council on the ground that the institution of a suit suffices to effect partition.[3]

192. **In a partition by metes and bounds, the allotment of shares should be made as far as possible in conformity with the following rules:—**

Equities on distribution of shares.

(1) The separate possession of coparceners of any property or which they have improved at their own expense should not be disturbed;[4]

(2) The predilection of coparceners to any property should be respected;[5]

(3) Shares should be made as compact and convenient as the nature of the property would allow;[6]

(4) The *bona fide* transferee of a defined portion of coparcenary property should be protected in his right as far as possible;[7]

(5) Inequalities of shares may be removed by the payment of owelty.[8]

1621. **Analogous Law.**—The rules here set out are condensed from the several Partition Acts relating to revenue paying estates and the cases in which they have been recognized. They are all rules conformable to natural equity which supplements all law, sacred and secular.

1622. **Maintenance of the Status Quo.**—It is a cardinal rule of all partitions that it should follow the line of least resistance, maintaining the *status quo ante* as far as possible and only deviating therefrom wherever it is necessary to equalize the shares. Where, therefore, a coparcener has been in separate possession of any portion of the joint property and has improved it at his own cost, it is both just and natural that he should claim to retain the *status quo* so far as the property in his possession is concerned.[9] This is in accordance with Hindu Law, under which, if one builds a house on ancestral land with separate funds of his own, the other members of the family have only a claim on him for other similar land equal to their respective shares.[10] Where a coparcener had been in previous possession of a certain piece of land it should be allotted to him as a whole if possible. But it should not be sub-divided.[11] It is a well-known principle

Clause (1).

(1) *Murugayya* v. *Palaniyandi*, 31 M. L.J. 147: 36 I.C. 507.

(2) *Ram Nath* v. *Gotu Ram*, 44 B. 179 (183, 184).

(3) *Ramalinga* v. *Narayana*, 45 M. 489 (495) P.C.; *Lekhraj* v. *Vishindas*, (1933) S. 260; *Venkatarayudu* v. *Sivaramakrishnayya*, 58 M. 126.

(4) *Ram Jowaya* v. *Amrit Ram*,(1885) P.R. 9 Rev.

(5) *Narayan* v. *Challan*, 15 C. L. J. 376.

(6) Story's Equity Juris., (2nd Eng. Ed.) p. 634.

(7) *Pandurang* v. *Bhaskar*, 11 B. H. C.R. 72.

(8) Or. XXVI, r. 14 (1), C.P.C.

(9) *Ram Jowaya* v. *Amrit Ram*, (1885) P.R. 9 Rev.

(10) 2 Mac. H. L., 152 followed in *Vithoba* v. *Hariba*, 6 B.H.C.R. (A.C.) 54.

(11) *Pudo Monee* v. *Dwarka Nath*, 25 W.R. 335 (342).

of equity which must be adopted in all partition cases, that, when it is inconvenient to divide a property, it must be left in the possession of the person in occupation, and the other persons who cannot conveniently get actual possession compensated.[1]

1623. Compensation for Improvements.—Where for any cause a coparcener is not able to secure possession of the property which he had improved at his own cost, he would be allowed compensation, for improvements according to the general principle thus enunciated: "Where one tenant in common lays out money in improvements on the estate, although the money so paid does not in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant in common to an allowance on a partition, in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part; nor is it necessary for him to show a previous request to join in the improvements and their refusal."[2]

Meaning of "Improvements."

1624. "A tenant-in-common in possession will be allowed for substantial and useful improvements but not for such improvements as are merely ornamental. The reason why a tenant-in-common will be allowed for improvements that are necessary and substantial improvements is because the possession of one tenant-in-common is the possession of that of his co-tenants. The court can properly render a judgment declaring that partition should be made; and also providing for an account between the parties in respect of the matters pertaining to the estate and in respect to the rents and profits already received. If there is inequality of value between one portion that cannot be divided, and another portion that can be, the Commissioner may make such allotment of parcels as will produce equality by awarding proper compensation in money."[3] It has been held in the Punjab that a sharer cannot be allotted a greater share on account of his improvements.[4] But if he is entitled to compensation, a larger share may be only a measure of it.

Clause (2).

1625. Choice of Property.—It is equally just that each coparcener should be given the choice to choose his own share. But this, again, is an equity and not his right.[5] Consequently, where parties cannot agree amongst themselves as to any item of property, the court may order the sale instead of division of the property in accordance with the provisions of the Partition Act.[6]

Clause (3).

1626. Compact and Convenient Shares.—It goes without saying that the very object of partition is to ensure the better enjoyment of the property, which requires that the property should be divided into compact and convenient shares. As Story says: "A court of equity will assign to the parties

(1) *Basunta* v. *Moti Lal*, 15 C.W.N. 555 n.: 11 C. 370.
(2) Freeman's Partition, § 510.
(3) Knapp on Partition, p. 375.
(4) *Ameerchand* v. *Mayasingh*, (1866) P.R. 16.
(5) *Narayan* v. *Challan*, 15 C.L.J. 376, following *Durfendra* v. *Purnenda*, 11 C. L.J. 189 (196); *Leigh* v. *Dickson*, 15 Q. B. D. 60; *Brickwood* v. *Young*, 2 Com.L.R. 387.
(6) S. 2, Act IV of 1893. *See* the Act printed in the Appendix.

respectively such parts of the estate as would best accommodate them, and be of most value to them with reference to their respective situations, in relation to the property before the partition. For, in all cases of partition, a court of equity does not act merely in a ministerial character and in obedience to the call of parties, who have a right to the partition; but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex equo et bono* according to its own notions of general justice and equity between the parties. It will, therefore, by its decree adjust all the equitable rights of the parties interested in the estate; and will, if necessary, for the purpose, give special instructions to the Commissioners, and nominate the Commissioners instead of allowing them to be nominated by the parties."[1] Partition must study the general convenience of all co-sharers and the special convenience of the sharer who has a special equity to any property. Where therefore, on half the land the defendant had constructed a costly building from the joint funds of the family, the court directed that the land be treated as joint family land, but that the price of one-third of half the land was made payable to the other co-sharers.[2] Here there was some equity apart from individual convenience which is no sufficient answer to a claim for partition of land by metes and bounds.[3] Where, at the time of the partition of a dwelling house, the brothers were found to have entered into an arrangement under which each was allowed an equal use of a single latrine in the house, the arrangement was held to amount to a partition which could not be interfered with except by reopening the entire partition. It was further held that the Partition Act did not apply to such a case.[4]

Good Faith Essential.

1627. But of course such improvements should have been made in good faith. But "the only good faith required in such improvements is that they should be made honestly for the purpose of improving the property and not for embarrassing his co-tenants or encumbering their estate, or hindering partition."[5]

But "if one joint tenant, or tenant-in-common, covers the whole of the estate with valuable improvements, so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvement so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding, they may have added greatly to the value of the land; because it would be the improver's own folly to extend his own improvements over the whole estate, and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case, the improver stands as a mere volunteer and cannot, without the consent of his co-tenant, lay the foundation for charging him with improvements."[6]

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(1) Eq. Juris. (2nd Eng. Ed.), p. 634.

(2) *Narayan* v. *Challan*, 15 C. L. J. 376 (379).

(3) *Ram Pershad* v. *Court of Wards*, 21 W.R. 152 (partition of a compound); *Murlidhar* v. *Ramnath*, 1 Hay 71; *Thuboo* v. *Khoob Lall*, 22 W.R. 294 (partition of a dwelling house).

(4) *Jadia* v. *Baldeo*, 17 C.P.L.R. 45.

(5) Freeman's Partition, § 510; cited in Mitra's Joint Property and Partition (2nd Ed.), 417.

(6) *Ib.*

1628. Transferee Protected.—When a coparcener has affected to transfer any specific item of coparcenary property it is but equitable to the *bona fide* transferee that he should not suffer by any distribution of shares. Consequently, it has been held that where a stranger has acquired any interest in coparcenary property, it is but equitable that in the distribution of shares such property should, as far as possible, be allotted to the transferor, so as to enable his transferee to retain or obtain possession of it.[1] But this is the transferee's equity and not his right.[2] This transferee is not before partition entitled to insist upon the possession of any portion of the undivided property as representing the share of his transferor,[3] though as already observed, the court will in a partition suit secure it to him if possible. (§ 1516.)

Clause (4).

This is taken to be the settled law governing decrees for partition.[4] Where, however, the transferee cannot be allotted his transferor's share, he is entitled to take the share that he may have got on the principle of substituted security[5] or obtain compensation from his transferor personally.[6] But he cannot recover mesne profits before the suit.[7]

1629. Owelty.—Sums directed to be paid for the purpose of equalizing the values of the shares, are in legal language, called "Owelty."[8] It cannot be awarded without an express direction of the court,[9] which is usually inserted in the preliminary decree.

Clause (5).

193. (1) In the absence of a contract to the contrary the parties to a partition shall be deemed to contract with each other as follows:—

Implied covenants on partition.

(*a*) That the interest in the property which each cosharer received on partition as his share subsists;[10]

(*b*) that there was no fraud or error in the allotment of shares,[11]

(2) Save as above, a partition once made cannot be re-opened.

(3) Provided that a party otherwise entitled to a relief on the ground of fraud, error or defect of title, may waive it by his acquiescence.[12]

Waiver of right.

1630. Analogous Law.—As previously observed, a partition may be general or partial. Where it is the latter, a fresh partition may be made of the property left undivided. But where it is complete, a fresh suit may still be necessary to rectify or amend it by making a fresh distribution of the property, if it was left out of account by mistake, inadvertence or fraud, or because it was not then available for distribu-

(1) *Pandurang* v. *Bhashkar*, 11 B.H. C. R. 72.

(2) *Narayan* v. *Gamnaji*, 5 Bom. L. R. 945.

(3) *Appovier* v. *Rama*, 11 M.I.A. 75 (85, 90).

(4) *Narayan* v. *Gamnaji*, 5 Bom.L.R. 945.

(5) *Byjnath* v. *Ramoodin*, 21 W.R. 233 P.C. *See* this rule discussed in 2 Gour's Law of Transfer (6th Ed.), § 831.

(6) *Byjnath* v. *Ramoodeen*, 21 W.R. 233 P.C.; *Bhup Singh* v. *Chedda Singh*, 42 A. 596; *Aiyyagari* v. *Aiyyagari*, 25 M. 690 (718, 719); *Saiyid Mahammad* v. *Jamad Husain*, 6 O.L.J. 495: 53 I. C. 659; *Kifayatullah* v. *Mahabir Prasad*, 1 O.L.J. 175: 24 I.C. 2.

(7) *Trimbak* v. *Pandurang*, 44 B. 621.

(8) O. Fr. *Oelte*, equality.

(9) Or. XXVI, R. 14 (1), C.P.C.

(10) *Maruti* v. *Rama*, 21 B. 333; *Ganashilal* v. *Babu Lal*, 40 A. 374.

(11) *Moro* v. *Ganesh*, 10 B. H. C. R. 444.

(12) *Rango* v. *Chinto*, (1876) B.P.J. 58.

tion, or conversely, where the parties have made division of property which did not belong to the family. It is, therefore, obvious that notwithstanding the Hindu maxim "once is partition of the inheritance made", there may be cases when it has to be reopened for correcting its inequality or remedying its defects. Moreover, it is now settled that there is a mutual implied covenant of the title in a partition, each co-sharer warranting the title of the rest. This covenant is implied even if the partition was made by court and has been the subject of a decree.[1] The relief to which the party aggrieved is entitled must depend upon other circumstances to be presently considered (**§§ 1635-1636**). And he might be deprived of the relief to which he is legally entitled by his laches, waiver or acquiescence.

1631. A partition may also be set aside on the ground of fraud.[2] or error, which of course, implies mutual mistake.[3] It cannot be set aside on the mere ground of inequity or unilateral mistake, or subsequent discovery of inequality of shares due to appreciation or latent intrinsic value then unknown to the parties. If, for example, a valuable coal mine is discovered in a parcel of land allotted to a co-sharer on partition, the other co-sharer cannot claim a share in his good luck any more than he would have been liable to re-partition if his share had been submerged by flood or destroyed by fire.

1632. Mutual Covenants of Title.—From the fact that partition implies no transfer but merely a change in the mode of enjoyment, it follows that each co-sharer is entitled to the *quantum* of interest in the property allotted to him in lieu of his share in the joint property and of his joint enjoyment thereof.

Clause (1) (a).

1633. There is generally in cases of partition an implied warranty both as to title and soundness, and if either from the defect of title or unsoundness as to a part of the property divided, a loss is caused to either party, that loss should be borne by the parties equally, unless the loss was due to the laches of the former or to any act or omission on his part done or made after the partition. The loss may be due either to ignorance of both the parties to the partition as to the nature of their rights in any of the properties which are the subject of division, or to a misunderstanding or fraud by one party or another.[4]

1634. So where a co-sharer had mortgaged his share before the partition in which the incumbered property was allotted to another co-sharer, who had no notice of the mortgage till he was obstructed by the mortgagee, whereupon he sued the mortgagor for repartition he was held entitled to a general repartition which the court decreed.[5] Such was the case of the parties to a partition, who, under a *bona fide* mistake, included, in the division of property, an orchard which did not belong to the family but was held in mortgage from a third person who subsequently brought a suit for redemption and recovered it from the party to whom

(1) *Ganeshilal* v. *Babu Lal*, 40 A. 374; following *Maruti* v. *Rama*, 21 B. 333.

(2) *Moro* v. *Ganesa*, 10 B. H. C. R. 444 (451, 452); *Rango* v. *Chinto*, (1875) B.P.J. 74.

(3) *Davloba* v. *Rayagavda*, (1883) B. P.J. 227; followed in *Maruti* v. *Rama*, 21 B. 333 (335).

(4) *Sheo Singh* v. *Lakha Singh*, 20 O. C. 79: 39 I.C. 392.

(5) *Lakshman* v. *Gopal*, 23 B. 385 (393, 394) following *Ooma Dutt* v. *Hunooman*, 22 W. R. 453.

it had been allotted at the partition. The latter sued for a repartition of the family orchard and the court held him equitably so entitled.[1] In another case, where two coparceners divided their estate in moieties under an equal partition, and some 15 years later, some one claiming by a title paramount ejected one of them from his share, he was held equitably entitled to obtain a repartition of the other moiety allotted to the other coparcener, because "they had divided under such misapprehension of the true state of the case that the Hindu Law, like common equity, would correct the error by distributing the existing but unknown burden evenly where it was placed on one only of the shares. In the case of an unknown charge, this would be at once obvious; in the case of a deduction *in specie*, it is not less true."[2] These are cases of a mutual mistake.

Cl. (1) (b). Fraud or Error.

1635. But when there is a fraudulent suppression of property the case for repartition or compensation is even clearer. For the sufferer has then not only the moral but also the legal claim for compensation. And the court has gone the length of holding such partition a nullity so far as regards the minor co-sharer defrauded by the manager. "Once it is established that whether by his own fraud, or by neglect, amounting to recklessness or wilfulness on the part of the guardian, the managing member of a joint Hindu family has robbed the infant members of the family, no question of procedure or technical requirement can be allowed to stand in the way of the civil court before which the matter is brought, compelling him to disgorge the proceeds of his robberry."[3] The facts of the case in which these observations occur were these. A stepbrother sued his two minor stepbrothers aged 13 and 11 for a revenue partition. Their mother, an illiterate woman, formally acted as their guardian in the suit who objected to the partition, but her objection was ruled out as filed out of time. She unsuccessfully appealed against the order and then sued for a declaration that the revenue partition was a nullity. The defence was *res judicata* but the court held that the minor's defence had been prejudiced by their stepbrothers's fraud in impleading a guardian who was under his thumb and who suppressed the true facts as to partible property from the court. The partition suit was in effect *ex parte* and the court held it to be subject to the rule that fraud vacates all judgments.[4] But apart from fraud, parties who were minors when their father effected a partition, may, upon their attaining majority, sue for re-partition, if they feel aggrieved by the shares as actually effected by the father. Error, without fraud is equally sufficient to entitle a party to relief. But as already stated such error must be one on the part of the court or of both parties to the partition. It must be such error as entitled a party to equitable relief. In one case, the court had passed a decree for partition which was transferred to the Collector for execution. The latter effected the partition but overlooked some of the directions of the decree and made unfair allotments of which the party aggrieved complained by

(1) *Maruti* v. *Rama*, 21 B. 333.
(2) *Devloba* v. *Regauda*, (1883) B.P. J. 227.
(3) *Raghunandan* v. *Sheo Nandan*, 17 A.L.J. 97: 49 I.C. 306 (310).
(4) *Raghunandan* v. *Sheo Nandan*, 17 A.L.J. 97 : 49 I.C. 306, following the effect of fraud on *res judicata*; *Bijai Miser* v. *Kali Prasad*, 39 A. 469; *Mohammad Sadiq* v. *Lamte Ram*, 23 A. 291 F.B. *See* on this point, S. 44, Evidence Act (I of 1872).

petition before the final decree of the civil court. The court held that it would not allow mistake of one of its agents in carrying out its directions to work permanent injustice, and directed the Collector to rectify his mistake.[1]

Where fraud acquiesced in.

1636. But there is a limit beyond which even fraud and error will not suffice to unravel a partition once closed. Such would be the case where it would act to the prejudice of an innocent third party or where a party has acquiesced in the violation of his right after full knowledge. And in this case, lapse of time is a strong governing factor.[2] It may deprive a person of his just right, or it may alter his remedy to one for a mere money compensation.[3]

1637. Re-partition or Compensation.—The question whether a party suffering from unequal partition is entitled to a re-distribution of the shares or to merely money compensation must depend upon a variety of circumstances. If he is alert and no other equity has intervened, he would no doubt be entitled to the equalization of his share by reallotment or rectification as the justice of the case may require. In one case, it was said to be the practice of the Calcutta High Court "that where a property has been divided and one of the parties affected by the division complains of what has been done, he is not at liberty to ask the court to order the rectification of a small portion of the property so divided. If the arrangement is not to be carried out as it stands, it must be entirely revised, that is, the whole of the property divided must be again brought before the court, and there must be division *de novo* of the property in its entirety."[4] This is certainly still the rule; and based on the reason that a partial partition is unfair to the defendant and otherwise impracticable, since one cannot always divide a part without looking at the whole, though this might at times be possible and acceptable to the defendant[5] in which case, it is manifest that the court will not order a general re-partition: In a case of this kind the only principle that can be adopted is that the court should ascertain the relative value of the lands originally made over by the defendant to the entire lands of the defendants; and that it should assign, out of the present share of the defendants, lands bearing the same relative value to the whole that the former lands bore, without prejudice to the general partition.[6] In other words, the sufferer should be compensated with the least disturbance of the completed partition. So it has been held that the mere proof of fraud or mistake does not entitle the party to reopen the whole partition "except in so far as is necessary to apportion the loss which arises out of the new fact,[7] with the result that the share originally allotted is not liable to variation in consequence of the new births or deaths, since.[8]

1638. The right is based simply upon this principle that when parties arrive at a partition either by agreement or by a decree, which

(1) *Ramchandra* v. *Krishnaji*, 40 B. 118 (125).

(2) *Samangouda* v. *Bharmangouda*, 1 B.H.C.R. 41; *Moro* v. *Ganesh*, 10 B.H. C.R. 444 (451, 452).

(3) *Rango* v. *Chinto*, (1876) B. P. J. 58.

(4) *Tripoora* v. *Gopal Nath*, 25 W.R. 358 (360, 361).

(5) *Burugapalli* v. *Nandigam*, 10 I.C. 57.

(6) *Ooma Dutt* v. *Hunooman*, 22 W. R. 453 (455); *Ganesh Lal* v. *Babulal*, 16 A.L.J. 339.

(7) *Ganeshilal* v. *Babulal*, 40 A. 374 (381).

(8) *Partap Singh* v. *Dalip Singh*, 52 A. 596 (603, 604).

after all is only a more solemn and binding form of agreement, there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss, not contemplated in the partition proceedings, unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which, of course, in the case of a decree, is adopted by the court making the decree, the mistake can be set right *pro tanto*.[1] But though it is certainly the rule, it is based on the reason that a partial re-partition is unfair to the defendant. If, therefore, he does not object, the court may rectify the partition without unravelling it.[2] But it is for the court to see whether this is possible. The plaintiff must sue for a general re-partition.

All property placed into hotchpot.

194. In a suit for a general partition every member of the co-parcenary is liable to bring into hotchpot all partible joint property.[3]

1639. Analogous Law.—It is a cardinal rule of partition that all parceners must throw all joint property into the "hotchpot"[4] for the purpose of equalizing shares.[5] This does not mean that all property is to be individually partitioned. All it means is that it is all to be taken into account in measuring the share of each coparcener. If some property is in the hands of members, not parties to the suit, the court should implead them so that all property may be brought into the hotchpot.[6]

Property which has been the subject of a previous arrangement or partition between the parties is no longer available for re-partition and should be left out of account. The shares taken by some of the coparceners who separated before the partition cannot be taken into account.[7] Nor is impartible property to be taken into consideration.

Only joint property should be so brought.

1640. Besides joint property, the manager may be called upon to account for property which he has improperly alienated. So where the father had gifted away some property to one son out of spite towards the other and with a view to punish and disinherit him, the gift was held to be beyond the competency of the father and the property so gifted was held liable to partition.[8] But gifts which the father or the manager is entitled to make to junior members at the time of marriage[9] or other ceremonious occasions, though made out of the common fund, are not liable to thrown into the hotchpot.[10]

(1) *Ganeshilal* v. *Babulal*, 40 A. 374.

(2) *Burugapalli* v. *Nandigam*, 10 I. C. 57.

(3) From Fr. *Hochepot—hocher*, to shake and *pot*, a pot or dish; a dish of mixed ingredients—thence, in law, a commixture of property for equality of division. *Rajendra* v. *Brojendra*, 37 C.L. J. 191; *Tarini Charan* v. *Debendralal*, 60 C. 655.

(4) *Rajendra* v. *Brojendra*, 37 C.L.J. 191; *Tarini Charan* v. *Debendralal*, 60 C. 655.

(5) *Ram Lochun* v. *Raghoobur*, 15 W. R. 111; *Laljeet* v. *Rajcoomar*, 25 W.R. 353; *Lakshman* v. *Ramchandra*, 1 B. 561; *Koonerrav* v. *Gurrav*, 5 B. 589 (595).

(6) *Lakshman* v. *Ramchandra*, 1 B. 561 (570); *Hari* v. *Ganpet Rav*, 7 B. 272; *Ali Hossein* v. *Ali Hossein*, 2 Agra 96; *Ghansham* v. *Saraswati Bai*, (1892) B. P. J. 415; *Wamanji* v. *Atmaram*, (1883) B.P.J. 337; *Mahbub* v. *Abdul Rahman*, (1912) P.L.R. 84: 13 I.C. 816.

(7) *Pranjivandas* v. *Ichharam*, 39 B. 734; *Gauri Shankar* v. *Atmaram*, 18 B. 611.

(8) *Nand Ram* v. *Mangalsi*, 31 A. 359.

(9) *Sheo Gobind* v. *Sham Narain*, 7 N. W. P. H. C. R. 75.

(10) *Shivmurtappa* v. *Virappa*, 1 Bom. L.R. 620.

1641. A partition suit is in the nature of a cross-suit in which it is open to the defendants to have their own shares divided off and given to them, and the fact that the partition suit has been brought by the purchaser cannot alter or annul that right. A defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff and could be called on to pay court-fee on the value of his claim.[1] Where a suit instituted by a member of a joint family for partition is dismissed on the ground that all the property had not been brought into the hotch-pot, and there was no subsequent division of the property by metes and bounds, it was held that the family continued joint and had never been divided.[2]

Presumption of complete partition.

195. (1) Every partition is presumed to be complete both as to the parties and the property then liable to partition:[3]

Limits of the presumption.

(2) Provided that on a partition made between two or more branches of a family, such presumption does not extend to the severance of interest of all the branches thereof *inter se*;[4] and in a partition between coparceners such presumption does not extend to the severance of interest of their descendants.[5]

Illustrations.

(*a*) *A* and *B* are two branches of a joint family possessed of property both partible and impartible. The partible property has been the subject of frequent partitions, between the two branches, but the impartible property continued to remain in possession of the junior branch. There is no presumption that it ceased to be joint property.[6]

(*b*) *A*, *B* and *C* form a joint-family. *A* separates from *B* and *C*. On *A's* separation, the presumption that *B* and *C* continue joint disappears. The fact that they continue joint must be proved.

(*c*) *A*, *B* and *C* form a joint-family. They effect a general partition. Such a partition raises a presumption that all the three separate from each other, but it does not raise a presumption that all the three separate also from their own descendants.[7]

(*d*) *A*, *B* and *C* form a joint family. They effect a general partition, after which *C* is found in sole possession of the family dwelling-house. There is no presumption that he holds it for the joint family.

1642. **Analogous Law.**—This rule is supported by the following:—

Manu.—"Once is the partition of an inheritance made; once is damsel given in marriage; and once does a man say: 'I give'; these three are, by good men, done once for all and irrevocably."[8]

It is natural that when persons wish to divide, they should do so once for all, and leave no dispute for future settlement. All property immediately available for partition is, therefore, presumed to have been made the subject of partition. But there may still remain property which, though partible, is not immediately liable to, or made available

(1) *Nand Ram* v. *Mangalsin*, 31 A. 359.
(2) *Hazari Lal* v. *Ram Lal*, 47 A. 746.
(3) Manu, X-47; *Vaidyanath* v. *Ayyasamy*, 32 M. 191.
(4) cf. *Hari Baksh* v. *Babu Lal*, 5 L. 92 P.C.
(5) *Ib.*
(6) *Konammal* v. *Annadana*, 51 M. 189 (204, 205) P.C.
(7) *Jai Narain* v. *Prag Narain*, 29 C.W.N. 775 P.C.: 85 I.C. 2 P.C., explaining *Hari Baksh* v. *Babu Lal*, 5 L. 92 P.C.; *Bala Bux* v. *Rukhmabai*, 30 C. 725 P.C.
(8) Manu X-47 (Jone's Tr.)

for partition. Such, for instance, is the share allotted to the mother,[1] and the property allotted to other relations for maintenance. Property subject to an incumbrance may for convenience be left joint, and other reasons may operate to prevent the completion of partition, *e.g.*, some property may be concealed. But such cases are exceptional and rare, and law, therefore, presumes the completeness of partition both in respect to the parties and property.

This section enunciates three propositions, the first of which is supported both by the text and cases, while the second and third are necessary deductions arising therefrom and are supported by judicial authority. They are: (1) That a partition is presumably exhaustive both as to the parties and property.[2] (2) That the patition between some coparceners does not necessarily imply a severance of interest of all coparceners, though it would have that effect if their shares are also intended to be ascertained and defined; in other words, there is, with the actual partition of some, presumed the intellectual partition of the rest.[3] But, of course, this is only a presumption which is capable of rebuttal by proof that, on separation of some of the members, the rest continued to be joint.[4] (3) Thirdly, while this would be necessary in a partition between brothers, where, if one or more should separate from the rest, the shares of each has to be ascertained; it is not necessary to ascertain the shares of a separating brother's descendants since he takes *per stirpes*, that is to say, for himself and his sons and grandsons. There can, therefore, be no presumption that, on his partition from his brothers, he and his descendants become presumably divided.[5] As will be seen all the three propositions are covered by the authority of decided cases.

1643. Presumption on Partition.—"Once is a partition made," says Manu[6] consequently, the fact that there has been a partition raises certain presumptions, namely, that all that was partible had been partitioned and all persons who had a share have received their share. But the fact that the family had partitioned all partible property raises no presumption that the impartible estate had become separate. An impartible estate once shown to be joint will be presumed to so continue until the right of survivorship is given up. It cannot be inferred from the mere fact of separate possession and enjoyment, for this is the incident of impartibility.[7]

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(1) Manu, IX-192.

(2) *Vaidyanatha* v. *Aiyasamy*, 32 M. 191; *Kumarappa* v. *Vanangamudi*, 55 M. 483; *Anandi Bai* v. *Subba Bai*, 35 B. 293; *Sundaramma* v. *Kamakotiah*, 26 I.C. (M.) 514; *Subba* v. *Alagammal*, 31 I.C. (M.) 674; *Narayan* v. *Nana*, 7 B. H. C. R. (A. C.) 153; *Shah Dev Singh* v. *Lajwanti*, (1932) L. 479.

(3) *Hari Baksh* v. *Babu Lal*, 5 L. 92 P.C.; *Ranganatha* v. *Narayanasamy*, 31 M. 482, explaining *Balabux* v. *Rukmabai*, 30 C. 725 (736) P.C.; *Rajarathnasami* v. *Anji*, 10 I.C. (M.) 103; *Parbati* v. *Maharaji Singh*, 6 I.C. (A.) 795; *Ramaswamy* v. *Mumandy*, 20 M.L.J. 709: 5 I.C. 343; *Nand Kishore* v. *Bohra*, 14 I.C. (A.) 237; *Ghose Lal* v. *Badri Singh*, 22 I.C. (O.) 129; *Suraj Pal* v. *Gajraj*, 1 O.L.J. 698: 26 I. C. 600; *Nihal* v. *Kishore Chand*, (1910) P. R. 97: 8 I.C. 999.

(4) *Jatti* v. *Banwari Lal*, 4 L. 350 P.C. : (1923) P.C. 136, explained in *Hari Baksh* v. *Babu Lal*, 5 L. 92 P.C.; *Parsotam* v. *Jagannath*, 41 A. 361; *Gadian* v. *Gadian*, 1 M.L.W. 799: 26 I. C. 43; *Bal Krishna* v. *Raju*, (1915) M. W.N. 17: 27 I.C. 736.

(5) *Hari Baksh* v. *Babu Lal*, 5 L. 92 P.C.: (1924) P.C. 126 (132, 133), explaining *Bala Bux* v. *Rukmabai*, 30 C. 725 P.C.; *Balkishen* v. *Ram Narain*, *ib.*, 738 P.C.; *Jatti* v. *Banwari Lal*, 4 L. 350 P.C.: (1923) P.C. 136.

(6) Manu, X-47.

(7) *Konammal* v. *Annadana*, 51 M. 189 (204, 205) P.C.; *Collector of Gorakhpur* v. *Ram Sunder*, 56 A. 468 P.C.

1644. Limits of the Rule.—It should, however, be added that the "parties" presumed to have partitioned mean only such persons as with reference to the evidence given would necessarily take a share. For instance, on proof of partition between two branches, a general partition between all the branches may be presumed, but it does not imply a separation of the members of each branch *inter se*.[1] Even as regards the several branches it is merely a legal presumption capable of rebuttal by proof that on separation of some of the members the rest continued to remain joint.[2] But even that presumption is not warranted in the case of a person and his own descendants.[3]

When Sons only Separate.

1645. It has been seen that Hindu law contemplates a complete and exhaustive partition both as to the person and the property. But this is not always possible. It sometimes happens that only a portion of the joint property is divided, or that only a single member may choose to separate from the family. In that case, he alone will go out but the others will still continue to remain joint as before. In either case, the presumption of their jointness disappears.[4] It does not necessarily dissolve their union. (§§ **1642-1643.**) Nor does it preclude proof of the fact that the partition was partial as to the persons or the property (**S. 205**), while, on a partition being made, there is the presumption that it is complete there is no presumption as to time, though partition is admitted.[5]

Where Property is kept Joint.

1646. Where on a partition some of the joint property remains undivided, the question whether the co-owners thereof will still continue to enjoy the status of coparceners depends upon their intention. If the intention was to divide the entire estate, but some items of property were nevertheless left whether designedly or through inadvertence, its quondam coparceners will retain it only as co-owners[6] unless the partition being partial, the residue of the estate is kept joint, in which case the status of jointness would enure beyond the partial partition and the pro-

(1) *Jai Narain* v. *Prag Narain*, 29 C. W.N. 775 P.C. : 85 I.C. 2; *Hari Baksh* v. *Babu Lal*, 5 L. 92 P.C.; *Ranganatha* v. *Narayanasami*, 31 M. 482 explaining *Balabux* v. *Rukhmabai*, 30 C. 725 (736) P. C.; *Rajarathnasami* v. *Anji*, 10 I. C. (M.) 103; *Parbati* v. *Maharaji Singh*, 6 I.C. (A.) 795; *Ramaswamy* v. *Mumandy*, 20 M.L.J. 709: 5 I.C. 343; *Nand Kishore* v. *Bohra*, 14 I.C. (A.) 237; *Jagmohan Das* v. *Kunwar Singh*, 95 I.C. 135 : (1926) A. 532; *Ghose Lal* v. *Badri Singh*, 22 I. C. (O.) 129; *Suraj Pal* v. *Gajraj*, 1 O.L.J. 698 : 26 I.C. 600; *De* v. *Sheonath*, 2 Luck. 459: (1927) O. 149; *Raghunandan* v. *Mahabir*, 96 I.C. 448: (1926) Pat. 545; *Nihal* v. *Kishore Chand*, (1910) P.R. 97 : 8 I.C. 999.

(2) *Jatti* v. *Banwari Lal*, 4 L. 350 P. C.: (1923) P.C. 136, explained in *Hari Baksh* v. *Babulal*, 5 L. 92 P.C.; *Parsotam* v. *Jagannatha*, 41 A. 361; *Gadian* v. *Gadian*, 1 M.L.W. 799: 26 I.C. 43; *Bala Krishna* v. *Raju*, (1915) M.W.N. 17: 27 I.C. 736.

(3) *Jai Narain* v. *Prag Narain*, 29 C. W.N. 775 P.C. : 85 I.C. 21; *Hari Baksh* v. *Babulal*, 54 C. 92 P.C. : (1924) P.C. 126 (132, 133), explaining *Balu Bux* v. *Rukmabai*, 30 C. 725 P. C.; *Balkishen* v. *Ramnarain*, *ib.*, 738 P.C.; *Jatti* v. *Banwari Lal*, 4 L. 350 P.C.: (1923) P.C. 136.

(4) *Anandi* v. *Hari*, 35 B. 293; *Dagadu* v. *Sakhubai*, 47 B. 773; *Beni Prashad* v. *Gurdevi*, 4 L. 252; *contra* dissented from in the last two cases; *Gauri Shankar* v. *Atmaram*, 18 B. 611 held overruled by *Girja Bai* v. *Sadashiv*, 43 C. 1081 P.C.

(5) *Rukhman* v. *Kirpa*, (1913) P.L.R. 338: 22 I.C. 134; *Tika* v. *Mahabir*, 19 O.C. 92 : 36 I.C. 629; *Mendava* v. *Jagannath*, 17 O.C. 235: 25 I.C. 689.

(6) *Appovier* v. *Rama Subba Ayyar*, 11 M.I.A. 75 (92); *Yerukola* v. *Yerukola*, 45 M. 648 F.B.; *Guru Lal* v. *Gajasa*, (1932) N. 92.

perty so held would on the death of any member be subject to survivorship.[1]

Re-opening of Partition.

196. The following persons are entitled to claim their share of the property even after its partition:—

Right of absent and disqualified coparceners to re-partition.

(1) A coparcener who being conceived at the date of partition is subsequently born;[2]

(2) Any other son born after the partition if the father had reserved no share for himself;[3]

(3) Absent coparcener;[4]

(4) Disqualified coparcener on the removal of his disqualification for which he was excluded from partition;[5]

(5) A son of such disqualified coparcener born after the partition.[6]

1647. **Analogous Law.**—The following texts bear on the subject of clause (1):—

Yadnavalkya.—"When after the sons, etc., have become separated, a son is born of a wife of the same class, he becomes a partner of a share, or his allotment should be made out of the visible estate, corrected by the necessary adjustment of profit or loss."[7]

Mitakshara. (Explaining the last).—"9. A share allotted for one who is born after a separation of the brethren, which took place subsequently to the death of the father, at a time when the mother's pregnancy was not manifest is 'his allotment.' But whence shall it be taken? The author replies: 'from the visible estate' received by the brethren, 'corrected for income and expenditure.' Income is the daily, monthly or annual produce. Liquidation of debts contracted by the father is expenditure out of the amount of property, corrected by allowing for both income and expenditure, a share should be taken and allotted to the posthumous son.

"10. The meaning here expressed is this: "Including in the several shares, the income thence arisen and substracting the father's debts, a small part should be taken from the remainder of the shares respectively, and an allotment equal to their own portion should be thus formed for the posthumous son born after partition.

"11. This must be understood to be likewise applicable in the case of a nephew, who is born after the separation of the brethren, the pregnancy of the brother's widow, who was yet childless, not having been manifest at the time of the partition.

"12. But if she were evidently pregnant, the distribution should be made after awaiting her delivery, as Brihaspati directs: Partition of heritage takes place among his brothers having waited until the delivery of such of the women, as are childless but pregnant.[8] This text should be interpreted 'having waited until the delivery of the women who are pregnant'.

Subodhini (Commenting on Mit. § 9, *supra*).—"If agriculture or the like have been practised by the brethren with their several shares after separation, the gain is 'income". The payment of the father's debts, the support of their own families and similar distributions constitute 'expenditure.' Counting the income in the shares, and deducting the expenditure from the allotments as much as may be in each instance, an allotment be thus adjusted for a son born of a pregnancy which existed at the moment of the father's decease as well as at the time of the partition though not then manifest."

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(1) *Phoolbas Kuar* v. *Lala Jogeshar*, 1 C. 226 P.C.; *Konammal* v. *Annadana*, 51 M. 189 (204, 205) P.C.

(2) Yad. II-122 (Mandlik), p. 216; Mit., VII-12. § 1647.

(3) Manu, IX-216 cited in Mit. I-VI-4; *Ganpat* v. *Gopal Rao*, 23 B. 636.

(4) *Krishna* v. *Somi*, 9 M. 64 (78) F.B.

(5) Mit. II-X-7; Mayukh, IV II-2.

(6) *Krishna* v. *Somi*, 9 M. 64 (69) F.B.

(7) Yad., II-122 (Mandlik), p. 216.

(8) The first part of this passage corresponds with a text of Vashisth's Institutes (XVII-36) : but the sequel of it is not to be found in that work—Code., to Mit. I-VII-12.

1648. The Mitakshara devotes a whole section[1] to consideration of the case of a son in the womb and the after-born son, distinguishing their rights and placing the former in the category of living persons at the date of partition.

1649. This solicitude for the unborn son is consistent with the general policy of Hindu Law which counts birth as from the moment of conception.[2] So in the Smiriti Chandrika it is said: "The venerable teachers direct that ownership of wealth is acquired by birth alone." "By birth alone" is meant "by the very formation of the *foetus* in the mother's womb."[3] So in the Tagore case[4] the Privy Council observed: "By a rule now generally adopted in jurisprudence, this class would include children in embryo who afterwards came into separate existence."[5] So in a Madras case it was held that the rights of a son in the womb to ancestral property cannot be defeated by a will or a gift.[6] This case was however, distinguished in Bombay on the ground that it did not involve any question as to the binding character of any partition already made.[7] In this view it was laid down that the right of the after-born son depends upon whether the father had or had not reserved any share for himself. If he had, the after-born son can only share with his father but has no claim against his divided brothers. But if he had reserved no share, then he is entitled to claim a share from his separate brothers not only in the property divided, but also in the accumulations made with the help of the divided property.[8]

1650. But, of course, the case of the subsequently begotten son is different to that of the son begotten at the date of partition. The case of the former is directly covered by the following texts:—

Clause (2).

Manu.—"A son born after a division shall alone take the paternal wealth."[9]

Brihaspati.—"A son born before the partition has no claim on the wealth of his parents, nor one begotten after it on that of his brother."[10]

Mitakshara. (Citing the last text).—"The meaning of the text is this. One born previously to the distribution of the estate, has no property in the share allotted to his father and mother who are separated from their elder children nor is one born of parents separated from their children a proprietor of his brother's allotment."[11]

As regards the after-born son it is settled that he cannot claim any share from his separated kinsmen[12] if his father was allotted a share and that his only right is to partition his father's share. But where the father has received no share and is unable to provide for him, then he is entitled to claim a share from his separated brothers.[13] This view is in some measure supported by the *dictum* of the Privy Council, who said:

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(1) II-S. VI.
(2) Sm. Ch. I-27.
(3) *Ib.*
(4) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.
(5) *Tagore* v. *Tagore*, 9 B.L.R. 377 (397) P.C.
(6) *Minakshi* v. *Virappa*, 8 M. 89.
(7) *Ganpat* v. *Gopalrao*, 1 Bom. L. R. 123 (125, 126).
(8) *Ganpat* v. *Gopal Rao*, 1 Bom. L. R. 123 (126), following *Chengamma* v. *Munisami*, 20 M. 75.
(9) Manu, IX-216, cited in Mit., I-VI-4.
(10) Brihaspati, cited in Mit., I-VI-4.
(11) Mit., I-VI-5.
(12) *Shivaji Rao* v. *Vasant Rao*, 33 Bom. 267 (271).
(13) *Ganpat* v. *Gopal Rao*, 23 B. 636; *Shivaji Rao* v. *Vasant Rao*, 33 B. 267 (272); *Chengama* v. *Munisami*, 20 M. 75.

"In the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. The rule is to be found in the Dayabhag, Ch. VII, Ss. 10, 11 and 12, which is a Bengal authority, but it refers to Vishnu and Yadnavalkya, authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely insisted on by the Benares school than by the Bengal school of law. But their Lordships are not now affirming the law on this point nor are they deciding or prejudicing any question which may arise hereinafter."[1]

1651. Absent Coparcener.—The absence of a coparcener cannot delay partition but it must preserve his share, which may be made over to his wife or other heir[2] and if partition is by suit, they should be equally made parties thereto.[3] The absent coparcener cannot be in a worse position than a minor or a lunatic whose share cannot be ignored because he is not able to claim it for himself. Where a definite share has been allotted to the absent coparcener the latter may reopen the partition on the ground of fraud and in his case the fact of inequality would be evidence of it. But apart from fraud, he can obtain no redress. Where, however, the absent coparcener is taken up for dead, his return would necessarily reopen the partition to the extent necessary for his share.

Clause (3).

The position of an absent coparcener is like that of minors, idiots and other disqualified persons. (§ **1652.**)

1652. Disqualified Coparcener.—Where a coparcener is excluded from participation in the family partition by reason of his disqualification, a question may arise whether his disqualification is absolute (**§§ 1596-1597; S. 304 q.** *v.* since in the latter case the subsequent removal of his disqualifications would entitle him to compel his kinsmen to cede to him his legitimate share. His right to a share is declared by the following text:—

Clause (4).

Mitakshara.—"7. If the defect be removed by medicaments or other means as penance and atonement at a period subsequent to a partition, the right of participation takes effect by analogy to the case of a son born after separation."[4]

1653. The analogy of a son born after separation is merely intended to strengthen the argument. It does not qualify his right. Of course, where a disqualified son has already received some share, though not proportionate to his right, it will not be possible to reopen the partition. But, otherwise, a disqualified coparcener may perhaps be more closely compared to an absent coparcener believed to be dead, who afterwards turns up to claim his share, which will have to be made up out of the other coparceners' allotments.[5]

1654. The right of an after-born son to a share, if necessary, by reopening the whole partition, is subject to clause (1), *i.e.*, he must be present *in germio matrix* at the time of the partition. But when he was not so present, his right to a

Cl. (5). Son of Disqualified Coparcener.

(1) *Bishenchand* v. *Asmaida*, 6 A. 560 (574, 575) P.C.
(2) *Srinath* v. *Probhatchandra*, 11 C. L.J. 580 : 6 I.C. 244.
(3) *Ib.*
(4) Mit. II-X- 7; Mayukh, IV-II-12.
(5) St., H.L., 207; *Krishna* v. *Sami*, 9 M. 64 (78) F.B.

share cannot be defeated if his father received no share, whether because he was disqualified,[1] or for any other reason. As such, this clause is only a branch of a more general rule enunciated in the next section.

[*See* the subject further discussed under the next section.]

Right of after-born son.

197. (1) In a partition between the father and his sons, an after-born son becomes entitled to his share on a re-partition, if he was begotten before partition, but not otherwise;[2]

(2) Where, however, in a partition, the father had been allotted no share for himself, a son after-born, even though not then begotten, is entitled to his share out of the property already partitioned, if necessary, by demanding a re-partition.[3]

1655. **Analogous Law.**—This section is supported by the undernoted cases. The fiction of considering an unborn child was actually born is not limited to Hindu Law, since it is a wider rule which found a place in the Civil Law and is a part of the English Law.[4]

Manu.—"A son born after a division shall alone take the paternal wealth.[5]

Brihaspati.—"A son, born before partition, has no claim on the wealth of his parents; not one, begotten after it, on that of his brother."[6]

Mitakshara.—"The sons being separated from their father, one, who shall be afterwards born of a wife equal in class, shall share the distribution. What is distributed, is distribution, meaning the allotment of the father and the mother; he shares that; in other words, he obtains after (the demise of) parents, both their portions his mother's portion, however, only if there be no daughter; for it is declared that "Daughters share the residue of the mother's property, after payment of her debts."[7]

1656. **Posthumous Son.**—The Mitakshara devotes a whole section to the rights of a posthumous and an after-born son. Taking the case of a posthumous son first, the Mitakshara provides that where the "brothers have made a partition subsequently to their father's demise, how shall a share be allotted to a son, born afterwards?" to which the author replies, "His allotment must absolutely be made out of the visible estate 'corrected for income and expenditure.'"[8] These words are explained to mean that "out of the amount of property corrected by allowing for both income and expenditure a share should be taken and allotted to the posthumous son. In other words, a posthumous son is entitled to a share out of the partitioned estate, if necessary, by its repartition.

The case of an after-born son is next taken up; but here the Mitakshara merely provides that if the brothers know that their mother is *enciente*, they must defer partition until her delivery;[9] but if they proceed to partition, the son would take his share as if he were then alive.

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(1) *Krishna* v. *Sami*, 9 M. 64 (69), distinguishing *contra* in *Pareshmani* v. *Dinanath*, 1 B.L.R. (A.C.) 117; *Kalidas* v. *Krishan*, 2 B.L.R. 102 F.B., on the ground that they were presumably cases under the Dayabhag law.

(2) Dig. I-V-7; *Blasson* v. *Blasson*, 2 De. G. J. & S. 665 : 46 E.R. 334, cited in *Kusum Kumari* v. *Dasrathi*, 34 C.L.J. 323 : 67 I.C. 210.

(3) *Krishna* v. *Sami*, 9 M. 64 (77, 78) F.B.; *Chengama* v. *Munisami*, 20 M. 75.

(4) *Blasson* v. *Blasson*, 2 De. G.J. & S. 665 : 46 E.R. 534, cited in *Kusum Kumari* v. *Dasrathi*, 34 C.L.J. 323 : 67 I.C. 210.

(5) Manu, IX-216.

(6) Brihaspati, cited in Mit. I-VI-4.

(7) Mit., I-VI-2.

(8) Mit., I-VI-8.

(9) *Ib.*, I-V-12.

1657. After-born Son.—Under Hindu Law a child is presumed to come into existence from the moment of its conception. Consequently, where partition is effected while a coparcener was in the womb, on his birth he becomes entitled to a share which he may claim by reopening the partition.[1] But if the partition was completed before his conception he has no right against his separated brothers though he may seek a partition of his father's allotment, including the allotments of those who are then in union with him.[2]

1658. Position of Heirs of the Excluded Coparcener.—The position of the heirs of the excluded person has occasioned some conflict in the judicial decisions of the country. For while it is conceded that the position of a child *in germio matrix* is exceptional, the indulgence which permits the fiction to treat a child in the womb as a child already born cannot be extended to one subsequently begotten. In that case if the father was excluded from participation on the ground of his disqualification, the estate vesting in the other coparceners, whether on partition or succession, cannot be divested so as to let in the heirs of the excluded person. It has been so held both in Calcutta and in Bombay,[3] the only exception being that such a son may reopen a partition, if the father, though not disqualified, had reserved no share to himself.[4] In some cases it is suggested that while there can be no divesting in the case of obstructed succession, the same rule cannot be applied to where the succession is unobstructed or where the estate is taken by survivorship and not by inheritance.[5] In such cases, the after-born son becomes entitled to his share if at a partition, the father, whether qualified or not, takes no share, in which case his after-born son would on the analogy of an absent coparcener be entitled to take a share, and may for that purpose, demand a re-partition.[6] But where the father was excluded for a disqualification involving moral turpitude, *e.g.*, the murder of his predecessor, it is in accordance with the rule of justice, equity and good conscience that both he and his issue and all relations claiming through him should be excluded from their share.[7] Apart, however, from such exclusion there remain the cases in which the father's exclusion was due to no fault of his own, in which case the two rules of law are in conflict: (*i*) that an estate once vested cannot be divested by an event subsequent thereto; and (*ii*) that the disqualification being merely personal the right of the son should not be prejudiced. On this point, the Calcutta[8] and the Madras Courts[9] are at variance, the one would exclude the son altogether, while the other would hold the son as entitled to a share. In so holding the Madras Full Bench distinguished the Bengal case on the ground that it was presum-

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(1) *Shivaji* v. *Vasantrao*, 33 B. 267.

(2) *Per* Ranade, J., in *Ganpat* v. *Gopal Rao*, 23 B. 636 (643).

(3) *Pareshmani* v. *Dinanath*, 1 B.L.R. 117; *Kali Das* v. *Krishna Chandra*, 2 B.L.R. 103 F.B.; *Bapuji* v. *Pandurang*, 6 B. 616; *Ganpat* v. *Gopal Rao*, 23 B. 636; *Pandewa* v. *Venkatesh*, 32 B. 455; *Narsinha* v. *Veerabhadra*, 17 M. 287 (292).

(4) *Krishna* v. *Sami*, 9 M. 64 F.B.; *Chengama* v. *Munisami*, 25 M. 75, explained in *Ganpat* v. *Gopal Rao*, 23 B. 636 (646).

(5) *Madan Mohan* v. *Purushotham*, 38 M. 1105 (1117, 1118).

(6) *Krishna* v. *Sami*, 9 M. 64 (77, 78) F.B.; *Chengama* v. *Munisami*, 20 M. 75.

(7) *Kenchava* v. *Girimallappa*, 48 B. 569 (574, 575) P.C. *See* S. 307, *post*.

(8) *Kali Das* v. *Krishna Chandra*, 2 B.L.R. 103 F.B.

(9) *Krishna* v. *Sami*, 9 M. 64 (77, 78) F.B.

ably a Dayabhag case and that the principle that an estate once vested cannot be divested is not a rule of Hindu Law, nor indeed, is it one of universal applicability, as witness the divestiture of the estate of all co-widows by an adoption by one of them.[1] This view is justified by the texts which limit the exclusion only to the disqualified coparcener but safeguards the rights of his issue.[2] By parity of reasoning, the same principle should hold good where on demise of the father, there has been a division amongst the brothers in which case the issue of an excluded coparcener should possess a similar right. But it is said that the principle cannot be so extended,[3] at any rate beyond the posthumous son.[4] The son is not bound by the father's release of his share for a nominal consideration: but as soon as he takes a share, the coparcenary claim is satisfied and another son since born cannot claim a share out of his brother's allotment.[5]

Decree for partition.

198. (1) A decree for partition may be preliminary or final.

(2) A preliminary decree must determine and declare the shares of the several parties and order the same to be partitioned by a Commissioner, or in the case of a revenue-paying estate, by the Collector or his gazetted subordinate.

(3) The final decree must be confirmatory of the distribution made by the Commissioner or the Collector with such variations as the court may be competent and think fit to make.

1659. **Analogous Law.**—There are ordinarily, but not necessarily,[6] two decrees in a partition suit. The first which is the preliminary decree for partition which merely determines and declares the shares of the respective claimants and directs their partition by a Commissioner to be appointed as provided in Or. XXVI, R. 13, or if the property is assessed to revenue, by the Collector or his gazetted subordinate as provided in S. 54 and Or. XX, R. 18 of the Code of Civil Procedure.[7]

Clause (1).

The procedure of the Commissioner must be that prescribed by Or. XXVI, Rr. 14-18 of the same Code.

It has been held that partition through the Collector is unnecessary where no separate allotment of revenue is asked for.[8]

When the partition has to be made by the Collector, the Civil Court has no jurisdiction to examine his work.[9]

1660. Ordinarily, the parties are to bear their own costs up to the stage of the preliminary decree,[10] unless the defendant has contested the plaintiff's right to

Costs.

(1) *Krishna* v. *Sami*, 9 M. 64 (79) F. B., citing *Rakmabai* v. *Radhabai*, 1 M. 69 P.C.

(2) Yadnavalkya, Ss. 140-142 (Mandlik's Tr.) 223, cited in *Krishna* v. *Sami*, 9 M. 64 (74) F.B.

(3) *Shivaji Rao* v. *Vasant Rao*, 33 B. 267 (272).

(4) *Ganpat* v. *Gopal Rao*, 23 B. 636; *Shivaji Rao* v. *Vasant Rao*, 33 B. 267 (272).

(5) *Shivaji Rao* v. *Vasant Rao*, 33 B. 267.

(6) *Sultan Singh* v. *Bahadur Singh*, (1912) P.L.R. 246 : 17 I.C. 390.

(7) *Chidambaram* v. *Gouri Nachiar*, 2 M. 83 P.C.

(8) *Jogodishuri* v. *Kailash Chandra*, 24 C. 725.

(9) *Dev Gopal* v. *Vasudev*, 12 B. 371; *Shrinivashabmant* v. *Gurunath*, 15 B. 527.

(10) *Shama Soonduree* v. *Jardine Skinner*, 12 W.R. 160; *Dildar Khan* v. *Bhowani*, 5 C.L.J. 642; *Satya Kumar* v. *Satya Kirpal*, 10 C.L.J. 503 : 39 C. 247.

partition in which case, he will saddled with the cost of his unfounded opposition.[1]

1661. Effect of the Preliminary Decree.—A decree for partition is a joint declaration of the rights of persons interested in the property sought to be partitioned, and is, if properly drawn up, in favour of each shareholder or set of shareholders having a distinct share.[2]

Clause (2).

1662. It is a definite act effecting a severance of the joint family and the divided status is not effected by the institution of an appeal against it.[3] Subsequent births and deaths cannot deprive any of the parties or their representatives of the shares allotted to them by such decree. Such a decree, like other decrees, if right at the time it was passed, cannot be varied by reason of events subsequently happening.[4] Hence where after the preliminary decree, one of the parties died, his share was held to go to his widow and did not enlarge the shares of his other *quondam* coparceners.[5] Indeed, it would seem that this would be the effect even of the filing of a partition suit which has been held to effect a severance.[6] (§§ 1707, 1708.)

There is, of course, nothing illegal in the coparceners agreeing that on their death their right should devolve by survivorship, in which case the agreement would be given effect to.[7]

But this can only be till a partition is finally closed. After it is once complete no party can continue coparcenership by agreement. As the Privy Council observed: "A separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to their coparcenary rights in the property is unknown to the law."[8]

1663. Mother's Case Exceptional.—The rule that the institution of the suit effects a severance does not apply to the mother who is entitled to a share only on completion of the partition, which has been construed to mean when the decree is made final. So where one *B* died leaving him surviving his widow *Y*, a son *R*, and a grandson *A*, who sued *R* for partition and possession joining *Y* as a co-defendant and the court passed a decree declaring each *A* and *Y* as entitled to one-third share in the estate. Before any final decree could be passed however, *Y* died and the question arising whether her share would enlarge *A's* share or

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(1) *Porter* v. *Lopes*, 7 Ch. D. 358 (367); followed in *Satya Kumar* v. *Satya Kirpal*, 10 C.L.J. 503 : 31 I.C. 247; *Matilal* v. *Giris Chandra*, 12 C. L.J. 346; *Dildar* v. *Bhawani*, 34 C. 878.

(2) *Khooshed* v. *Nubee Fetima*, 3 C. 551.

(3) *Thandayuthapani* v. *Raghunatha*, 35 M. 239.

(4) *Subharaya* v. *Manika*, 19 M. 345; *Thandayuthapani* v. *Raghunatha*, 35 M. 239; *Sheo Dyal* v. *Lalta Prasad*, 23 O.C. 184 : 58 I.C. 608; *contra* in *Sangili* v. *Mookan*, 16 M. 350 (353); *Sakharam* v. *Hari*, 6 B. 113, which is, in view of the Privy Council ruling, no longer law.

(5) *Rustam* v. *Dinkar*, 55 I.C. (N.) 38; *Mamma* v. *Mamma*, 2 M.L.W. 325 : 28 I.C. 543; *Sigu* v. *Segu*, (1911) M.W. N. 467 : 12 I.C. 704.

(6) *Suraj Narain* v. *Iqbal Narain*, 35 A. 80 P.C.; *Kaval Nain* v. *Budh Singh*, 39 A. 496 (499) P.C.; *Girja Bai* v. *Sada Shiv*, 43 C. 1031 (1045) P.C.; *Ramdin* v. *Bisheshar*, 3 O.L.J. 508: 37 I.C. 111; *Syed Kasam* v. *Jorawar Singh*, 31 M. L.J. 46 P.C.

(7) *Muthu* v. *Ponnusawmy*, 29 M.L. J. 214 : 29 I.C. 549.

(8) *Ekradeshwar* v. *Janeshwari*, 42 C. 582 (599) P.C.

go to her own legal representatives, the court held that as Y had died before the final decree, her inchoate right to allotment of a share on partition in lieu of maintenance never ripened into a tangible right and that, therefore, her death had the effect of merely extinguishing her right, and enlarging the shares of the plaintiff and the other co-parcener.[1]

1664. Final Decree.—The final decree must be passed as provided in Or. XXVI, R. 14 (3) of the Code of Civil Procedure.

Clause (3).

The final decree is not a decree in execution of the preliminary decree but, is a decree in the suit, which continues, till the final decree is made, which it is the duty of the court to make without any formal application by the parties.[2]

1665. Where revenue-paying estates are subject to partition by revenue officers, a partition so made is equally conclusive as between the parties and their representatives. Such partition against the father binds his sons.[3]

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(1) *Raoji* v. *Anant*, 42 B. 535.
(2) *Dwarka Nath* v. *Barinda*, 22 C. 416.
(3) *Gajadhar* v. *Hari Singh*, 47 A. 425 (433).

CHAPTER XIV.

RE-UNION.

Re-union.

199. (1) Re-union of persons, subject to the Mitakshara[1] and the Dayabhaga[2] schools of law, can take place only between a person and his father, brother, and paternal uncle, and amongst them only who were parties to the original partition.[3]

(2) Provided that of persons subject to the Mayukh[4] and the Mithila[5] branches of law, any late coparceners may unite if they were parties to the original partition.

Explanation.—Though the father or other guardian may represent a minor coparcener at a partition, he cannot effect his re-union.[6]

1666. Analogous Law.—The law of re-union is founded on the text of Brihaspati,[7] and is explained in the following texts:—

Yadnavalkya.—"Effect which had been divided and which are again mixed together are termed re-united. He to whom such appertain is a re-united parcener."[8]

Mitakshara.—"2. Effects which had been divided and which are again mixed together are termed re-united. He to whom such appertain is a re-united parcener.

"3. That cannot take place with any person indifferently but with a father, a brother or a paternal uncle, as Brihaspati declares: 'He who being once separated dwells again through affection with his father, brother or paternal uncle is termed re-united'."[9]

Vivad Chintamani.—"The first principle of re-union is common consent of both the parties, and it may be either with the co-heirs or with a stranger after the partition of wealth."[10]

Mayukh[11] (*After citing the Mitakshara and Brihaspati*).—"Union may take place even with a wife, a paternal grandfather, a brother's grandson, and the rest, according to the rule that the subject and the predicate should inhere in the same object observable in the text: 'He who having been separated again dwells together is re-united'."[12]

Dayabhag (*After quoting Brihaspati*).—"A special association among persons other than the relations here enumerated, is not to be acknowledged as a re-union of parceners; for the enumeration would be unmeaning."[13]

Dayakram Sangrah.—"3. Therefore, where a person has once become disunited from his father and the rest, afterwards, the former partition is annulled by mutual consent of the separated parties, and in consequence of an agreement being

(1) *Ram Narain* v. *Pan Kuar*, 14 Pat. 268 P.C.

(2) *Abhai Churn* v. *Mangal*, 19 C. 634 (638).

(3) *Ram Narain* v. *Pan Kuar*, 14 Pat. 268 P.C.; approving *Basanta* v. *Jogendra*, 33 C. 371 (374); *Balabux* v. *Rukhmabai*, 30 C. 725 P.C.

(4) *Viswanath* v. *Krishnaji*, 3 B.H. C.R. (A.C.) 69; *Lakshmibai* v. *Ganpat*, 4 B. H. C. R. (O. C.) 150 (166).

(5) Dayakrama Sangraha, cited in § 1666.

(6) *Balabux* v. *Rukhmabai*, 30 C. 725 (734, 735).

(7) *Vishvanath* v. *Krishnaji*, 3 B. H. C.R. (A.C.) 69 (75).

(8) Yad., II-9.

(9) Mit., I-IX-2, 3, cited and followed in *Balabux* v. *Rukhmabai*, 30 C. 725 (734) P. C.; *Jatti* v. *Banwari Lal*, 4 L. 350 P.C.; *Ram Narain* v. *Pan Kuar*, 14 Pat. 268 P.C.

(10) Vachaspathi Misra's Vivad Chintamani (Tagore's Tr.), 30.

(11) *Sanskrit*, put together, re-united (hence the term *Sanskrit*, put together).

(12) Mayukh, IV-9-1.

(13) Dayabhag, XII-4.

concluded to the following effect, 'the wealth which is thine is mine—that which is mine is thine,' they resolve on dwelling in the same abode. This is considered re-union.

"4. Here since the father and the others are particularly specified re-union takes place with those who are alone described, and not with nephew and the rest, who are not named. Otherwise the specific mention of father and the others would be unmeaning. Such is the opinion according to the Dayabhag.

"5. The followers of the Mithila school are of opionion that the use of the term father and the rest is illustrative and that re-union takes place when those whose right to a share of the common property is established by their birth re-associate after having once separated. Consequently, that re-union can occur with nephews and the rest."[1]

1667. It will be thus seen that both under the Mitakshara and the Dayabhag or the Bengal school of law, re-union is only possible with the father, brother or the paternal uncle,[2] and it is so settled by the Privy Council.[3] It is not possible even between first cousin.[4] But there may be re-union between brothers whether of the whole blood or of the half blood. The only exception is the Mithila school and the Mayukh which allows re-union between any coparceners.

1668. Principle.—As might be supposed; re-union does not amount to the cancellation of partition, though the parties to a partition may cancel it, in which case, they would remain as united as if the partition had never taken place. On the other hand, where there is a mere re-union, it cannot re-unite all those who had separated, and the new status cannot be created except by an intention and an agreement to do so. Nor does such re-union restore the old coparcenary with its devolution by survivorship. Being a new status, limited by Brihaspati's text, it creates anomalous coparcenary, in that its most essential incident is lacking.

1669. Who May Re-unite?—As regards the Mayukh; since it yields to the Mitakshara, it cannot sanction a departure at variance with the latter. The texts before cited contemplate a limited and an unlimited re-union. In the first case, re-union is only possible with the father, brother or paternal uncle, in the latter case all coparceners who divided could re-unite. The latter view has been abandoned everywhere outside the Mithila country where such unlimited re-union is still conceivable.

1670. Even as regards the former, there can be no re-union, unless there had been a previous union and separation.[5] If, therefore, the father and son were separate from the rest of the family, re-union is not possible with them and the family.[6] It is not necessary that the separation should be by a formal partition nor need the re-union be in a formal manner or by a formal deed or by any deed at all.[7] What is however necessary is, that there must be an intention to re-unite.[8] Re-union cannot be presumed from the fact that the relations had postponed an apportionment of lands in severalty from motives of convenience. In order to constitute re-union four things are essential: (1) a previous

(1) Dayabhag, Ch. V, 3-5.
(2) *Ram Narain* v. *Pan Kuar*, 14 Pat. 268 P.C.; *Basanta* v. *Jogendra*, 33 C. 371.
(3) *Ram Narain* v. *Pan Kuar*, 14 Pat. 268 P.C.
(4) *Ib.*
(5) *Ram Narain* v. *Pan Kuar*, 14 Pat. 268 P.C.; *Balabux* v. *Rukhmabai*, 30 C. 725 P.C., explained in *Akshay* v. *Hari Das*, 35 C. 721 (723); *Jatti* v. *Banwari Lal*, 4 L. 350 P.C.
(6) *Akshay* v. *Hari Das*, 35 C. 721 (723).
(7) *Mahalakshmamma* v. *Surya Narayana*, 51 M. 977.
(8) *Prankishen* v. *Mothooramohun*, 11 M.I.A. 403 (406); *Lakshmi Bai* v. *Ganpat*, 4 B.H.C.R. 150 (166), O.A. 5 B.H.C.R. (O.C.) 128.

state of union; (2) re-union, by those who have made a partition; (3) an intention to re-unite; and (4) the requisite relationship. Where, therefore, the sons take under their father's bequest, the sons cannot re-unite because the first two conditions in their case are wanting.[1] Again since re-union must be made by the very persons who made the partition, it follows that their descendants cannot re-unite.[2] They may of course re-unite in fact, but their re-union will not be a re-union in law reconstituting a coparcenary with a right of survivorship.

1671. The question whether there has been a re-union is thus a question of fact,[3] to be proved by him who asserts it and it is a fact which depends upon the proof of the intention to constitute re-union.[4] The mere fact that two relations continue to live jointly after a partition is merely evidence which may establish re-union, but it has not necessarily that result.[5] For instance, where after partition in distinct shares amongst brothers, some of whom were minors, the minor brothers continued to live jointly with one of the adult brothers, that fact would not constitute a re-union since the minors were incapable of exercising any volition in favour of a re-union.[6] Even if the minors had been adults, the mere fact of commensality would not prove re-union. For instance, where after a partition three brothers agreed that their separate shares should be kept joint and that the eldest should manage the same, the true effect of the agreement was held not to leave the family as a joint family but to render the eldest brother accountable for receipts and expenditure on the footing of ordinary agency and not of joint family management.[7] What was wanting in this case, it may be asked, to constitute a re-union? Only this, that the brothers did not amalgamate their shares, but merely kept them joint. In other words they agreed to be partners but not coparceners. In order to constitute a re-union after partition, there should be a junction of estate and a re-union of property: "The property which is mine is thine, and that which is thine is mine."[8]

Minor cannot re-unite.

1672. While the minority of a coparcener is no obstacle to a valid partition, it is an obstacle to a subsequent re-union, since in order to constitute a re-union there must be an agreement which the minor cannot enter into nor can any one on his behalf. As the Privy Council remarked of a re-union pleaded with a minor: "It is difficult also to see how an agreement for that purpose could have been made by or on behalf of the appellant during his minority."[9] Re-union is brought about through "affection" and it is not to the minor's benefit that his share should be placed in jeopardy in an affectionate compact.

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(1) *Lakshmibai* v. *Ganpat*, 4 B. H. C. R. 150 (166).

(2) *Vishvanath* v. *Krishnaji*, 3 B. H. C.R. 69.

(3) *Raghubir Singh* v. *Moti Kunwar*, 35 A. 41 (47) P.C.; *Balabux* v. *Rukhmabai*, 30 C. 725 (726) P.C. It is a matter of law; *Narain* v. *Mahanga*, 59 I.C. 706.

(4) *Babu* v. *Official Assignee*, 57 M. 931 (940) P.C.

(5) *Kuta* v. *Kuta*, 2 M.H. C. R. 235 (237); *Ram Huree* v. *Vrihee Ram*, 15 W. R. 442.

(6) *Kuta* v. *Kuta*, 2 M.H.C.R. 235; *Gopal* v. *Kenaram*, 7 W.R. 35; *Rusi Mendli* v. *Sundar*, 37 C. 703 (707).

(7) *Satrucherla* v. *Satrucherla*, 22 M. 470 P.C.

(8) Dayabhag, XI-I-30, cited in *Gopal* v. *Kenaram*, 7 W.R. 35; *Prankishen* v. *Mothooramohun*, 10 M.I.A. 403 (406); *Ram Huree* v. *Vrihee Ram*, 15 W.R. 442; *Jatti* v. *Banwari Lal*, 4 L. 350 P.C.

(9) *Balabax* v. *Rukmabai*, 30 C. 725 (734, 735) P.C.; *Jatti* v. *Banwari Lal*, 4 L. 350 P.C. *Rusi Mendli* v. *Sundar Mendli*, 6 I.C. 441.

Partition after re-union.

200. The shares of re-united members on a partition may be equal[1] or proportionate to the extent of the contribution made by them at the time of re-union.[2]

Illustrations.

Two brothers *A* and *B* re-unite; the value of *A's* share being double that of *B's* On partition between the two branches, in Madras, *A's* branch will be allotted double the amount of *B's* share, while in Bombay they will share equally.

1673. Analogous Law.—The two views stated in the section are conflicting and each is supported by the texts, the Madras view by the Smriti Chandrika quoted below,[3] and the Bombay view by the Mayukh which bases its view on usage.[4] The following texts bear on the rule:

Manu.—"If brothers once divided and living again together as parceners make a second partition, the shares must in that case be equal. There is not in this instance, any right of primogeniture. (*Jeshthyam.*)."[5]

Smrithi Chandrika.—(Citing the last) "The subject of this is to show that, in the distribution, the shares may be even unequal where the wealth at the time of re-union, had been made up of disproportionate contributions. Therefore, the inequality of shares must be proportionate to the extent of the contribution which each parcener had made at the time of re-union."[6]

1674. Principle.—The whole law relating to re-united families is anomalous and illogical. It is agreed that the re-union does not obliterate the effect of the previous partition, and consequently, the *quantum* of each coparcener's share is unaffected by the re-union. But if so, on the death of a coparcener, his share should descend to his wife; but it does not, since another text[7] diverts it to the surviving brother. Then as regards the effect of the re-union, the cases are in conflict on the point whether the re-united members share equally as if they had never separated, as is held in Bombay,[8] or whether their share is proportionate to their contribution at the time of the re-union, as is held in Madras.[9]

No writing necessary.

201. No writing is necessary to effect a reunion, but if it is reduced to writing such writing must be registered if its provision falls within the terms of S. 17 of the Registration Act.[10]

1675. Analogous Law.—No writing is required to effect either a partition or re-union thereafter but as in the case of a partition, so a *fortiori* in the case of a re-union, if the transaction is once reduced to writing, then it must be registered, since a re-union is only possible if there is an agreement declaratory of the new status.[11] But

(1) *Pranjivandas* v. *Ichharam*, 39 B. 734 (742) followed in *Krishnayya* v. *Guravayya*, (1921) M. 443, contra *Narayana* v. *Sankar Sah*, 51 M. L. J. 621, O A. 53 M. 1 (20) F.B.

(2) Manu, IX-210, Sm. Ch. XII-4 (Setlur) pp. 300, 301.

(3) Smriti Chandrika, Ch. XII-4 (Setlur); *Narayan* v. *Shankar Sah*, 53 M. (10) F.B.

(4) Mayukh (Mandlik, p. 85); followed in *Pranjivandas* v. *Ichharam*, 39 B. 734 (742).

(5) Manu, IX-210; commented on in Mayukh (Mandlik), p. 85 in support of equal division as also supported by usage.

(6) Ch. XII-4; (Setlur) pp. 300, 301.

(7) Narad, XIII-25; Yad. II-138; cited in Smriti Chandrica, XII-10 (Setlur) pp. 301, 302.

(8) *Pranjivandas* v. *Ichharam*, 39 B. 734 (742), followed in *Krishnayya* v. *Guravayya*, (1921) M. 443. Contra *Narayana* v. *Sankar Sah*, 51 M.L.J. 621, O.A. 53 M. 1 (20) F.B.

(9) *Manjanatha* v. *Narayana*, 5 M. 362; approved in *Narayana* v. *Sankar Sah*, 53 M. 1 (20) F.B.

(10) S. 17 (1) (*b*) Registration Act; *Mahalakshmamma* v. *Suryanarayana*, 51 M. 977 *cf. Pratab Singh* v. *Keshav Lal*, 59 B. 180 P.C.; *Rangu* v. *Lakshman*, (1930) B. 438; *Mg Po* v. *Mg Shwe*, 1 R. 405.

(11) *Ib.*

since both an intention and an agreement may be inferentially deduced from other writings, *e.g.*, recitals in a mortgage deed, it must be proved by those relying upon such recitals that they were made with the knowledge of the parties concerned and that they were not inconsistent with other recitals.[1]

Succession amongst re-united relations.

202. (1) Subject to the following modifications, a re-united family is, for the purpose of succession, treated as a joint family.[2]

(2) As between relations of equal degree, those joint or re-united exclude those who were separate when the succession opened.

(3) In a re-union between brothers of the whole blood and those of half blood, the former succeed to each other in preference to the latter.[3]

(4) Where brothers of the whole blood remain separate, and only those of the half blood re-unite, brothers of the whole blood and those of the half blood and their descendants inherit together.

(5) Where only some brothers of the half blood re-unite, those not re-united do not inherit.

(6) Brothers of the whole blood, though separate, take in preference to the father though re-united.[4]

(7) In default of the uterine brother, or reunited half-brother, the estate devolves on the following heirs, namely:—

(1) Reunited mother,
(2) Reunited father,
(3) Any other reunited coparcener,
(4) Separate half-brother,
(5) Separate mother,
(6) Separate father,
(7) The widow,
(8) The daughter,
(9) The daughter's son,
(10) The sister.

(8) Subject as above, succession follows the general law.

1676. **Analogous Law.**—In strict logic, a re-united family should be on the same footing as one which never separated. But that it is not so is proved by the following texts:—

Manu.—"If re-united coparceners make a fresh partition, the shares must be equal. The right of the law of primogeniture does not then apply."[5]

Yadnavalkya.—138. "A re-united brother shall keep the share of his re-united co-heir who is deceased; or shall deliver it to a son subsequently born. But an uterine or whole brother shall thus retain or deliver the allotment of his uterine relation.

"139. A half-brother being again associated may take the succession, not a half-brother though not re-united; but one united by blood though not by coparcenary may obtain the property and not exclusively to the son of a different mother."[6]

Mitakshara.—"6. The allotment of a re-united brother of the whole blood, who is deceased, shall be delivered by the surviving re-united brothers of the whole blood to a son born subsequently. But on the failure of such issue he shall retain it. Thus if there be brothers of the whole blood, an uterine or whole brother being a re-united parcener, not a half-brother who is so, takes the estate of the re-united uterine brother. This is an exception to what has been said before."[7]

(1) *Govindoss* v. *Official Assignee*, 57 M. 931 (942) P.C.
(2) *Prankishen* v. *Mothoora Mohun*, [illegible] *Venkataramayya*, 19 M.L.J. 723.
(3) Mit. II-IX-16.
(4) *Ramasami* v. *Venkatesan*, 16 M. 440.
(5) Manu, IX-210.
(6) Yad. II-138, 139.
(7) *i.e.*, by Yad. II-39. See *supra* Mit., II-IX-1, 6.

Dayabhag.—"39. If there be competition between claimants of equal degree whether brothers of the whole blood or brothers of the half-blood, or sons of such brothers, or uncles, or the like, the re-united parcener shall take the heritage, for the text does not specify the particular relation and all these relations were premised in the preceding text and a question arises regarding all of them; therefore, the text must be considered as not relating expressly to brothers."[1]

1677. Succession in Re-united Families.—According to the Smriti-Chandrika, a coparcenary once determined by partition can never be restored by re-union, the reason given being that a share once ascertained remains distinct in spite of the re-union, with the result that re-united members are not coparceners but merely co-owners, following a rule of succession.[2] But this is an extreme view and has not been followed in courts. Re-united members and their issue are coparceners in a re-united family,[3] and however remote, succeed to the property of one another by survivorship.[4] This mode of succession is not confined to members who actually re-united, since the son of a re-united member born after the re-union becomes re-united and takes by survivorship.[5] In other words, on a re-union taking place, not only the parties re-uniting but their descendants and representatives, however remote, will remain joint and succeed to one another on that footing of jointness until a fresh partition takes place, exactly in the same manner, as in the ordinary case of a joint family of which the members remain joint until partition.[6] Consequently it has been held that the shares of the re-united members are the same as they would be at the original partition irrespective of the amount of capital contributed by each coparcener, and even notwithstanding that the portions brought in on re-union were unequal.[7] And in a competition for the succession to the estate of a deceased relative among those who stand in an equal degree of relationship to him, those descended from a re-united parcener are to be preferred to those who are descended from an unassociated parcener.[8] In such cases, re-union is a ground for preference.[9] In other words, a re-united coparcener takes the heritage in preference to and in utter exclusion of the separated claimant, but of an equal degree, whether brothers of the whole or half-blood or sons of such brothers or uncles.[10]

1678. But in a competition between uterine and non-uterine brothers another idea influences the decision, namely, the superior efficacy

(1) Dayabhag, XI-VI-39. There is a long disquisition in Dayabhag on the rights of re-united kinsmen. *See* XI, Sec. I-1-20-30.

(2) Smriti Chandrika, (Setlur) Ch. XII-IX, p. 301; *Ramaswami* v. *Venkataswami*, 16 M. 440.

(3) *Kristraya* v. *Venkataramayya*, 19 M.L.J. 723.

(4) *Samudrala* v. *Samudrala*, 33 M. 165, distinguishing *Ramasami* v. *Venkatasami*, 16 M. 440, following *Prankishen* v. *Mothooramohun*, 17 C. 33 (35); *Sadananda* v. *Baikuntha*, 2 Pat. L. T. 259; 63 I.C. 833.

(5) *Samudrala* v. *Samudrala*, 33 M. 165.

(6) Mit., II-IX; 2 Mac. H. L. 172, 173; Mayukh, IV-IX; Dayabhag, XI-VI 39; *Dayakramasangrah*, V-8; Viv. Ch., p. 304; 2 Dig. 561, 562; *Tarachand* v. *Pudum*, 5 W.R. 249 (250); *Abhaicharan* v. *Mangal*, 19 C. 634; *Amritrav* v. *Abaji*, (1878) B. P. J. 293.

(7) *Amrit Rao* v. *Abaji*, (1878) B.P. J. 293; *Krishnayya* v. *Guravayya*, 41 M. L.J. 503: (1921) M. 443. As to conflict of views on partition *see* S. 200.

(8) *Jadub* v. *Benadbehary*, 1 Hyde, 214; *Kesahram* v. *Nandkishor*, 3 B.L.R. (A.C.) 7; *Abhaicharan* v. *Mangal*, 19 C. 634 (637).

(9) *Ramasami* v. *Venkatesan*, 16 M. 440.

(10) *Prankishen* v. *Mothoora*, 10 M.I. A. 403 (406); *Ramkuri* v. *Trikiram*, 15 W.R. 442; *Abhaichurn* v. *Mangal*, 19 C. 634; *Sadananda* v. *Baikuntha*, 2 Pat. L. J. 299: 63 I.C. 833.

of the funeral obligations offered by the uterine brother. That furnishes a ground of preference in his favour. If the re-united parcener is a brother of the whole blood both cases of succession concur. They conflict where there is a competition between a re-united brother of the half-blood and a separated brother of the whole blood. The rule of equal division is the outcome of the desire to give effect to both principles.

In a case the adopted son of a re-united half-brother was held to succeed equally with two unassociated full brothers.[1] In a competition between the separated brother and a re-united father, the Oudh court favour the former, though their decision proceeds upon no certain ground.[2] Again a pothumous son excludes a separated son on the ground that his existence dates from the moment of his conception and not of his delivery.[3]

1679. There is no reason why a separated brother should oust the the re-united father, though it has been so held[4] on the authority of the Vir-Mitrodaya and Smriti-Chandrika, which, however, regards the whole law of inheritance to a re-united member good, because it is supported by the text of Sankh and not because it is founded on reason as the general law of inheritance.[5]

According to the Vir-Mitrodaya,[6] and the Smriti Chandrika,[7] the relations enumerated in this clause are next entitled to succeed.

Burden of proving re-union.

203. He who relies upon re-union must prove it.[8]

1680. Analogous Law.—It has already been stated that re-unions are nowadays rare, though not obsolete,[9] since the causes which lead to partition are not easy to eliminate nor is the state of independence born of partition easily forsaken. As the crux of partition is the intention, so is that of re-union.[10] After a partition is once completed, the presumption in favour of jointness vanishes.[11] Consequently, he who relies upon a re-union must prove it like any other fact.[12] It is said that after partition there is a presumption against a re-union.[13] At any rate, there is no presumption that when some separate the rest remain united, and in the absence of a presumption either way, the fact of jointness must be clearly proved.[14]

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(1) Mayuk, IV-IX-13; *Ramasami* v. *Venkatesan*, 16 M. 440.

(2) *Bindra* v. *Mathura*, (1931) O. 17 F.B.; *see* Vir-Mitrodaya, Ch. IV-§ 9 (Setlur, pp. 433, 434).

(3) *Khushaldas* v. *Mulibai*, (1936) S. 199; disting. *Trayan Kesar* v. *Basant Kumar*, 5 Luck. 248: (1930) O. 36 on the ground that that case dealt with self acquired property. It really dealt with the appreciation of S. 28 of the Provincial Insolvency Act.

(4) *Bindra* v. *Mathura*, (1931) O. 17 F.B.

(5) Smrithi-Chandrika (Setlur) Ch. XII-31, pp. 305, 306.

(6) Ch. IV, (Setlur) pp. 427-428.

(7) Ch. XII, (Setlur) pp. 300-307.

(8) *Babu* v. *Official Assignee*, 57 M. 931 P.C.

(9) Sir F. Mac. Considerations on H. L., 107; *Tarachand* v. *Pudum*, 5 W.R. 249; in *Gopal* v. *Kenaram*, 7 W.R. 35 (re-union was proved).

(10) *Ram Hari* v. *Trihi Ram*, 7 B.L.R. 336; *Rusi Mendli* v. *Sundar*, 37 C. 703; *Parbu* v. *Jwala*, 2 A.L.J. 467.

(11) *Anandibai* v. *Hari*, 35 B. 293.

(12) *Babu* v. *Official Assignee*, 57 M. 931 P.C.; *Gopal* v. *Kenaram*, 7 W.R. 35; *Balabux* v. *Rukhmabai*, 30 C. 725 (736) P. C.; *Rusi Mandli* v. *Sundar Mendli*, 6 I.C. (C.) 441; *Parbati* v. *Maharaj Singh*, 6 I.C. (A.) 795; *Maharaj Sai* v. *Kedar Nath*, (1933) N. 130.

(13) *Amam Singai* v. *Chaitulal*, (1879) C.P.S.C., Pt. VIII, No. 12.

(14) *Balakrishen* v. *Bamnarain*, 30 C. 738 P.C.; *Balabux* v. *Rukhmabai*, 30 C. 725 P.C.; *Jatti* v. *Banwari Lal*, 4 L. 350 P.C. *Parbati* v. *Maharaj Singh*, 6 I.C. (A.) 795.

CHAPTER XV.

IMPARTIBLE ESTATES.

1681. Topical Introduction.—The law relating to impartible estates has been casually referred to in the preceding discussion whenever it became necessary to contrast and compare it with other species of property and rights. Impartible estates, in their inception, owe their existence to royal grants made for reasons which might have been political, military, religious or personal. Political grants were made from state policy to allies, servants and dependents for support and service. Military grants were made to vassal chiefs on condition of military service. Religious endowments were prompted by piety. They form an important branch of Hindu Law and form the subject of a separate chapter. Personal grants were service grants made to friends, servants and dependents, their duration depending on their nature and terms. Latterly, such grants have been made, confirmed or continued by the Indian Government, while grants are, however, subject to the provisions of the Crown Grants Act,[1] the provisions of which supersede those of Hindu Law, if in conflict. This Act has been the subject of discussion in the author's other work to which reference is invited in case of necessity.[2]

Impartible estates may owe their origin to any of the five causes enumerated in section **206**.

Hindu text books are silent on the subject of impartible estates, though they contain faint traces of that right out of which has evolved the present law on the subject. Manu alludes to such a right in the following texts:—

Manu.—"106. By the eldest, at the moment of his birth, the father, having begotten a son, discharges his debt to his own progenitors; the eldest son, therefore, ought before partition, to manage the whole patrimony.

"119. Let them never divide the value of a single goat or sheep, or a single beast with uncloven hoofs; a single goat or sheep remaining after an equal distribution, belongs to the first born.

"125. As between sons, born of wives equal in their class and without any other distinction, there can be no seniority, in right of the mother; but the seniority ordained by the law, is according to the birth."[3]

1682. Quoting the last text, the Privy Council said: "Now, when it is said, that the single goat or sheep is to belong to one son, it is apparently for the same that a zamindari so descends, *viz.*, that the subject is in its nature impartible, and therefore, the rule that is laid down with reference to one impartible subject, *viz.*, that it belongs to the first-born, appears by reasonable and just implication, to be the rule applicable to all such subjects. And which of several sons is to be deemed to be the first-born is declared by Manu in his S. 125 above cited. There can be no seniority in right of the mother, but the seniority ordained by law is according to birth."[4]

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(1) Act XV of 1895.
(2) 1 Gour's Law of Transfer, 6th Ed.,) §§ 50-54.
(3) Manu, IX-106, 119, 125.
(4) *Ramalakshmi* v. *Shivnath*, 14 M. I.A. 570 (593).

1683. Impartible estates existed before the advent of British rule in India, but both in their inception and incidents they widely differed from those evolved out of what were in effect tenancies at will under the indigenous rule whose theocratic sway left no room for thwarting after their will by having recourse to an independent constituted judicial authority. In the early ages, the lord paramount did carve out smaller estates by grant or recognition, but they were estates of a feudal character held on a military tenure, revenue farms or clearance leases, the tenure of which was as uncertain as their incidents were variable. But whatever their origin or their character, they were held by sufferance of the ruling power and were liable to resumption on his demise. As such estates multiplied and grew in strength and power, the sovereign considered it inexpedient to disturb their possession, and so slowly and by degrees the holders of the estates acquired therein rights akin to *quasi* ownership which were in later years made more concrete and fixed by the grant of sanads or patents and the overt bestowal of some mark of the royal favour upon each succession. A sword, a turban or a shawl presented to heir upon his succession was intended to serve the dual purpose of recognizing and confirming the claim of the heir.

1684. But if the sovereign capriciously resumed his grant, there was no redress open to the grantee since the sovereign was the ultimate court of appeal and it had not conceded to its subjects the right of suing it in a court of law. Nevertheless, the two great impulses of fear and favour sufficed to maintain the holders upon their *gaddi* and so, in course of time, there arose the continuity of tenure and its customary incidents, one of which was the rule of primogeniture, the existence of which was recognized and legalized by the Bengal Regulation XI of 1793 (1) which, however, declared that all newly formed estates shall be both partible and descendible according to the Hindu or Mahomedan law of inheritance. An inquiry was set on foot and whenever an estate was found to possess the necessary incidents of impartibility, that fact was noted or reaffirmed in the settlements, commenced long before but made on the close of the Mutiny. But there still remained several estates on the border line to whom such privilege was not accorded. They were left free to carry on as before but without the hall-mark of official recognition.

Impartible estate defined.

204. An estate is impartible if it is incapable of division into two or more parts so as to confer upon the holders thereof rights equal to those possessed by the holder of the undivided whole.

1685. Analogous Law.—In popular parlance, an impartible estate is one of which there can be no partition. This term has been defined before with reference to Hindu Law. (§ **177.**) But an impartible estate may be owned by a Mahomedan or other Non-Hindu, and since its incidents are identical, the subject is not exclusively one of Hindu Law.

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(1) Act XV of 1895.

(2) *Ramalakshmi* v. *Shivnatha*, 14 M. I.A. 570 (593).
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1686. It will be observed that the essence of impartibility comprises in its incapacity for sub-division. This does not mean that the estate may not be split up into parts creating several independent estates. But what it means is that on any division no two part holders can possess co-ordinate rights with those possessed by the original owner who remains its overlord. It thence follows that the latter may carve out, by making perpetual grants, other estates, which may themselves be impartible.[1] But they, nevertheless, remain subordinate to the parent estate, the holder of which may possess only the shadowy right of escheat,[2] but it is a right which singles it out as an estate of which the others are subordinate offshoots. In course of time, these latter may receive an independent legal recognition and they then become independent impartible estates whose connection with the parent stock is but a memory. This process of gradual disruption is accelerated by the claims of junior members to whom maintenance grants have to be made. That the holder of an impartible estate can make such perpetual grants out of his estate, if it is not inalienable, is now settled.[3]

It has been said that impartibility is an incident attached not to the property of a family but to the law governing that particular family,[4] that is to say, it is a personal and not a territorial law. But impartibility is ordinarily the quality of an estate and it is with reference only to an estate that the custom defines its tenure, though the rule of primogeniture may become established as *Kulachar* or a family custom, as it was found to be the rule in the case of properties of the Darbhanga Raj.[5]

1687. Properties allotted by the State to a person in consideration of the discharge of certain duties or as emoluments of an office are *prima facie* impartible, even though the duties or office may be hereditary in a particular family.[6] This principle was put to test in a case in which the Raja of Tanjore had made certain grants of land to his *Guru* (or religious preceptor) some of which were made without assigning any purpose, while others were made to him for the purpose of perpetually conducting a food *chatram* near the tomb of a holy man, and in one case of making an *agrahar* by building houses round a holy place. The holy place referred to was a *math* which the *Guru* had established. The Privy Council held that while the former grants were partible, the latter were not, because they were intended to be religious charities to be made to him as the head of the *math* and were to be administered by the head thereof, and as that office was impartible, so were also the grants.[7]

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(1) *Narain* v. *Loknath*, 7 C. 461; *Udaya* v. *Jadabal*, 8 C. 199 P.C.

(2) *Durga Dat* v. *Rameshwar*, 36 C. 943 P.C.

(3) *Annund Lal* v. *Guru Narain*, 5 M.I.A. 82, explained in *Udaya* v. *Jadab Lal*, 8 C. 199 (206) P.C. affirming O. A. *Uddoy* v. *Jadublal*, 5 C. 113.

(4) *Venkata* v. *Uddagiri*, 21 M.L.J. 351 : 41 I.C. 208; *Zemindar* v. *Subbaya*, (1918) M.W.N. 146: 43 I. C. 871.

(5) *Ekradeshwar* v. *Janeshwar*, 42 C. 582 P.C.

(6) *Jaffar* v. *Aji*, 2 M.H.C.R. 19; *Trimbak* v. *Lakshman*, 20 B. 495, approved in *Sethuramaswamiar*, v. *Meruswamiar*, 41 M. 296 (306) P.C.

(7) *Sethuramaswamiar* v. *Meruswamiar*, 41 M. 296 (305, 306) P.C.

205. An estate is inalienable if the holder thereof, for the time being, is incompetent to alienate the whole or any part thereof to another so as to confer upon him the same right as he himself possessed therein.

Inalienable estate defined.

1688. Analogous Law.—The impartibility of an estate implies that it cannot be sub-divided into co-ordinate parts: its inalienability means that it cannot be transferred so as to confer on the transferee any right beyond the lifetime of the holder. The inalienability of an estate may not preclude the carving of a subordinate tenure. It depends upon its terms. An estate customarily inalienable may be alienated for necessity,[1] and may be sold in execution of a decree upon such debt.[2] It may be disposed of by will.[3] And it does not prevent the holder from surrendering it by an act *inter vivos* to the next heir.

1689. It will be presently seen that the impartibility of an estate *prima facie* implies its alienability,[4] though this is only a presumption which may be rebutted by proof of a contrary custom. In order to prove the inalienability of an estate, it is not enough merely to show that there has been no alienation for a long time past; what is required to be proved is that there were occasions for an alienation which was not made. As the Privy Council observed: "The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability."[5] (§§ 1737-1739.) *Babuana* or maintenance grants are not by their nature inalienable,[6] though they may so become by custom.

1690. Inalienable Estate.—Impartibility leads logically to the existence of a power of alienability, and not to a rule of inalienability.[7] But it is an incident which is often associated with impartibility, and estates which were granted for personal service were, as a rule, made both impartible and inalienable. Such are the estates in the nature of a Raj which were by their very nature both impartible as well as inalienable. And it would be against public policy to alter their incidents now. They are even now held in *quasi*-sovereignty, and though their holders have been released from the obligation to perform military services, yet their other incidents remain and have become the integral part of their tenure. In many cases they have been the subject of regrants, in which case the law re-affirms them as both impartible and inalienable. But where it fails to do so, they may still be impartible, or inalienable, or both, by reason of their very nature or custom.

1691. It is obvious that where an estate is held on condition of service, the tenure becomes necessarily subject to two incidents:—

(*i*) The tenure is resumable upon the holder refusing to render service; and,

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(1) *Gopal* v. *Raghunath*, 32 C. 158, contra *Raja Madhusudan* v. *Khestrabasi*, 8 Pat. 932 (936), *cf.*, amended Ss. 2 (*d*) and 6, Transfer of Property Act.

(2) *Veerasurappa* v. *Errappa*, 29 M. 484.

(3) *Muthusawmy* v. *Bangarammal*, 9 M.L.J. 59 : 8 I.C. 332.

(4) *Durga Dat* v. *Rameshwar*, 36 C. 943 P.C.; *Venkata* v. *Uddagiri*, 21 M.L. J. 351 : 41 I.C. 208.

(5) *Saraj Kuari* v. *Deoraj Kuari*, 10 A. 272 (289) P.C., cited with approval in *Durga Dat* v. *Rameshwar*, 36 C. 943 (954) P.C.

(6) *Durga Dat* v. *Rameshwar*, 36 C. 943 (954) P.C.

(7) *Venkata* v. *Uddagiri*, 21 M.L.J. 351: 41 I.C. 208.

(*ii*) The estate is by its nature inalienable beyond the life-time of the holder, since if it were alienable for a longer period, the successor would be deprived of the means to discharge his duties.

But the condition in the sanad rendering them inalienable must be peculiar to the estate. As the Privy Council observed: "The conditions in those sanads by which the Palayagar was bound to protect the inhabitants by preventing, as far as might be in the power of the Palayagar, robberies, depredations, etc., in their properties, to deliver up persons guilty of murder, and not to give shelter to deserters, and to apprehend and deliver them to the Collector are similar to the duties which all landholders and Zemindars in British India have to perform."[1] As such, they do not qualify the alienability of the estate.

Origin of impartible and inalienable estate.

206. An estate may owe its character of impartibility or inalienability to—

(*a*) **any law for the time being in force;**
(*b*) **a grant of the sovereign power;**
(*c*) **its nature;**
(*d*) **custom; or**
(*e*) **an accretion thereto.**

1692. Analogous Law.—All property is the creature of law, and law is the primordial source of all its incidents. As law itself is the breath of Kings, it follows that the King could create anomalous estates and define their incidents. As such, many estates owe their impartibility to the sovereign grant. And as custom is a part of the common law of the land, custom is another source of such estates, some of which become impartible by the very nature of their tenure. Such were the estates in the nature of a Raj which both the Hindu and Mahomedan rulers created in this country and whose impartibility has since been recognized by the British power either by a fresh conferral, confirmation or statutory recognition. It has already been remarked that various motives prompted these grants. (§ **1681.**)

Origin of Impartible Estate.

1693. Clause (2) states that an impartible estate cannot be created by contract, though the parties making it would be ordinarily bound by it.[2] But such contract creates only a personal right and is not binding upon an assignee or the heir.[3] It cannot directly affect the property or alter its incidents, unless it is continued so long that impartibility becomes an incident of the estate, not as a matter of contract, but as one of custom, though the custom itself may owe its origin to a contract.[4]

1694. Another means of imparting the incident of impartibility to an estate, by the volition of a person, exists where the holder of such

(1) *Bahadur Singh* v. *Balchand*,(1922) P.C. 623.

(2) *Rup Singh* v. *Bhabuti*, 42 A. 30; *Piroj Shah* v. *Mani Bhai*, 36 B. 53; *Chaita* v. *Madan*, 33 I.C. (C.) 33; *Krishendra* v. *Debendra*, 12 C. W. N. 793.

(3) Gour's Law of Transfer (6th Ed.) § 415; *Rajender* v. *Shamchand*, 6 C. 106 (116); *Venkataramana* v. *Brammanna*, 4 M.H.C.R. 345.

(4) *Kishore Singh* v. *Gahena Bai*, 15 N.L.R. 176: 53 I.C. 630 (637, 638) P. C., followed in *Mahtab Singh* v. *Badan Singh*, 48 C. 997 (1006, 1007) P.C.

estate incorporates his self-acquisition in the impartible estate upon which the acquisition becomes a graft upon the parent estate and becomes merged in its incidents.[1]

1695. Impartible Estate.—Impartible estates owe their origin to the feudal tenures which conquerors in the East and the West created, by distributing and settling the conquered lands amongst their allies and dependants either as a reward for past support or on condition of future service or of both. These subordinate chieftainships were in the nature of personal grants held during the pleasure of the sovereign and were naturally impartible. As the grants multiplied and the occasion for service disappeared, the grantees became released from the condition of military service, but the chieftains naturally kept up the dignity of their Raj by copying in its Government and devolution the example of their sovereign. When on discontinuance of the native rule, the country passed to the East India Company, the latter scrupulously maintained the old tradition, and on the Government being directly taken over by the British Crown, an inquiry was set on foot and the *status quo ante* maintained and assured by the issue of Patents or Sanads under the hand of the Settlement and other responsible officers.

Their History.

1696. Now, as there is a distinction between the public and the private property of a Hindu sovereign, his Raj and the public property going to the succeeding Rajah, while his personal and private property going to another set of heirs, the same distinction was observed in the case of the smaller chieftainships.[2] Impartible estates are variously called; they are known as "Raj" in the North and "Polliam" in the South. But an estate may be impartible though it is neither.[3] Some of these are called Jagirs or Inams, others Taluqs or Tahuts, while in some parts, they pass by the title of Zemindaris.

1697. Jagirs: Their History and Incident.—Of these the Jagirs[4] occupy an important place in the land tenures of India. "The Moghul Empire recognized a definite portion of its own dominions as that which was directly managed by the Emperor's officers, and another area as that available for the assignment of the revenue spoken of. And when certain offices or titles were conferred, a fixed grant went with them as an appanage. Such grants were called "Jagirs." They were at first always for life, and resumable with the office. Nearly all later Governments have adopted the Jagir, but chiefly to support troops, or to reward a service of some kind. They are still granted by our own Government, but as a reward for services in the past, and not burdened with the obligation of military service. In time, it was thought beneath the dignity of the ruler to resume, and so the grant became permanent and hereditary. Possibly, this stage was hastened by the fact that the Government—both Hindu and Mahomedan—had always been accustomed to grant smaller holdings of land, free of revenue, to pious purposes, to support temples, mosques, schools, or bridges and tanks, and these were called '*inam*' or '*muafi*,' and were usually hereditary and permanent as long as the object was fulfilled.

(1) *Guruswamy* v. *Senabatti*, 39 M.L. J. 529.

(2) *Secretary of State* v. *Kamachee*, 7 M.I.A. 476.

(3) *Chintamun* v. *Nowlukho*, 1 C. 153 P.C., reversing O.A. *Natukhee* v. *Chowdhry*, 20 W.R. 247.

(4) Contracted from *Jai*, land and *Gir*, holder, *i.e.*, landholder.

As the inam was permanent, so the Jagir grew to be so in many cases. Possibly, also, it was the decline of power which caused jagirs to be irregularly granted, and thus to become permanent. When a disorganized Government desires to reward a worthy (or an unworthy) servant, it generally has its treasury empty, and the easiest plan (though true policy would suggest a cash pension for life or lives) would be to give a man a grant by way of assignment, and allow him to collect what revenue he could off the area."[1]

Jagirs were at times also clearance leases with the express object that the grantees should settle the waste.

Where, however, the Jagirs were granted as a reward for military or other service, they were naturally personal and impartible in their character but the fact whether they retained or lost their impartibility, depended upon their subsequent history.

1698. Ordinarily, a Jagir is the grant of the royal share of the revenue and not of the soil,[2] and is presumed to enure only for the life of the grantee.[3] Unless it is a grant to the grantee "and his heirs" there is nothing to control the ordinary meaning of words, in which case he takes an absolute interest. And the words "*putra poutradi*" in the grant of Jagir do not, at all events outside Bengal, necessarily import an estate of inheritance descending to collaterals.[4] The principle that Jagirs are to be considered life tenures only "unless otherwise expressed in the grant" was expressly laid down in the Bengal Regulations[5] and is the law in the other parts of India.[6] So Melvill, J., had held in an earlier case that "the grant in Jagir or Saranjam was very rarely a grant of the soil, and the burden of proving that it was in any particular case a grant of the soil lay very heavily upon the party alleging it."[7]

1699. In this respect a Jagir and a Saranjam differ from an *Inam* which is a grant of the soil and is generally alienable at the pleasure of the holder.[8] Where the Jagir is merely a life estate, it follows that it is not liable in the hands of a successor in title for the mortgage debts of his predecessor.[9] And being of personal tenure, it is not partible.

Where a Jagir is granted in perpetuity and partakes of the nature of a Raj, it retains its incident of impartibility, unless there is anything in the grant to make it partible.

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(1) Baden-Powell's Land Systems of British India, pp. 189, 190.

(2) *Guru Rao* v. *Secretary of State*, 41 B. 408.

(3) *Raghoji* v. *Laxman*, 36 B. 639 P. C.; *Ram Narayan* v. *Ram Saran*, 46 C. 683 (692) P.C.; reversing O. A. *Ram Saran* v. *Ram Narayan*, 42 C. 305.

(4) *Ram Narayan* v. *Ram Saran*, 46 C. 683 P.C., reversing O.A. *Ram Saran* v. *Ram Narayan*, 42 C. 305.

(5) Beng. Reg. XXXVI of 1793, S. 15.

(6) *Per* Lord Hobhouse in *Dasi Bai* v. *Ishvardas*, 15 B. 222 (227, 228) P.C., affirming O.A. 9 B. 561; *Raghoji* v. *Laxman*, 36 B. 639 P.C.; *Ram Narayan* v. *Ram Saran*, 46 C. 683 (692) P.C. To the same effect, *Ramchand* v. *Venkatrav*, 6 B. 598; *Gulabdas* v. *Collector*, 3 B. 186 P.C.; *Narain Krishna* v. *Rangrav*, 4 B. H.C.R. (A.C.) 1 (24).

(7) *Ramchund* v. *Venkatrav*, 6 B. 598.

(8) *Krishnarav* v. *Ramrav*, 4 B.H.C. R. (A.C.) 1; *Suryanarayana* v. *Patanna*, 41 M. 1012 (1021) P.C.; followed in *Upadrastha* v. *Divi*, 43 M. 166 P.C.

(9) *Gulab Das* v. *Collector*, 3 B. 186 P.C.

Partible on re-grant.

1700. An impartible estate does not retain its incidents of impartibility or inalienability by the mere fact of its restoration or re-grant after its confiscation by Government. But a change in the nature of the tenure may suffice to remove its anomalies. As the Privy Council observed: "If the Government had intended to make the estate impartible and to limit the succession to a single heir according to the rule of primogeniture, instead of to the heirs of the grantee according to the rule of Hindu Law, there is no doubt they would have expressed their intention in unambiguous language."[1] The fact that the estate was at one time subject to military or feudal service and was consequently both impartible and inalienable does not make the estate subject to those incidents for all time.

1701. Ghatwal.—The Ghatwals[2] were originally keepers of the ghats or passes in the hilly tracts of Chota Nagpur, Monghyr, Birbhum and the Santal Parganas, latterly recognized as chiefs of the areas over which they had become established. For a time they served as a frontier police. Their tenure is in part regulated by the statutory law and varies so much that it is not possible to generalize upon their modern incidents. Ordinarily, however, they are perpetual holdings subject to the condition of service.[3] They are in the nature of Jagirs, which, though hereditary, are not subject to the ordinary rules of inheritance accordance to Hindu or the Mahomedan Law, but are subject to the condition of recognition by the Government. As such, they are incapable of partition, upon the death of the holder, and alienation during his life.[4]

Where the Ghatwal is unable to render service, a deputy might be appointed on his behalf, but his incapacity to render service does not render his estate liable to forfeiture.[5] But where he is dismissed for misconduct, it has the effect of the forfeiture of his tenure, since the right to possess the land depends upon the tenure of the office.[6] Succession to Ghatwalis is regulated solely by the nature of the Ghatwali tenure which descends undivided to the party who succeeds to and holds the tenure as Ghatwal. A woman is not incapable of holding a Ghatwal tenure.[7] And although in custom it descends from father to son, no succession is legal or valid till confirmed by the Zemindar and reported by him to the Government authorities. Where Government has dispensed with the service of the Ghatwals, the Zamindar is under no obligation to continue to appoint, and may, on a vacancy occurring, settle the tenure as he pleases.[8]

Succession to a Ghatwal is by primogeniture.[9]

A Ghatwal tenure is, as regards its alienability, subject to variable incidents. For instance, such a tenure in Kharagpur is not inalienable, and may be transferred by the Ghatwal or sold in execution of a decree against him, if such transfer or sale is assented to

(1) *Venkata* v. *Narayana*, 6 C.L.R. 153 (159) P.C.; *Mallikarjun* v. *Durga*, 13 M. 406 (422) P.C.

(2) Lit. *Ghat*, a mountain pass, and *wal*, belonging to—keeper of a pass.

(3) *Leelanund* v. *Monorunjan*, 5 W. R. 101.

(4) *Nilmoni* v. *Bukronath*, 9 C. 187 P. C.; *Kali Pershad* v. *Anand Roy*, 15 C. 471 P.C.

(5) *Jogendra* v. *Kalicharan*, 9 C.W. N. 663.

(6) *Debee* v. *Sree Kishen*, 1 W.R. 321; *Secretary of State* v. *Puran Singh*, 5 C. 740.

(7) *Kustoora* v. *Monohur*, (1864) W. R. 39; *Doorga* v. *Doorga*, 20 W.R. 154.

(8) *Mahbub* v. *Patasu*, 10 W.R. 179.

(9) *Kali Pershad* v. *Anand Roy*, 15 C. 471 P.C.

by the Zemindar. And when once it is established that the Ghatwal had the power of alienation, that power forms an integral portion of his right and interest in the Ghatwali, and must not, in the absence of evidence, be limited to an alienation for his own life and no longer.[1]

1702. Saranjams.—Saranjams[2] are jagirs, and as such may include the grant of the royal share of the revenue or of the soil.[3] They were originally grants of jagirs granted for the support of troops. They were confined to the Nasik and Khandesh districts in the North and to the Southern Maratha country. No condition of service being required, they have been commuted to a money payment; and the grant is a personal distinction for life or lives, or in perpetuity as the case may be.[4] A Saranjam given for the support of a distinguished family is generally by its nature impartible, and inalienable,[5] but all rights acquired by the Saranjamdar, including rights of occupancy in lands unoccupied at the time of the grant, are on his death liable to resumption by Government.[6]

1703. Vatans.—A Vatan was a grant of land made by the sovereign in lieu of service. As such, it was a service-grant, and was both impartible and subject to the law of primogeniture. A vatan was a public office. As in the case of the other service tenures, the vatan tenure became hereditary without retaining its initial association with service. So where it was found that in a Deshpande vatan, for over 150 years, the performance of the services of the vatan and the bulk of the property was confined to the elder branch, the younger branch being provided only with maintenance, it was held that such practice being more probably due in its origin to a family or local usage, than a mere arrangement determinable at the will of any members of the family, ought to be recognized and acted upon as a legal and valid custom.[7]

1704. Polliam.—An impartible estate is known as a Raj in Northern India, while it is called a Polliam in the Southern Peninsula.[8] This term was thus defined by the Privy Council: "A Polliam is in the nature of a Raj; it may belong to an undivided family; but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the polligar, the other members of the family being entitled to a maintenance or allowance out of the estate."[9] The polligars were originally petty chieftains occupying hilly or forest tracts and nominally owing allegiance and paying tribute and service to the paramount power, but really free of outside control. On the transfer of the Government of the country to the British, the Polliams were settled, but though naturally impartible, their other incidents do not appear to have been clearly defin-

(1) *Kali Pershad* v. *Anand Roy*, 15 C. 471 P.C.

(2) Persian word, meaning "Supply of provisions" for troops, or the performance of particular duty. *Mukasa* has much the same meaning.

(3) *Secretary of State* v. *Girjabai*, 51 B. 957 (967) P.C.; *Secretary of State* v. *Laxmi Bai*, 47 B. 327 P.C.; reversing O.A. *Gururao* v. *Secretary of State*, 41 B. 408.

(4) 3 Baden-Powell's Land Tenures of British India, p. 300.

(5) *Ramchandra* v. *Sakharam*, 2 B. 346.

(6) *Secretary of State* v. *Girja Bai*, 51 B. 957 (971) P.C.

(7) *Ramrao* v. *Yeshvantrao*, 10 B. 327.

(8) *Chintamun* v. *Nowlukho*, 1 C. 153 P.C. This history of the Polliams of Southern India will be found given in the Fifth Report of the Select Committee of the House of Commons presented to Parliament in 1812 (reprinted Cambray) and in the Madura Manual. The account given in the Fifth Report was adopted by Lord Kingsdown in *Kooldeep Narain* v. *Government*, 14 M.I.A. 247.

(9) *Narayunty* v. *Vengama*, 9 M.I.A. 66 (86).

ed. So, quoting the High Court, the Privy Council said: "The existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are in our opinion, matters judicially determinable on legal evidence, just as the right to any other property."[1].

1705. Impartible Rights.—Personal rights are naturally impartible. Such is the right of a priest to serve his *Yajamans*,[2] though the acquisitions made by him might be partible.[3] The Pattam or office of dignity in a family governed by the Aliysantan Law is indivisible and whether the family be divided or not, in the absence of any arrangement made for its devolution, the Pattam descends to the eldest male of the surviving members of the family.[4] It was so held of the shebaitship of a sacred shrine attached to the Tanjore Raj, which after confiscation was restored, whereupon the widows of the grantee continued to manage it one by one. There was no trust-deed and the court held that as the shrine was attached to an impartible Raj, and as by usage the management vested in the occupant of the Raj, the trusteeship was equally impartible and could not be divided among all the heirs to the estate, or the management directed to be held by rotation.[5] But a sacerdotal office is by its nature impartible.[6] Such was held to be the effect of a regrant made after the estate had been seized and purchased by Government for arrears of revenue.[7]

1706. Impartible by Law.—On the termination of the Moghul rule, when the country passed into the hands of the British, it was found that both the titles and the incidents of several large estates held by their proprietors for generations were by no means clear; while in other cases, the terms upon which the estates were held required revision. Such was especially the case with the holders of military tenure. Two courses were taken to place them on a more satisfactory footing. Where several estates of the same class were found to be held on a similar tenure, their status was determined and made the subject of special legislation. This policy gave rise to the Oudh Estates Act[8] and more recently, to the Madras Impartible Estates Act.[9] In other cases the Government sanctioned the issue of sanads, defining the status of holders and the rules of succession applicable to them. In each case, the policy of the Government was to protect and preserve these large estates and prevent their disintegration, which would have followed their relegation to the ordinary law. To ensure this result, the old *sanads* were in some cases renewed; while in other cases, fresh grants were made and the grantee started with a new muniment of title. This was found necessary in cases in which several estates were confiscated in consequence of the mutiny and regranted upon its close. Some doubt was cast on the power of the Gvernment to create by *sanads* an anomalous estate and regulating its succession. This resulted in the passing of the Crown Grants Act[10] which legalized "provisions, restrictions,

Clause (a).

(1) *Collector* v. *Lekamani*, 14 B. L. R. 115 (137) P.C.

(2) Cf., *Bechram* v. *Thakoormonee*, 10 W.R. 114; *Ghelabai* v. *Hargowan*, 36 B. 94; *Manghernlal* v. *Vithal Ram*, 5 S. L.R. 107 : 13 I.C. 225.

(3) *Khedroo* v. *Deo Rance*, 5 W.R. 222.

(4) *Timmappa* v. *Mahalinga*, 4 M.H. C.R. 28.

(5) *Ayiswarya* v. *Sivaji*, 49 M.L.J. 568 : (1925) M. 84.

(6) *Gobinda* v. *Ramcharan*, 52 C. 748.

(7) *Hargovind* v. *Collector*, (1937) A. 377.

(8) I of 1869.

(9) Mad. Act II of 1904.

(10) XV of 1895. For the history and scope of this Act, *see* 1 Gour's Law of Tranfer (6th Ed.).

conditions and limitations over" contained in any grant of transfer made by Government.

1707. The four primary sources of impartible estates are those stated in the section. Of these, the law declaring or creating them is entirely of British origin. Most of such estates owe their origin to the grants of the Hindu and Mahomedan Kings. The next most important source of their creation is custom; while some estate have become impartible by their very nature. Where impartibility is created by law the question is simply reduced to one of construction. The Madras Impartible Estates Act[1] and the Oudh Estates Act[2] are instances of such law declaring the estate therein mentioned as impartible.

1708. Of these, the Madras Act declares certain estates to be impartible, as to which it provides as follows: "The proprietor of an impartible estate shall be incapable of alienating or binding by his debts such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other coparceners, to make an alienation of the joint property, or incur a debt binding on the shares of the other coparceners independent of their consent."[3]

It will be noted that this section enacts a view of law which has since been definitely overruled by the Privy Council according to whose view there is no coparcenary in an impartible estate, the holder of which may alienate to any one at his discretion. But this contingency was present in the minds of the legislature who have added the following saving clause: "The Act shall not affect alienations made or debts incurred before the coming into force of this Act and shall cease to apply to estates or parts of estates which may hereafter be lawfully alienated otherwise than by temporary transfer."

The Oudh Estates Act was intended to safeguard the impartibility of the Oudh Taluqdars to whom their previous estates had been regranted after the re-occupation of Oudh by the British Government after the mutiny in 1858. The estates are impartible and only alienable within limits, while succession to them is subject to the rule of primogeniture.[4]

The Taluqdars of Oudh, like the Subedars of the South, were at first officials and afterwards lessees of the tracts or taluqs from which they were authorized to collect land revenue for payment into the royal treasury.[5] They are now subject to statutory control.[6]

1709. It has been held in Patna that there is a custom which has attained the status of a *lex loci* in Chota Nagpur that grants made by the Maharaja of Chota Nagpur are themselves impartible, and as regards succession, subject to the rule of primogeniture. This is the more so if the grantee is a relation.[7]

1710. Of the same kind though not belonging to the same class is the impartible tenure created by statute. Such is the tenure of a "protected Thekadar" under the Central Provinces Land Revenue Act[8]

(1) Mad. Act II of 1904.
(2) I of 1869.
(3) S. 7, Mad. Act II of 1904.
(4) S. 22, Act I of 1869.
(5) 2 Baden-Powell's Land Systems of British India, p. 214.
(6) Oudh Estates Act (I of 1869) amended by (X of 1885).
(7) *Kopilnath* v. *Govenmrment*, 22 W.R. 17; *Gajendranath* v. *Mathuranath*, 20 C. W.N. 876; 1 Pat.L.J. 109 : 35 I.C. 383.
(8) S. 65 (*a*), C. P. Land Rev. Act, (XVIII of 1881), re-enacted as S.

which constitutes it both impartible and inalienable. These subordinate estates are the creatures of contract, though their indivisibility is a creature of law. And so is their succession. In so far as they are impartible they will possess the same incidents except in so far as they are varied by the statute creating them or the custom, if any, modifying them.

Clause (b).

1711. Impartible by Grant.—In countries with unlimited monarchies, such as India was under its Hindu and Mahomedan rulers, the sovereign is the fountain head of law, and as such, the voice of the sovereign is the voice of Law. This power has been assured to the Government of India by the passage of the Crown Grants Act.[1] But as successors of the Moghul Emperors, the East India Company possessed the power to reaffirm their grants and these were in turn confirmed by the Government of India in temporarily settled areas with the completion of the first settlement in 1864-5. The effect of these confirmatory grants was to leave the old incidents intact with the result that if the estate regranted were originally impartible, they did not cease to be so with the issue of a fresh sanad.[2] Such was held to be the effect of a regrant made after the estate had been ceased and purchased by Government for arrears of revenue.[3]

The Civil Courts have confirmed these grants in several cases[4] in which they have held that where an estate was granted as an impartible raj, the withdrawal from the holder of judicial powers or a few instances of allotments of villages to junior cadets of the family, not shown to be in lieu of the share which they would have received on partition, had not the effect of altering the incident of impartibility. Such was the view taken in the Kunjpura Estate case.[5]

In the Karvetinagar Zemindari case, the court found that though it was originally a semi-independent polligar under the Mahomedan rule, yet on assumption of the Government of the country by the British, the latter regranted it free from military service and removing the restraint on alienation.[6]

1712. The question whether an estate is made impartible by the terms or the nature of the grant is one of construction of the deed, if any, in the light of surrounding circumstances. It has already been stated that a person cannot alter the ordinary incidents of impartibility by transferring it to another on that condition. The subject has no such right.[7] Where therefore, the estate was partible, the mere fact that the other members of the family treated it as impartible does not convert it into an impartible estate,[8] which, being an anomalous estate, must be proved by evidence which is both clear and unambiguous. Where such

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109, C.P. Act II of 1917. The view that co-parcenary rights exist in such tenure, taken in *Fagwa* v. *Budhram*, 10 N.L.R. 64, is inconsistent with the view of the Privy Council in *Ramrao* v. *Raja of Pittapur*, 41 M. 778 P.C. and the provisions of the statute.

(1) *Ibrahim* v. *Ihsham*, 39 C. 711 P. C., affirming O.A. (1908) P.R. 47.

(2) *Afzalkhan* v. *Ghulam Kasim*, 30 C. 843 (863) P.C.

(3) *Har Govind* v. *Collector*, (1937) A. 377.

(4) *Zemindar* v. *Subbaraya*, (1918) M. W.N. 146 : 43 I.C. 871.

(5) *Ibrahim* v. *Ihsham*, 39 C. 711 P. C.

(6) *Perumal* v. *Udagiri*, 21 M.L.J. 351 : 41 I.C. 208.

(7) S. 1, Crown Grants Act (XV of 1895); *Sheo Singh* v. *Raghubans*, 27 A. 634 (653) P.C.; *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.

(8) *Rajalakshmi* v. *Suryanarayan*, 3 M.L.J. 100; *Shanker* v. *Hardeo*, 16 C. 397 P.C.; *Piroz shah* v. *Manibhai*, 36 B. 53 (56).

estate was granted by a sanad, the question is reduced to the examination of its terms.

Clause (c).

1713. Impartible by Nature.—An estate may become impartible by the very nature of its constitution. Such is an estate in the nature of a Raj or chieftainship. So where land originally granted as Jagir was subsequently treated as an appanage to the title of "Raja" it was held that the incidents of impartibility and primogeniture became attached to the grant.[1] Such is the character of all *jagirs* of which it was said: "The grants were manifestly grants in Jagir of the ordinary character, that is to say, they were personal and not hereditary, and were resumable at pleasure, Being personal and temporary, they were necessarily impartible."[2] Grants made to religious charity to be administered by the head of a *muth* were likewise held to be necessarily as impartible as the headship of the muth[3] or the holder of any similar office.[4] Apart from the estates which are impartible by nature, there exist properties which are by their nature equally so, such as, for instance, a pension[5] a Yajman-*vriti*[6] a common way,[7] a well, an idol or a flag. (§ **1601.**)

1714. The question whether an estate, impartible by the nature of its grant, retains its incident of impartibility even after the conditions of the grant are released, must depend upon the proof of custom, since custom may perpetuate an incident even after its purpose has ceased. Grants made for military service and those partaking of a feudal character were necessarily impartible; but whether after their release from feudal obligation or service, they continued to remain impartible depends, not so much upon the history of their origin, as upon the character of their continuance. The fact that the Government had re-settled the estate with a sanad in the common form, does not necessarily affect its impartibility,[8] unless it does so expressly or by necessary implication. Even then the sanad would be merely evidence of the fact that so far as the grantor was concerned, the estate had ceased to be anomalous, but it does not prevent the incident surviving the grant. The custom regarding them would then assume the rank of a territorial custom, and as *lex loci*, it will support the tenure in spite of the conduct of those who stood to profit by its disintegration. But where the custom is merely a *Kulachar* or a family usage, the family that makes it can equally unmake it. Where an estate is by law, grant or by its nature impartible, the mere fact that it has been partitioned does not make it partible.[9] Impartibility is the usual rule amongst large Rajput land-owners, who belonging as they do to the ruling race, carry with them that relic of feudalism and

(1) *Sarabjit* v. *Indrajit*, 27 A. 203 (258).

(2) *Sethuramaswamier* v. *Meruswamier*, 41 M. 296 P.C., affirming O.A. 34 M. 470.

(3) *Gobinda* v. *Ram Charan*, 29 C.W.N. 931: (1925) C. 1107; *Shivram* v. *Sheridhar*, 43 I.C. (N.) 137.

(4) *Rameshwar* v. *Jibendar*, 32 C. 683, affirmed O.A. *Durga Dut* v. *Rameshwar*, 36 C. 943 (952) P.C.

(5) Ss. 11, 12, Pensions Act, (XXIII of 1871).

(6) *Raja Ram* v. *Ganesh*, 23 B. 131; *Ramchand* v. *Utamchand*, (1937) S. 147.

(7) *Shantaram* v. *Waman*, 47 B. 389 where several estates in a locality bearing a similar history were held to retain their pristine incident of impartibility.

(8) *Raj Kishen Singh* v. *Ramjoy*, 1 C. 186 (191) P.C.; *The Udayarpalayam case*, 24 M. 562, O.A. 28 M. 508 P.C.; *Mhd. Afzal Khan* v. *Ghulam Kasim*, 30 C. 843 (862) P.C.; *Martand Rao* v. *Malhar Rao*, (1928) P.C. 10; *Zamindar of Karvatnagar* v. *Subbaraya*, 43 I.C. 871 (872, 873) : (1918) M.W.N. 146.

(9) *Dwarka Prasad* v. *Jai Bahram*, 67 I.C. 686 : (1922) P. 322.

transplant it even upon new estates, which they may have acquired in the course of their adventures.[1]

Maintenance Grants.

1715. This raises the question whether maintenance grants carved out of impartible estate are also impartible. The question is again one of intention. If the subject of the grant was to remain with the grantor, the grantee only getting the benefit of the usufruct for maintenance, it is clear that neither is the incident of the property altered nor are the grantees even entitled to partition *inter se*.[2] But it does not thence follow that the grant is by reason of this fact inalienable,[3] unless, of course, the grant was limited to the grantee personally. But where the grant is intended to or has the effect of conveying an estate in land, a separate and independent estate comes into existence and as all property is *prima facie* partible, it becomes equally partible, since the incident of impartibility which attached to the parent estate does not persist in all derivative estates carved out therefrom.[4] But as will be presently seen such estate may also be customarily impartible. Such are the Jagirs granted by the Maharaja of Chota Nagpur where such custom has attained the notoriety of a *lex loci*.[5]

Clause (d).

1716. Impartible by Custom.—Custom accounts for impartibility in a large number of cases and it is also responsible for the rule of primogeniture which, ordinarily, governs succession to such estates. It is said that both the custom of impartibility and succession by, a single owner are incidents attached not so much to the property held by a family as to the law governing the family.[6] But though the custom may be limited to a family, it must necessarily refer to some specific property, otherwise it would be too wide.[7] Such customs have been known to exist in the families of large land-holders, such as the Maharajas of Chota Nagpur[8] and of Darbhanga.[9] Where custom defines the incidents as to impartibility and succession, it also determines the right of the relations to maintenance.[10]

1717. The custom which creates such an anomalous estate may be custom of any of the kinds described before (**§§269-274**). It may be an incident of an estate or may be a mere rule of succession. The question whether it is the one or the other depends upon its history. One thing is certain that impartibility never attaches to small estates, although the estate need not be a Raj or a Polliam,[11] and it cannot survive as a family custom independently of some particular estate. A family cus-

(1) *Rana Mahatab Singh* v. *Badan Singh*, 48 C. 997 (1008, 1009) P.C.

(2) *Udaya* v. *Jadablal*, 8 C. 199 P. C. *Sartajkuari* v. *Deoraj*, 10 A. 272 (288, 289) P.C.; *Venkata* v. *Court of Wards*, 22 M. 383 P.C.; followed in *Durga Dut* v. *Rameshwar*, 36 C. 943 (952) P.C.; *Ramchandra* v. *Muheshwar*, 33 C. 158.

(3) *Poteswari* v. *Rudra Narain*, 1 A. L.J. 543.

(4) *Gajendra* v. *Mathura Nath*, 20 C.W.N. 876 : 1 Pat. L.J. 109 : 35 I.C. 383.

(5) *Ram Rao* v. *Raja of Pittapur*, 41 M. 778 P.C.; *Raj Kumar* v. *Janki Koer*, 24 C.W.N. 857: 62 I.C. 289 P.C.

(6) *Ramcharan* v. *Harihar*, 35 I.C. (Pat.) 392.

(7) *Rudra Pratap* v. *Nirman Pratap*, 74 I.C. 225 : (1923) O. 61.

(8) *Ekradeshwar* v. *Janeshwari*, 42 C. 582 P.C.

(9) *Maharaja of Jeypore* v. *Vikrama Deo*, 24 C.W.N. 226 P.C. : 52 I.C. 333; *Rama Rao* v. *Raja of Pittapur*, 41 M. 778 (785, 786) P.C.

(10) *Parbati* v. *Jagdis*, 29 C. 433 (453) P.C.; *Secretary of State* v. *Kamachee*, 7 M.I.A. 476 (537); *Jagadamba* v. *Wazir*, 2 Pat. 319.

(11) *Beer Pertab* v. *Rajendra Pertab*, 12 M.I.A. 1; *Chintamun* v. *Nowlukha*, 1 C. 153 P.C.; *Shyamanand* v. *Rama Kanta*, 32 C. 6.

tom of succession to an estate not absolutely owned by the family never exist.[1] (§ 1728.)

Gaddinashin.

1718. The custom is the survival of the great sovereignties which existed in this country both under the Hindu and the Mohammadan kings. The evidence is the evidence of *gaddinashin*[2] and it must be shown that the estate is of the nature of a Raj in which one person alone is the *gaddinashin*. This was pointed out by the Privy Council in two cases, in one of which Lord Hobhouse said: "The other remark is a suggestion that there is no necessary connection between *gaddinashin* and primogeniture. That may be so; but it is impossible to read the evidence without seeing that witnesses on both sides treat the two as identical or the former as proving the latter. Not a single question is put to any witness who has affirmed or denied *gaddinashin* for the purpose of disconnecting it from promogeniture...Their Lordships think that when the witnesses affirm or deny *gaddinashin* they mean to affirm or deny primogeniture; and their constant identification of the two things shows how closely they are connected in the minds of the families of that part of the country. The custom of *gaddinashin* has clearly an important bearing on that of primogeniture though the connection between them may not be a necessary one."[3] In another case, their Lordships quoted this passage and the following from the judgment of the Allahabad High Court over which they were sitting in appeal: "In order to constitute a valid argument it ought to have shown not only that *gaddinashin* and the presentations of nazars was the ordinary concomitant of the possession of an impartible Raj, but also that it was an exclusive attribute of families in whom the custom of primogeniture prevails."[4] The nature of the evidence necessary to establish a custom has already been discussed. (§§ 304-328.)

1719. Proof of Custom.—The proof of impartibility by custom is no exception to the rules that govern the proof of any other custom. (**S. 11.**) But as regards impartibility and primogeniture, such proof is easier where the estate to which it relates and in respect of which it is claimed is in the nature of a Raj or *quasi*-principality, or an estate in which the successor is clothed with the emblem of authority by his being ceremoniously placed on a *masnad* or *gaddi*, or being given the title of Rana, Raja, or the performance of the ceremony of *tilak* or the like affording ocular proof of his sole succession, but those are all trappings of the custom and not its prerequisite, since custom may equally be proved *aliter*. It will suffice if some cases are here passed in review to indicate generally the evidence which the court treats as sufficient and that which it rejects as insufficient.

1720. The following case illustrates the difficulty which besets the proof of custom. The plaintiff sued his brother for partition of the family estate. The defendant pleaded a *privilegium* in his family of inheritance by primogeniture. The Subordinate Judge who tried the case found such custom proved. The High court held it not proved. The evidence adduced to prove it comprised an entry in the *Wajib-ul-arz*, the early history of the family contained in an official publication and oral

(1) *Thakur Rudra Pratap* v. *Nirman Prasad*, 74 I.C. 225: (1923) O. 61.

(2) "Sitting upon the throne."

(3) *Nitri Pal* v. *Jai Pal*, 19 A. 1 P. C.; *Mahtab Singh* v. *Badan Singh*, 48 C. 997 (1015) P.C.

(4) *Garuradhwaja* v. *Superandhwaj*, 23 A. 37 (50) P.C., reversing O.A. *Superandhwaj* v. *Garuradhwaj*, 15 A. 147.

evidence of witnesses who gave it as their opinion that the estate was impartible. The High court dismissed them with the remark that they were either interested or depended upon the *Wajib-ul-arz*. Accordingly, they decreed the claim; but on appeal the Privy Council reversed them holding the custom proved by the following facts:—

(1) That for a period of nearly 80 years from the time of the British occupation, the enjoyment had been consistent with the alleged custom.

(2) That as such, for three generations, there had been successive descents of the estate to an eldest son.

(3) There had been a persistent tradition of impartibility of the estate.

(4) The evidence of 56 witnesses who gave it as their independent opinion based on hearsay but not mere repetition of hearsay.

Though the oral evidence without the other facts would not have sufficed to establish custom, it corroborated these facts which went far to prove it. In the result, they held the custom proved and dismissed the suit with costs.[1]

1721. In another case, the same high tribunal upheld the custom on proof of the existence of a *gaddi* for four generations, and the title of Rana borne by the holder of the estate for the time being[2] from a very early period. In this case the family was one of Rajputs who had migrated from their original home into the Central Provinces. Citing Todol's Rajasthan, their Lordships pointed out that the rule amongst the Rajput states favoured primogeniture and the custom of primogeniture was carried by the Rajput settlers to their new home where on acquisition of new estates they continued to observe it.[3] In yet another case, they upheld a similar custom in favour of lineal primogeniture on the following evidence: (*i*) judgments in three cases in which the custom was held proved; (*ii*) oral evidence on both sides which declared that there was such a tradition in the family; (*iii*) a procedure marked by the titles of honour given to the sons of the holder; (*iv*) opinions of defendant's witnesses who supported his plea of impartibility by an expression of their opinion as to his family and the families belonging to the same group. On the other hand, there was the record of heirs stated in an official document by a late holder on the requisition of the authorities of that time. The High court upheld the custom and the Privy Council upheld the High court mainly relying upon the judgments and the special marks of respect shown to the sons of the holder. Referring to the judgments, their Lordships said: "These decrees do not, of course, bind the parties to the present suit, but they go a long way to show the prevalence of the custom among families having a common origin and settled in the same part of the country."[4] The appellant pressed the declaration of heirs made in the official record; but their Lordships admitted its importance but declined to accept it as laying down any positive rule of succession in the family.

1722. The court is justified in inferring custom from a uniform practice lasting for a considerable period. So, where it was found that the practice in a *Deshpande Vatan* had been, for a century and a half without interruption or dispute of any kind whatever, to have the per-

(1) *Garuradhwaj* v. *Superandhwaj*, 23 A. 37 (52) P.C.
(2) *Mahtab Singh* v. *Badan Singh*, 48 C. 997 P.C.
(3) *Ib.*, p. 1009.
(4) *Mohesh Chunder* v. *Satrughan*, 29 C. 343 (354) P.C.

formance of the services of the *vatan* and the bulk of the property in the hands of the elder branch, the younger branches being provided only with maintenance, the court held the practice as more probably due in its origin to a family or local usage, than a mere arrangement determinable at the will of any member of the family.[1]

1723. It is held by the Privy Council[2] and it is enacted in S. 110 of the Evidence Act, that where a person is found in possession of land receiving rent and paying revenue, he is presumed to be its owner and as such entitled to exercise all the rights incident to the ownership.[3]

Where all the lines of evidence, of differing degrees of value, converged towards the same result, *viz.*, the existence of a custom of impartibility and of primogeniture, the Privy Council held the custom established, adding: "Perhaps no one of them would, if standing alone, be conclusive in favour of the defendant's case; but taken as a whole, they are conclusive."[4]

1724. Family Custom.—The nature of evidence required to establish family custom is not different to that required to establish any other form of custom, for example, territorial or local custom. But the fact that such custom is limited to a single family or group of families entitles the court to require even a higher standard of proof than what would satisfy it in the case of a wider custom. Where the custom belongs to a group of families, it is not so difficult to establish it as where it is limited to a single family. But in this case it is for the party setting up such custom to establish the closest possible analogy between the various families constituting the group. Courts are reluctant to hold a family custom proved from only three or four examples of a comparatively recent time.[5] But these instances will suffice if the custom is sufficiently widely distributed over a group of families: in one such case the court accepted the evidence of its existence for about 80 years as sufficient.[6] But it is not always possible to furnish instances of the application of family custom, since there may never have been an occasion for the growth of instances. In that case, the well-established family tradition would theoretically suffice, though it must be supported by other antecedant probabilities such as the nature of the estate, its character and magnitude and other circumstances rendering it probable that the family had been from time immemorial treated as one subject to such custom.[7] Where the custom is established as existing in two branches of a family, it will be deemed to exist in another branch of the same family.[8]

1725. Where custom is sought to be proved by the establishment of a family tradition, regard must be had to the fact that only such evidence is admitted as is relevant for that purpose. The statements of the deceased, relatives, servants or dependents of the family would be relevant if they are shown to have possessed special means of knowledge respecting the usage of the family to which

(1) *Ramarao* v. *Yesvantrao*, 10 B. 327.

(2) *Oolagappa* v. *Arbuthnot*, 14 B.L.R. 115 (139) P.C.

(3) *Collector* v. *Lakamani*, 14 B.L.R. 115 (139) P.C.

(4) *Nitra Pal* v. *Jai Pal*, 19 A. 1 (16) P.C.

(5) *Chandika Baksh* v. *Muna Kunwar*, 24 A. 273 P.C.

(6) *Garuradhwaja* v. *Superundhwaja*, 23 A. 37 P.C.

(7) *Rana Mahatab Singh* v. *Badan Singh*, 48 C. 997 (1018) P.C.; *Maharanee Heeranath* v. *Baboo Burn Narain Singh*, 9 B.L.R. 274 : 17 W.R. 360; *Mahamaya* v. *Haridas*, 42 C. 455 (470 471); *Garuadhwaja* v. *Superundhwaja*, 23 A. 37 (50, 51) P.C.

(8) *Garuradhwaja* v. *Superundhwaja*, 23 A. 37 P.C., overruling 15 A. 147; *Sarabjit* v. *Indarjit*, 27 A. 203.

they depose. Where oral evidence refers to an opinion on the grounds of which that opinion is held, it must be the evidence of the persons who hold that opinion on those grounds. "Their Lordships think it is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay and not mere repetition of hearsay."[1] It is said that a family custom regarding impartibility and primogeniture must relate to some estate possessed by the family. In other words, there must be a particular estate to which the custom must be attached. Ordinarily, it must be so. But it is not a condition precedent to the existence of such custom since where impartibility is a part of family law of succession it is as much a part of personal law as survivorship or adoption, marriage and the limited rights of females, independent of the property which it may at any time possess. A scion of a noble house may acquire property in a distant land which, from its extent and character, partakes of the nature of a Raj, the acquirer would immediately treat it as an impartible estate because it is the custom in his family to treat such estates as impartible. It may be, that the estate acquired was never impartible before, though if it were so, it would strengthen its claim to remain impartible.

1726. It need scarcely be added that where it is sought to prove a custom in one family by proof of custom in another family, the two families must be shown to belong to one group, or otherwise connected by relationship or territorial affinity.[2]

1727. No Custom.—The proof of custom must conform to the test already set out.[3] But so far as regards the proof of the custom of impartibility law now recognizes not only a local custom, but one limited to a single family. In the one case, the custom becomes a *lex loci*, while in the other case, it is a mere family usage or *kulachar* at variance with the general law and usage in the vicinity.[4] Such a departure from the ordinary rule must naturally disclose some exceptional ground for its foundation. It may be found in the important nature of the estate partaking of the nature of a petty Raj or principality, the antecedents of its holders, whether they belong to those who have for generations followed the rule of feudalism, such as members of the Rajput clan who, as the Privy Council have observed, as a rule follow the rule of impartibility if it was the rule of their ancestral home.[5] In its inception such custom may originate in a contract expressed or implied; and its continuance may equally be sustained by it (**§§ 1731-1734**). But in order to become a *kulachar*, such custom must possess the prime quality of antiquity. In other words, it must be an immemorial custom and not only one of a recent date.[6] An estate, impartible only for 67 years,

(1) Ss. 32 (5), 49 60, Ev. Act; *Garuradhwaja* v. *Superundhwaja*, 23 A. 37 (52) P.C.

(2) *Rup Singh* v. *Rani Baishni*, 7 A. 1 (19) P.C.

(3) *See* Chapter II, *ante*, and the Commentary thereon.

(4) *Abraham* v. *Abraham*, 9 M.I.A. 243 P.C.; *Rajkishen* v. *Ramjoy*, 1 C. 186 P.C.

(5) *Mahabat Singh* v. *Badan Singh*, 48 C. 997 P.C.

(6) *Martand Rao* v. *Malhar Rao*, 55 C. 403 (413) P.C., following *Umrithnath* v. *Goureenath*, 13 M.I.A. 542; but see *contra*, § 279.

could not, it was said, be held to be so by an ancient and invariable custom. But in this case, the Privy Council had calculated its duration from the date of the grant in 1796 only up to the date of the first settlement in 1863, whereas the estate had remained impartible till 1917, *i.e.*, no less than 121 years, when the last zamindar died, on whose death the plaintiff sued his younger brother for a declaration that the zamindari was impartible, which more than sufficed to prove the antiquity of its custom. But this was the estate of a *Kunbi*. In the case of a *Rajput*, the same Board presumed a custom proved as existing thirty years ago to be ancient.[1]

(For other cases, *see* §§ 279-291.)

1728. Limits of the Rule.—Impartibility never attaches to small estates, and it cannot survive as a family custom independently of some particular estate. A family custom of succession to an estate not absolutely owned by the family can never exist.[2] It cannot, for instance, become an incident of a maintenance grant though carved out of an admittedly impartible estate[3] (§ 1716); further, though an impartible estate is ordinarily in the nature of a *Raj*, it does not follow that all *Rajs* are nceeesarily impartible.[4]

1729. Adverse Possession.—The incident of impartibility cannot be imparted to an estate by adverse possession, since adverse possession merely hushes hostile claims but cannot add a new attribute to property. It is, however, possible that the holder of an estate may by resisting successive claims remain the sole owner thereof. But such estate in his hands, though for the moment unpartitioned, does not on that account become impartible. It is, however, conceivable that adverse possession may assist in the acquisition of an impartible right, as where such claims were made to the knowledge of those prejudicially affected by it, and still the lawful claimant did not challenge it for any length of time.[5] In this connection what is to be proved is not merely that a branch of the family of persons were excluded but that their exclusion was in derogation of a claim made and denied by the party setting up adverse possession. The holder of an impartible estate cannot, by giving notice to the junior members that he intends to be divided in status as regards all partible and impartible properties, put an end to the rights of the junior members over the impartible estate. Such a notice has the effect of destroying the undivided status of the partible properties only.[6] Where a junior branch was let in to inherit an impartible estate in consequence of a family arrangement, it does not destroy the rights of the senior branch to inherit by survivorship.[7]

1730. Impartible by Accretion.—Accretion is yet another source of impartibility. Its relation to impartibility will be found discussed in the sequel.[8]

Clause 1 (e).

(1) *Basant Singh* v. *Brij Raj Saran*, 57 A. 494 (508) P.C.

(2) *Rudra Pratap* v. *Nirman Prasad*, 74 I.C. 225: (1923) O. 61.

(3) *Maharaja Udai Pratab* v. *Maharaja Kumar Jagat Mohan*, 6 Pat. 638.

(4) *Martand Rao* v. *Malhar Rao*, 55 C. 403 (411) P.C.

(5) Art. 127, Limitation Act, read with ib., s. 28; cf. *Sri Raja Viravara* v. *Sri Raja Viravara*, 20 M. 256 (264) P. C.; *Vishnu* v. *Ganesh*, 21 B. 325 (327, 328).

(6) *Annadana* v. *Kona Ammal*, 71 I. C. 533: (1923) M. 402.

(7) *Ib.*

(8) S. 211 *post*.

No impartibility by contract.

207. (1) A partible estate cannot be made impartible by contract.[1]

(2) Such contract may bind the persons making it, but it cannot create any right *in rem*.[2]

1731. Analogous Law.—It is not for the subject to alter the legal course of devolution of property,[3] the utmost he can do is to bind another by his personal contract. And the question is whether such contract, even though personal, is not illegal. This question has been the subject of judicial examination, the result of which has led to the conclusion that such contract would be illegal if it lends to create a perpetuity,[4] but that if it is limited as to time and made for a definite purpose, it will bind them personally, but not their transferees, heirs and legal representatives.[5] But such contract, if acted upon by the family for a sufficiently long time, may become the origin of a family custom, but not because it is a contract, but rather because the family and their descendants have foregone their rights and have adopted it as *Kulachar*, in which case, the maxim *communis error facit jus*[6] applies. Many customs have grown of a conduct, the origin of which is a contract. But such custom would require several generations to develop and single departure would be sufficient to disturb its continuity, which, if the origin were not traceable would be treated as an individual abberration not sufficient to affect its even continuance.

A will dedicating property to a religious or charitable object must be distinguished from a mere contract, since in that case the testator transfer his interest to a juridical person or institution in which, from its very nature, there can be no co-sharers and consequently, no right of partition. But even here, if a partition is possible, the will will fail of its purpose.[7]

1732. No Impartibility by Contract.—Law favours free trade in property and discourages all attempts to fetter its free disposal with conditions. The creation of an impartible estate is, however, dictated by public policy, which cannot be enlarged by contract. A contract amongst the members of a joint family that they will live jointly and not go to partition will. however, bind them as a personal contract.[8] But it does not bind their assignees and heirs.[9] And even as regards the actual parties thereto, it desirable or necessary that partition should take place. The fact that it desirable or necesary that partition should take place. The fact that such an agreement exists does not necessarily negative the right to partition if it is otherwise found to be necessary or convenient. *A fortiori* it cannot make property impartible for ever. Where a claimant obtained

Clause (1).

(1) *Tagore* v. *Tagore*, 9 B.L.R. 377 (409) P.C.

(2) *Ramlinga* v. *Virupakshi*, 7 B. 538. (409) P.C.

(3) *Tagore* v. *Tagore*, 9 B.L.R. 377

(4) *Ramalinga* v. *Virupakshi*, 7 B. 538,

(5) *Radha Nath* v. *Taruck Nath*, 3 C.W.N. 126 (128) P.C.

(6) *Jagdish Bahadur* v. *Sheo Partab Singh*, 23 A. 369 (381).

(7) *See* 1 Gour's Law of Transfer (6th Ed.), pp. 282, 283; *Ashutosh* v. *Doorga Churn*, 5 C. 438 (444) P.C.; *Ramalinga* v. *Virupakshi*, 7 B. 538; *Chander* v. *Kundan Lal*, 31 A. 3; *Radhanath* v. *Taruk Nath*, 3 C.W.N. 126 (128); *Mallan* v. *Purushothama*, 12 M. 287.

(8) *Rajendra* v. *Sham Chand*, 6 C. 106; *Pirojshah* v. *Kanibhai*, 36 B. 53; *Jafri Begum* v. *Ali Raza*, 23 A. 383 (392) P.C.; *Mukerji* v. *Afzal Beg*, 37 A. 155; *Sakhawat* v. *Abu Said*, 22 O.C. 100: 52 I. C. 73.

(9) *Nasratullah* v. *Mujibullah*, 13 A. 309; *Bisheshar* v. *Ram Prasad*, 28 A. 627; *Mukerji* v. *Afzal Beg*, 37 A. 155; *contra* in *Gulbandi* v. *Manni Lal*, 23 A. 219.

possession of the estate under compromise with the widow of the last holder, it was held that its impartible character was not lost.[1] But though neither contract nor compromise can directly invest an estate with the incident of impartibility, still they may indirectly originate such estate, as where, acting upon the contract, the parties have for long treated the estate as impartible.[2]

1733. The process of evolution of an impartible estate from a contract would then be as follows: A contract express or implied against partition is made. It is acquiesced in by the members of the family who, for convenience or from a sense of pride or respect to the senior members of the family, abstain from forcing a partition. The contract gives birth to a conduct. This conduct, if long continued, develops into a custom which then becomes enforceable as a *kulachar*, independently of the volition of those who by their conduct have brought it into existence. Contrariwise, the incidence of impartibility, when based on such custom, may be destroyed by an act or conduct, conscious or unconscious, of the parties who may, by repeated partitions, destroy the invariability of the custom.[3]

A contract may originate custom, it may sustain it during its formative period; but it is a contract or conduct which may any moment put an end to it before it has taken root as a custom. Even after it has taken root, the same process may suffice to dissolve it; since it is open to the members of a family to partition an estate which owes its impartibility only to a *kulachar*, though they could not by that means circumvent a local custom which, being a *lex loci*, cannot be defeated by any action of the parties.

1734. Apart, however, from its effect upon the foundation and destruction of a family custom, a contract cannot bring into existence an impartible estate. For instance, it is not open to a group of men, a company or a corporation to acquire landed property and by their own volition impress upon it the character of impartibility. In their case, no lapse of time and no conduct, how-long-soever continued, would suffice to make a partible estate impartible. As their Lordships observed: "Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails."[4] In other words, while no party can alter the incident of a tenure imparted to it by law, or custom having the force of law, there is nothing to prevent a family from putting an end to a custom which had sprung into existence by their own consentient act.

Relation of an inalienable estate to impartible estate.

208. (1) An estate may be impartible without being inalienable, and it may be inalienable without being impartible.[5]

(2) An impartible estate is *prima facie* alienable, though it may be made inalienable in the same way as it is made impartible.[6]

(1) *Lakhraj* v. *Harpal*, 34 A. 65 (70).
(2) *Kishore Singh* v. *Gahena Bai*, 35 I.C. 630 (637, 638) P.C.
(3) *Rajkishen* v. *Ramjoy*, 1 C. 186 (195) P.C.
(4) *Rajkishen* v. *Ramjoy*, 1 C. 186 (195) P.C.
(5) *Durga Dat* v. *Rameshwar Singh*, 36 C. 943 (952) P.C.
(6) Ib.; *Udaya* v. *Jadabal*, 8 C. 199. P.C.

(3) Where an estate is inalienable, the extent of its inalienability must be determined by the nature and source of its origin.[1]

1735. Analogous Law.—Since impartibility and inalienability are two things apart, the fact that an estate is impartible does not warrant the inference that it must also be inalienable. This is settled by the Privy Council.[2] But since the causes which operate to make an estate impartible also extend to make them inalienable, it follows that estates which are impartible are also at times inalienable, still inalienability is not a necessary adjunct of impartibility and it cannot be inferred from the mere absence of alienation without any evidence of facts which would make it probable that an alienation would have been made.[3] Inalienability may be inferred from some speciality in the tenure.[4]

An estate inalienable by custom may be alienated for necessity.[5] It had been held in a long series of decisions that the Zemindaris in the Madras Presidency are inalienable as well as impartible. As such, the court will presume alienability without proof of a custom to that effect.[6] The Ghatwali tenures are impartible, but while those in the Khargpur district are alienable[7] those elsewhere are inalienable.[8]

Clause (2).

1736. There is no logical necessity that an impartible estate should also be inalienable. As a matter of fact law presumes the contrary, and this presumption is justified by the fact that all estates are *prima facie* both alienable and partible. Impartibility is an anomalous incident, which becomes atttached to certain estates in the manner previously indicated (**S. 206**). But when an estate ceases to be impartible, it does not necessarily cease to be inalienable.[9] Such is a religious office which has been held to be alienable only to the next heir. An instance of a grant, which though impartible, is yet inalienable is furnished by the Babuana grant of the Darbhanga Raj, which was held to descend to the eldest male heirs of the grantee to be held by the heir for the time being for the maintenance of the family, the lands granted reverting to the grantor on failure of male descendants.[10] An Inam, also called Saranjam.[11] is similar in character. The right to succession is in the family of the holder subject to regulation by Government. The holder has no power of alienation by will, and he cannot alienate beyond his lifetime except for necessity. But a right to a permanent tenancy may be acquired by

(1) *Durga Dut* v. *Rameshwar Singh*, 36 C. 943 (952) P.C.; *Sartaj Kuari* v. *Deoraj Kuari*, 10 A. 272 (289) P.C.

(2) *Durga Dat* v. *Rameshwar Singh*, 36 C. 943 (952) P.C., affirming O.A. *Rameshwar Singh* v. *Jibendar Singh*, 32 C. 683, following *Udaya* v. *Jadablal*, 8 C. 199 P.C.; *Sartaj Kuari* v. *Deoraj Kuari*, 10 A. 272 (288, 289) P.C.; *Krishna Rao* v. *Court of Wards*, 22 M. 383 P.C.

(3) *Durga Dat* v. *Rameshwar*, 36 C. 943 P.C.; *Sartaj Kuari* v. *Deoraj*, 10 A. 272 P.C.; *Venkata Surya* v. *Court of Wards*, 22 M. 383 P.C.

(4) *Rupsingh* v. *Pirbhoo*, 21 A. 557.

(5) *Gopal* v. *Raghunatha*, 32 C. 158, contra *Raja Madhusudan* v. *Khesta Basi*, 8 Pat. 932 (936); *cf.* Ss. 2 (*d*) and 6, Transfer of Property Act.

(6) *Venkata Surya* v. *Court of Wards*, 22 M. 383 (397) P.C.

(7) *Kali Prashad* v. *Anand*, 15 C. 471 P.C.

(8) *Nilmoni* v. *Bakranath*, 3 C. 187 P.C.

(9) *Udaya* v. *Jadablal*, 8 C. 199 P.C.; *Durga Dat* v. *Rameshwar*, 36 C. 943 (952) P.C.; *Sartaj Kuari* v. *Deoraj Kuari*, 10 A. 272 (282, 289) P.C.; *Krishna Rao* v. *Court of Wards*, 22 M. 383 P.C.

(10) *Durga Dut* v. *Rameshwar Singh*, 36 C. 943 P.C., affirming O.A. *Rameshwar Singh* v. *Jibender Singh*, 32 C. 683.

(11) *Gurarao* v. *Secretary of State*, 41 B. 408.

prescription against the holder for the time being so as to bind his successors.[1]

1737. Proof of Inalienability.—Since law favours free transfer of property, there is no presumption in favour of the impartibility of an estate, nor can that presumption be made from the fact that an estate that has remained partible and inalienable for several generations is necessarily so, though it is a circumstance to be taken into account in judging of its impartibility, or inalienability, either or both according to the circumstances of each case. Many estates declared both impartible and inalienable, and settled on a favoured land revenue assessment are not unconditionally impartible and inalienable, since the reduced revenue may depend upon the two incidents remaining attached to the estates. If, therefore, the holder partitions or aliens the estates, the State becomes entitled to withdraw its favoured assessment, but the partition or alienation is not necessarily void. To be void the terms of the grant or the law governing it must expressly or by necessary implication, declare it unconditionally impartible or inalienable. Such a condition cannot be implied in an estate only customarily impartible or inalienable.

1738. No contract can make an estate impartible beyond the lifetime of the contracting parties. (**S. 207.**) The same rule applies to inalienability. (§ **1735**). It may be that an estate in its inception may owe these incidents to a contract; but in order to vest the estate with these incidents, that contract must develop into a custom: *error communis facit jus.* (§ **1731.**) In other words, the estate can only become impartible and inalienable by custom and not by contract, though contract may date the origin of the custom. The sources of inalienability and those of impartibility are identical. But the two incidents, though allied, are distinct; and as already observed, an estate may be impartible though it is not inalienable, and *vice versa.* (**S. 208.**) Inalienability in this connection must be understood as the quality of an estate unconnected with the disability of its holder. This quality may owe its existence to any of the five causes set out in section 206. But inalienability admits of degree. An estate personal in character is inalienable though it may become alienable within limits. Such is also property with constitutes an endowment for religious or charitable purposes.[2] Such are service grants which are usually inalienable.[3] Such is also "Pension" which means periodical payment by government to the pensioner.[4] Inams Saranjams fall into the same class. The subject concerns the domain of general law, and has been discussed at length in another connection to which reference is invited for more particular information.[5]

1739. It follows as a matter of necessity that where an anomalous estate is created, the extent of its anomalous character must be determined by the terms and purpose of its creation. On this point it has been held that "the absence of an alienation, without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of inalienability."[6]

(1) *Trimbak* v. *Sheik Gulam*, 34 B. 329, (341, 342).

(2) *Shri Ganesh* v. *Keshavram*, 15 B. 625.

(3) *Forbes* v. *Meer Mahomed*, 13 M. I.A. 438; *Brendon* v. *Sunderabai*, 28 B. 272; *Yamuna Bai* v. *Lagmanna*, 21 Bom. L.R. 820: 52 I.C. 770; *Girdhar* v. *Gaya Prasad*, 3 O.L.J. 235; 34 I.C. 672.

(4) *Nawab Bahadur of Murshidabad* v. *Karanani Industrial Bank, Ltd.*, 59 C. 1 P.C.

(5) 1 Gowr's Law of Transfer, (6th Ed.) §§ 219, 224, 231, 233.

(6) *Srtraj Kuari* v. *Deoraj Kuari*, 10 A. 272 (289) P.CC., cited *per curium* in *Durga Dut* v. *Rameshwar Singh*, 36 C. 943 (954) P.C.

Incidents of an Impartible Estate.

209. An impartible estate is subject to the following incidents:—

(1) The estate is held by one person at a time, but he may hold it as a coparcener or as his separate property;[1]

(2) If the estate is not inalienable, the holder, for the time being, is its sole owner and may relinquish, transfer or devise it at his discretion;[2]

(3) The sons and brothers of the holder are entitled to maintenance, the right of other relations to maintenance being determined by custom;[3]

(4) If the holder is a coparcener, all rights of other coparceners merge in him except their right of survivorship adapted to its anomalous character;[4]

(5) The heir-apparent has merely a *spes successionis* which he may renounce or surrender, but which he cannot partition, transfer or devise; nor is it liable to be sold in execution of a decree against him;[5]

(6) The succession to the estate is ordinarily by primogeniture, determined by the rule of survivorship or inheritance according as the estate is joint or separate property of the holder;[6]

(7) The successor takes the estate subject to such burdens created, and the debts payable, by his predecessor as provided under the next section;[7]

(8) The estate does not lose its incidents of impartibility by the mere discontinuance of service attaching thereto, or by the fact that it is re-granted after confiscation.[8]

Illustrations.

(*a*) *A, B* and *C* are three members of a joint family. An impartible estate is granted to *A*. It is *A's* joint property though *B* and *C* have no rights of a coparcener other than the right of survivorship.

(*b*) In the last case, *A* has sons *D* and *E*. On *A's* death his eldest son *D* will succeed to *A's* impartible estate and will be a coparcener with *B*, *C* and *E* in the joint estate.

(*c*) *A, B* and *C* are members of a coparcenary. *A* is the holder of an impartible estate. On his death the estate will devolve on his nearest survivor to the exclusion of the widow.

(*d*) *A* is the holder of an impartible estate. He becomes a rebel whereupon his estate is confiscated by Government who regrants it to his brother *C*. It remains an impartible estate in the hands of *C*.[9]

(*e*) But if, in the last case, the regrant is to "*C* and his heir," then the estate loses its impartibility, for the "heirs" of *C* cannot come in if the estate remains impartible.

(*f*) *A* obtains a service grant which is impartible. *A* discontinues the service It does not affect the impartibility of his estate.

1740. Analogous Law.—There is no textual authority on the factum and incidents of impartible estates. (§ **1681.**. They have grown out of the royal grants made for civil and military services, and their incidents are defined in the terms of the grant clarified and modified by several Acts of the local legislatures, where they are so dealt with, the holders are, of course, bound by them. In other cases and on points

(1) *Shibaprasad* v. *Prayagkumari*, 59 C. 1399. P.C.

(2) *Sartaj Kuwari* v. *Deoraj*, 10 A. 272 P.C.

(3) *Rama Rao* v. *Raja of Pittapur*, 41 M. 778 (785).

(4) *Shibaprasad* v. *Prayagkumari*, 59 C. 1399. P.C.

(5) S. 6 (*a*), Transfer of Property Act, S. 64 (*m*) C.P. Code; contra *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 P. C.

(6) *See* S. 214.

(7) *See* S. 210.

(8) *Rajkishen Singh* v. *Ramjoy*, 1 C. 186 P.C.

(9) *Hargovind* v. *Collector*, (1937) A. 377.

not dealt with by law or the royal grants, the estates are subject to the several incidents set out in the clauses of the section, the authority of which will be found set out in the sequel under the clauses concerned.

1741. Personal Property of Impartible Holder.—The rule of impartibility applicable to zemindaris does not extend to the personal property of the zemindar left at his death, which is divisible amongst his coparceners in accordance with the ordinary law.[1]

The question whether an estate is partible or impartible is a mixed question of law and fact.[2]

1742. Coparcenary in Impartible Estate.—The question whether an impartible estate can be held in coparcenary or in absolute ownership has often been considered in connection with the question of succession, and the Privy Council, after expressing themselves on either side;[3] have in a recent case held it to be no exception to the general law of coparcenership,[4] but with the utmost deference it is submitted that, apart from the rule of devolution, which was the very question to be considered, it is difficult to reconcile that pronouncement with the general law and the incidents of coparcenary property. It is said that the heir to such estate has not a mere *spes successionis*, but reasons have been given elsewhere why his interest is nothing more. (**§ 1750.**)

Clause (1).

As it is, the latest view of the Privy Council is that an impartible estate may as much be held in coparcenary as any other property, and that, on death of its owner, its succession would be subject to survivorship or inheritance according to whether it was joint or separate property of the last holder; the result being that, on the death of the holder, if the estate is found subject to primogeniture and survivorship, it will devolve, not on the member nearest in blood, but on the eldest member of the senior branch of the family.[5]

1743. It is of the essence of an impartible estate that it must be held by a single person. Such person may be real or juridical, *e.g.*, a corporation or an idol, but in each case, the holder can have no partners or sharers, since the partners or sharers possess the right of enforcing partition. The question whether an estate is partible or impartible is a mixed question of law and fact.[6]

1744. Holder's Right of Ownership.—Subject as above, the holder of an impartible estate is entitled to exercise all rights of an absolute owner. He is entitled to spend his receipts therefrom in any way he pleases, and if out of his savings he acquires other estate, he is entitled to treat it as his self-acquisition, since even where the estate is coparcenary, the coparceners have no claim thereon, not even the claim to personal maintenance.[7] An impartible estate is not necessarily inalienable, even where

Clause 1 (e).

(1) *Maharajulangaru* v. *Puntilu*, 5 M. H.C.R. 31.

(2) *Muthu* v. *Dora Singha*, 3 M. 290 P.C.

(3) *Sartaj Kuari* v. *Deoraj Kuari*, 10 A. 272 P.C.; *Venkata Surya* v. *Court of Wards*, 22 M. 383 P.C.; *Ram Rao* v. *Rajah of Pitapur*, 41 M. 778 P.C.; *Sripat Chunder* v. *Rajah Jagadesh*, 55 I.A. 282 : (1927) P.C. 159; *Pratap Chunder* v. *Jagadish*, 54 C. 955.

(4) *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 P.C.; *Baijnath* v. *Tej Bali Singh*, 43 A. 228 P.C.; *Ram Jagadamba* v. *Wazir Narain*, 2 Pat. 319 P.C.; explained in *Fulbati* v. *Maheshwari*, 2 Pat. 685 (700, 704).

(5) *Hurgovind* v. *Collector*, (1937) A. 377.

(6) *Muthu* v. *Dora Singa*, 3 M. 290 P.C.

(7) *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 (1413) P.C., following *Rama Rao* v. *Raja of Pittapur*, 41 M. 778 P.C.

it is so, the holder's right of enjoyment is in no way qualified, though in that case he cannot alien any part of the estate beyond his own lifetime, provided such alienation carves out an estate equal to his own. It does not debar him from making grants or giving leases for any term, the validity of which cannot be challenged by his successors on the mere ground of their predecessor's incompetency, though they may be set aside if found to be outside the scope of his prudent management or made in fraud of his successor.

1745. Relation's Right to Maintenance.—The Privy Council admit that even where an impartible estate is joint property, the junior members have no right of maintenance in lieu of their coparcenary right[1] or otherwise than by custom[2] which distinctly favours the maintenance of the holder's son[3] and brothers,[4] but there is no invariable or certain custom to maintain any below the first generation from the last holder. If the rule were otherwise, in a few generations the estate itself would cease to exist.[5]

Clause (3).

1746. Maintenance Grants.—The question of maintenance suggests another question that of maintenance grants. Though the estate be inalienable, the holder of an impartible estate is not precluded from making maintenance grants in perpetuity of subordinate tenures which may be both alienable and heritable.[6]

1747. The question whether such grant is personal to the grantee or will survive his death is one of construction and intention. *Prima facie* maintenance grant is intended even if the deed described the grantee as "proprietor" and as holding "for ever".[7]

1748. Custom sometimes modifies the terms of a grant by superadding to it incidents of its own. So when the proprietor of the Chota Nagpur Raj granted a village to a priest by a sanad which provided that the grantee and his "*al-aulad*" (descendants) were to possess and enjoy the property, it was held that though the term "*al-aulad*" would etymologically include both the female as well as the male descendants, yet according to the custom proved to have prevailed at the time of the grant and subsequently in that part of the country, the words must be interpreted to mean lineal *male* descendants only.[8] In some cases, as in the cases of grants by the Maharaja of Chota Nagpur,[9] or the Maharaja of of Darbhanga,[10] the grants are themselves impartible.

1749. In the absence of family usage or custom, a maintenance grant is alienable.[11] A maintenance grant to the grantor's son and his descendants in ancestral property in the hands of the grantee, so that

(1) *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 (1413) P. C., following *Rama Rao* v. *Raja of Pittapur*, 41 M. 778 (785) P.C., followed in *Commissioner* v. *Zemindar of Chemudu*, 57 M. 1023 (1026).

(2) *Rama Rao* v. *Raja of Pittapur*, 41 M. 778 (785) P.C.

(3) *Ib.*, p. 786; citing *Yarlagadda* v. *Yarlagadda*, 24 M. 147 (155) P.C.

(4) *Ib.*

(5) *Nilmony Singh* v. *Hingoo Lal*, 5 C. 256 (259), approved in *Rama Rao* v. *Raja of Pittapur*, 41 M. 778 (786) P.C.

(6) *Narayan* v. *Lokenath*, 7 C. 461.

(7) *Rameshwar* v. *Arjun Singh*, 23 A. 194 P.C.; *Bunia Hussain* v. *Haji Unisa*, 35 I.C. (O.) 764.

(8) *Perkash* v. *Rameshwar*, 31 C. 561 (570).

(9) *Gajendra* v. *Mathuranath*, 20 C. W.N. 876: 1 Pat. L.J. 109: 35 I.C. 383; *Ramacharan* v. *Harihar*, 35 I. C. (Pat.) 392.

(10) *Durga Dut* v. *Rameshwar*, 36 C. 943 P.C., in which, however, the impartibility was admitted.

(11) *Sashi* v. *Jagoti*, 44 C. 585 P.C.

the latter cannot alienate it to the detriment of his descendants except as allowed by law.[1]

The word "grant", as used in legal transactions in India, is not to be understood in its technical English meaning of a conveyance at common law of remainders, reversions and incorporeal hereditaments, which do not lie in livery or of which livery could not be given.[2]

[For further information on the subject of maintenance, *see* Chapter VII.]

1750. Successor's Spes successionis.—Though the Privy Council have in a recent case[3] described the coparcenary heir's chance of succession to an impartible estate as not a mere *spes successionis*, similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate, but an interest that may be renounced or surrendered, it is submitted that even in a so-called impartible coparcenary estate, the chance of the heir to succeed to the holder is no more than a chance dependent upon future adoptions, births and deaths in the family, and so long as the holder is alive, no junior coparcener has anything but a chance to succeed to him. It is so described in the Acts of the Legislature to which their Lordships did not advert.[4]

Clause (4).

1751. As such chance it is not property that can be transferred or seized or sold in execution of a decree against the coparcener. And though it may be renounced and surrendered, that right might even be exercised in respect of a mere contingency. Further, unless the estate is also inalienable, the holder possesses the absolute right of transfer and bequest which he may exercise and thereby defeat his coparcener's expectancy.

1752. Succession by Primogeniture.—The succession to an impartible estate, ordinarily, follows the rule of primogeniture modifying the law of coparcenary, survivorship and inheritance. The former would govern succession to a joint estate, the latter to an estate that was never joint, and being joint has since been partitioned. As to this the Privy Council have held that in the case of joint ancestral property a general partition and the presumption flowing from it that it is both final and complete cannot and does not apply to property which is impartible. This does not mean that the coparcener's right to such property can never be the subject of partition. All it means that such right can only be renounced or surrendered to another branch of the family by the senior line, by expressly or impliedly renouncing or surrendering it, which is a question of fact dependent upon the circumstances of each case.[5] The fact of a general partition between all members of the family does not warrant such presumption. As in a family, subject to the Dayabhaga law, there is no survivorship, succession thereto will follow the general law of inheritance adapted to the rule of primogenture.[6] Though the rule of primogeniture generally

Clause (5).

(1) *Durga Dut* v. *Rameshwar*, 36 C. 943 (952) P.C.

(2) *Hazarimal* v. *Aliani*, 18 I.C. 625.

(3) *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 P.C.; *Sellappa* v. *Sellappa*, I. L.R. (1937) M. 906 (other coparceners have a right of ownership, but what are its active incidents?).

(4) S. 61 (*a*); Transfer of Property Act; S. 64 (*m*), C. P. Code; *Sartaj Kuari* v. *Deoraj*, 10 A. 272 P.C.

(5) *Collector* v. *Ram Sundar*, 56 A. 468 (484, 485) P.C., following *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 (1414) P. C., approving *Konammal* v. *Annadana*, 51 M. 169.

(6) *Baij Noth* v. *Tej Bali*, 43 A. 228 (235) P.C.

governs the descent of impartible estate, yet a family usage of selection may vary that rule.[1]

1753. For the purpose of determining the heir, it is necessary to ascertain whether the estate is the self-acquisition or the ancestral joint property of the holder. On his death his eldest son, and if he dies without male issue, the eldest of his undivided coparceners, and in their absence his widow and not his collateral, will succeed to his estate.[2] Women are not precluded by any rule of descent from succeeding to an impartible estate,[3] though they may be excluded by custom. But whoever relies upon such custom must prove it.[4] The holder is entitled to adopt a son but the adopted son acquires no greater right in the estate than the natural son.[5]

1754. Where an impartible estate becomes vested in the daughter's son of the original holder, it will devolve on his death on his own son and not on another daughter's son of the original holder. There is no authority for the contention that when an impartible estate becomes obstructed by being vested in a female heir, it becomes always obstructed heritage, so that on the death of each succeeding holder (whether male or female), the true successor is the heir of the original unobstructed owner.[6] So in a competition between the direct lineal descendant of a common ancestor and a person one degree nearer to him, the court preferred the former holding him entitled, because in a joint family he would, being the eldest of the senior branch, be the head of the family, and as such, entitled to inherit the impartible Raj.[7]

[*See* this subject cintinued in commentary to Section 214 (3), (5).]

1755. Successor Pays Debts.—The subject will be found discussed in the next section.

Clause (6).

1756. Discontinuance of Service.—A service estate does not cease to be impartible by discontinuance of the service attaching thereto. In fact a large number of existing impartible estates were at one time held on service tenures; but their release from service does not alter their established incident of impartibility.[8] Nor does the fact that the estate was re-granted, after its confiscation by Government suffice to alter its impartibility unless that incident was altered expressly or by necessary implication.[9]

Clause (7).

1757. Though the execution of a promissory note by the previous holder might suggest *prima facie* that the creditor looked to his personal credit, it is still competent to him to show that the estate was intended to be equally bound.[10]

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(1) *Achal Ram* v. *Udai Partap*, 10 C. 511 (518) P.C.; *Ishri Singh* v. *Baldeo Singh*, 10 C. 792 P.C.; *Mhd. Afzal Khan* v. *Ghulam Kasim*, 30 C. 843 (862) P.C.

(2) *Periasami* v. *Periasami*, 1 M. 312 (321) P.C.; *Doorga* v. *Doorga*, 4 C. 190 (202) P.C.

(3) *Katama* v. *Raja of Shivgunga*, 9 M. I. A. 543; *Collector of Madura* v. *Veeracanu*, 9 M.I.A. 446.

(4) *Ramanandan* v. *Janki*, 29 C. 828 P.C.

(5) *Venkatasuria* v. *Court of Wards*, 22 M. 383 P.C.

(6) *Muthu* v. *Udayana*, 6 M.L.J. 149.

(7) *Baijnath* v. *Tej Bali*, 43 A. 228 P.C.

(8) *Rajkishen Singh* v. *Ramjoy*, 1 C. 186 P.C.; *Beer Partab* v. *Rajendra*, 12 M.I.A. 1; *Savitri Bai* v. *Anandrao*, 12 B.H.C.R. 224 (226); *Radha Bai* v. *Anant Rao*, 9 B. 198; *Ram Rao* v. *Yeshwant Rao*, 10 B. 327.

(9) *Haurgovind* v. *Collector*, (1937) A. 377.

(10) *Harpal* v. *Bishan*, 6 A.L.J. 753; *Indar* v. *Harpal*, 34 A. 79 (84); *Durga*

210. In an impartible estate, not governed by any law or the terms of the Crown Grant the right of the holder to incur debts and charge the estate so as to be binding upon his heir is subject to the following rules, namely:—

Holder's debts.

(1) Where the estate is not inalienable, the holder may charge it for any debts he may have incurred, which will be recoverable from the estate in the hands of the heir;

(2) Where such estate is inalienable, his debts, charged and uncharged, may be recovered from the heir if they were incurred for legal necessity[1] or benefit[2] as hereinbefore defined in sections 118 and 119 respectively;

(3) Provided that where the debt is uncharged, the heir other than the son, takes the estate by survivorship, he takes it free from the debt incurred by his predecessor;[3]

(4) Provided further that where the heir is the son, he is liable to pay his father's debts, irrespective of the mode of his succession to the estate.

1758. **Successor's Liability to pay Holder's Debts.**—The question to which, if any, the heir is liable to pay debts, charged or uncharged, of his predecessor must, subject to the terms and conditions of the grant, depend upon their character, and the character of the estate. If there is nothing in the grant of an estate or law governing it, and the estate is not inalienable, the holder, being entitled to alien his estate, is equally entitled to charge it, and his heir who takes the estate must pay the debt whatever their character. But where the debt is not charged on the estate and the estate is alienable, the liability of the heir must depend upon whether he is the son or any other relation of the holder, and whether he succeeds to the estate by the rule of survivorship or inheritance. If he is the son, he is under the pious obligation to pay his father's debt and his obligation continues whether the estate he has taken is partible or impartible. If, in this case, the debts were charged on the estate, he would still be liable for the debt, though entitled to challenge his father's alienation upon any of the grounds open to him if the estate he had taken were partible. (§ 159.) Where the heir is any other relation, *e.g.*, the brother, he would take the estate free of his liability for the unsecured debts on the grounds that the estate in his hands is not the assets of the previous holder.[4] *E converso* the successor in such case is entitled to recover all debts due to his predecessor without obtaining a succession certificate because the debts accrued to him by survivorship.[5]

In a succession otherwise than by survivorship, the position of the heir, other than the son, seems akin to that of the reversioner succeeding to the estate on the death of a Hindu widow who is entitled to appropriate all receipts from her estate without being accountable to any

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v. *Chintamani*, 31 C. 214. In *Kesho Prasad* v. *Siv Saran*, 48 I.A. 329 P.C., the *gaddinashin* zemindarin had executed an agreement promising to pay the manager a certain pension. The Privy Council threw out the manager's suit, holding, on the construction of the deed, that it fell short of a contract but contained merely a recommendation which could not be legally enforced against her successor.

(1) *Gopal* v. *Raghunath*, 32 C. 158.

(2) *Immudipattam* v. *Subramania*, (1924) M. 707.

(3) *Nachiappa* v. *Chinnayasami*, 29 M. 453.

(4) *Nachiappa* v. *Chinnayasami*, 29 M. 453; *Raja of Kalahasti* v. *Achigadulu*, 30 M. 454; *Mandelswara* v. *Prayag*, 32 M. 429; *Maharaja of Bobbili* v. *Kaminiayani*, 35 M. 108; *Varagana* v. *Murugappa*, 36 M. 375; *Indarsen* v. *Harpal Singh*, 34 A. 79.

(5) *Gur Pershad* v. *Dhani Bai*, 38 C. 192.

one, apart from which she is entitled to incur debts for legal necessity for which the reversioner is liable. The heir of an impartible estate is similarly liable for all debts of his predecessor if supported by legal necessity,[1] or benefit.[2] This principle of the general law has found legislative expression in section 4 (1) of the Madras Impartible Estates Act[3] which, prohibits all alienations to inure beyond his own lifetime, unless the alienation is made, on the debt incurred, "under circumstances which would entitle the managing member of a joint Hindu family, not being the father or the other coparceners so to do independently of their consent." As such, the Privy Council set aside a sale executed by the holder of a portion of his impartible estate at the instance of his heir on the ground that it was unsupported by legal necessity or any benefit of the estate.[4]

1759. The Madras Act is, of course, conclusive of the holder's power to charge his heir with the debts, but the analogy of the manager of a joint family does not appear to be apposite, since the receipts of the joint estate in the hands of the manager do not belong to him exclusively and he is, therefore, bound to apply them upon the maintenance and repairs of his estate and spend the surplus on the joint family. But the holder of an impartible estate does not suffer from the same liability, since all the receipts are his own, and though he is morally bound to keep his estate in good repair, he cannot be compelled to do so. It seems that the analogy of the Hindu widow is closer, though here again, while the reversioner may restrain waste, the heir apparent of an impartible estate has not that right, for if the holder is devastating the estate to ruin his successor, it is a greater injury to him than if he cut him out altogether by his gift or devise. Even if the estate be inalienable, he is the owner and not the trustee for his heir. And as owner his powers are limited only by such acts as even the owner cannot do. Spoliation and waste are certainly not such acts, though there are means for restraining them by taking over the management, say, by the Court of Wards. And since the receipts belong to the holder it is not open to the heir to repudiate his liability on the ground that the holder had discharged legal necessity with borrowed money when he could have met it out of his ample receipts.

1760. The liability of the heir for payment of his predecessor's debt does not extend to the appropriation of his receipts from such estate to this purpose, since such receipts are not assets of the last holder, nor is a creditor, therefore, entitled to recover his debt by attaching them.[5]

Acquisitions and accretion.

211. (1) An estate created impartible by law or by a grant from the Crown cannot be enlarged by accretion, by custom or otherwise,[6] unless such accretion is permitted by the law or grant creating it.[7]

(1) *Gopal* v. *Raghunath*, 32 C. 158; *Madhusudan* v. *Khestabasi*, 8 Pat. 932 (940).

(2) *Immudipattam* v. *Subramania*, (1924) M. 707; *Sellappa* v. *Suppian*, (1937) 1 M.L.J. 422.

(3) Mad. Act II of 1904, quoted in *Nagappa* v. *Brahadambal*, 58 M. 350 (353) P.C.

(4) *Nagappa* v. *Brahadambal*, 58 M. 350 (353) P.C.

(5) *See* S. 146.

(6) *Shibaprasad* v. *Prayag Kumari*, 59 C. 1399 (1420-1422) P.C., approving *Gurusami* v. *Pandia Chinna*, 44 M. 1.

(7) Ss. 2, 3, Crown Grants Act (XV of 1895); *Jagadamba* v. *Wazir Narain*, 2 Pat. 319 (326) P.C.; *Someshwari* v. *Maheswari*, 10 Pat. 630; *Shibaprasad* v. *Prayag Kumari*, 59 C. 1399 (1422) P.

(2) No income of an impartible estate howsoever created and no movable property possessed by its holder can form an accretion to such estate, even though they be furnishings and equipment, necessary for the support of the dignity of the holder and the *gadi*, unless they are shown to follow the *corpus* by custom which must be pleaded and proved.[1]

(3) In an estate made impartible by custom, the question whether the immovable property purchased out of its income, and other self-acquisitions of the owner become an accretion to the estate depends upon his intention to incorporate them therewith.[2]

(4) But such intention cannot be presumed from the mere fact that the holder had blended the income of the two estates.[3]

Illustrations.

(*a*) *A*, the holder of an impartible Raj acquires mouzas, *B*, *C* and *D* out of its income. *B*, *C*, and *D* are managed by the same staff and their collection papers are kept with those of the Raj. This is insufficient to show *A's* intention to treat *B*, *C* and *D* as part of the Raj.[4]

(*b*) *A* inherits a Raj as a Crown grant. Out of its income he purchases, mouzas *B*, *C* and *D* which he wishes to incorporate in his Raj. He cannot do so, as by so doing he would alter the ordinary course of devolution of ordinary property.[5]

(*c*) In the last case, if the Raj be impartible by custom, then *A* has the inherent right of incorporating his self-acquisitions with his joint property, whether partible or impartible. *A*, can, therefore, incorporate the mouzas in his Raj, if he intends to do so unless such exclusion is excluded by law or custom to the contrary.[6]

(*d*) *A* owns an impartible Raj, also three mouzas *B*, *C* and *D* of which mouza *B* is his ancestral joint property, and *C* and *D* are both his self-acquisitions. *A* blends the income of *C* with that of *B*, and that of *D* with that of the Raj. The mere blending, in the former case, will raise the presumption of *A's* intention to treat *B* and *C* as joint propetry; but no such presumption arises in the latter case by treating *D* as part of the Raj, since the question depends upon the nature of the Raj and *A's* intention to incorporate *D* with it.[7]

1761. Analogous Law.—All acquisitions made by the holder of an impartible estate do not necessarily become part of his impartible estate. *Prima facie* they are his self-acquisitions and as such follow the rule appliable to self-acquired property.[8] In order to constitute accretions to the impartible estate, they must be intentionally incorporated with it. Such intention would not necessarily be ascribed to one who left the acquisitions undisposed of in his lifetime.[9] But as the holder may incorporate his acquisitions with the parent estate at any time at his discretion, it follows that while he is alive, he is entitled to treat them

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C.—the movables included the furniture and equipment of the Raj, *see* item (6) on p. 1404.

(1) *Shiba Prasad* v. *Prayag Kumari*, 59 C. pp. 1432, 1433.

(2) *Shibaprasad* v. *Prayag Kumari*, 59 C. 1399 P.C.

(3) *Ib.*, p. 1416.

(4) *Ib.*, p. 1415.

(5) *Shiba Prasad* v. *Prayag Kumari*, *ib.*, pp. 1421, 1422.

(6) *Ib.*

(7) *Ib.*, pp. 1418, 1419.

(8) *Secretary of State* v. *Kamachee*, 7 M.I.A. 476 (537); *Parbati* v. *Jagadis*, 29 C. 433 (453) P.C.; *Jagadamba* v. *Wazit Narain*, 2 Pat. L.J. 239: 38 I. C. 255: O.A. 2 Pat. 319 P.C.; *Aparna Debi* v. *Shiva Prasad*, 3 Pat. 367; *Harihar Prasad* v. *Kesho Prasad*, (1925) Pat. 68; *Sri Partab Chandra Deo* v. *Sri Raja Jagadish Chandra*, 40 C.L.J. 331: 82 I.C. 886 : *Harbaksh* v. *Dal Bahadur*, 22 A.L.J. 1079: (1925) A. 155; *Raghuraj Singh* v. *Debi Sing*, 97 I.C. (N.) 721 : (1927) N. 15.

(9) *Jagadamba* v. *Wazit Narain*, 2 Pat. 319 (325) P.C.; *Janki Parshad* v. *Dwarka Prashad*, 35 A. 391 P.C.; *Murtaza Husain* v. *Yasin Ali*, 38 A. 552 P.C.; *Rajeswara* v. *Viraprat'apali*, 5 M.H.C. R. 31; *Kotta* v. *Bangari*, 3 M. 145; *Sarabjit* v. *Indrajit*, 27 A. 203.

as one or the other. But there is a presumption that he intends to keep his acquisitions separate and the mere fact that he managed them through his Raj servants or had the account papers of the one maintained with the other does not shew his intention to incorporate them;[1] but he may at any time treat them as indistinguishable from his Raj when they would become accretions to the Raj and acquire all its incidents.

1762. Where, however, they remain unincorporated, they will descend to the heirs of the holders in accordance with the normal personal law to which he is subject. As the Privy Council remarked: "Unless there be a custom by which self-acquired properties of a Mitakshara family become part of the ancestral estate, or unless it be shown that the person acquiring the same intended to incorporate such acquisitions with the estate, they descend by the ordinary law of inheritance. For example, where the owner of an ancestral impartible estate, possessed also of self-acquired properties, dies leaving lineal male descendants, as the inheritance is 'unobstructed,' both classes of property go to them; supposing, however, he were to die leaving no male progeny in the direct line, but a widow and a divided agnatic relation, in the absence of a custom the self-acquired property would go to the widow, while the estate would devolve on the agnatic heir."[2]

1763. Mahomedan Law.—But since the Mahomedan Law makes no distinction between ancestral and self-acquired property, and recognizes no principle of differentiation in the matter of lineal and collateral succession, as is the case under the Mitakshara, which divides inheritance into "unobstructed and obstructed heritage" all classes of property, whether ancestral or self-acquired, would in the case of Mahomedans follow one rule of devolution. If a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the taluqs to establish it.[3]

Property is presumably partible and alienable.

212. (1) All property is presumably partible and alienable.[4]

(2) Impartibility and inalienability are the incidents of an estate which must be pleaded and proved in each case.[5]

1764. Analogous Law.—When we see the vast body of property around us which is both partible and alienable, law naturally presumes in favour of the general partibility and alienability of all property. Impartibility or inalienability being exceptional and confined only to a few estates, must be proved whenever it is challenged in each case. So it is now enacted in S. 6 of the Transfer of Property Act as follows: "Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force."

The impartible and inalienable estates owe their existence to the feudal tenures created by the sovereign power for past and future

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(1) *Parbati* v. *Jagadis*, 29 C. 433 P.C.; *Shibaprasad* v. *Prayagkumari*, 59 C. 1399 (1415) P.C.

(2) *Secretary of State* v. *Kamachee*, 7 M.I.A. 476 (537); *Harihar Prasad Singh* v. *Kesho Prasad Singh*, 93 I.C. 454 : (1925) Pat. 68.

(3) *Murtuza Husain* v. *Yasin Ali*, 38 A. 552 (567, 568) P.C.

(4) *Cf.*, S. 6, T. P. Act.

(5) *Rup Singh* v. *Rani Basini*, 7 A. L. (19) P.C.

services. But in recent years law has declared several estates to be impartible and inalienable, while in other cases, the same incidents have become attached to certain estates by custom.

An estate may be impartible, though not inalienable, and it may be inalienable though not impartible. The question of inalienability again depends upon the nature of the tenure, law or custom,[1] since a custom may be general, local, or one confined only to the estate in question.[2]

1765. These incidents cannot be engrafted upon an estate by contract or compromise which is void as being opposed to public policy.[3] The fact that parties have treated the estate as impartible and as such have not partitioned it for six or seven generations does not deprive the members of the family of their rights of partition.[4] Apart from some estates to which custom may become attached, it cannot be pleaded, as a rule of the family succession, applicable to all properties held by them. Even the fact that the family has observed such a custom for time immemorial, say even for 500 years, would not render it valid by its age, since it is unreasonable.[5]

The question whether an estate is impartible, is a mixed question of law and fact.[6]

213. Limits of inalienability. **(1) An estate made inalienable by law or a grant from the Crown cannot be alienated except when so provided or permitted by any law for the time being in force.[7]**

(2) An estate inalienable by custom may be alienated for legal necessity.[8]

(3) A custom making an estate absolutely inalienable is repugnant to Hindu Law and opposed to public policy.

Explanation 1.—**The holder of an estate, howsoever inalienable, is entitled to open new mines and cut down timber.[9]**

Explanation 2.—**The holder of an impartible and an inalienable estate is entitled to make grants of land, and grant leases.[10]**

1766. An estate may be absolutely or conditionally inalienable. It may be absolutely so made by law or a grant from the Crown, as pro-

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(1) *Sartaj Kuari* v. *Deoraj*, 10 A. 272 (288) P.C.; *Venkata* v. *Court of Wards*, 22 M. 383 P.C.; *Pratap Chandra* v. *Jagadish Chandra*, (1925) C. 116, O. A. : (1927) P.C. 159 : 54 I.A. 289; *Venkatachalam* v. *Visvanatha*, 102 I.C. 618: (1927) M. 725; *Baij Nath* v. *Kedar Nath*, 106 I.C. 646, P.C.

(2) *Basvant Rao* v. *Mantappa*, 1 B. H.C.R. (App.) 42 (47).

(3) *Vinayak* v. *Gopal*, 27 B. 353 P.C.; *Piroj Shah* v. *Manibhai*, 36 B. 53 (56); *Sri Raja Viravara* v. *Sri Raja Viravara*, 20 M. 256 P.C.

(4) *Durriao* v. *Dari*, 13 B.L.R. 165 P.C.; *Muthu* v. *Dorasingha*, 3 M. 290.

(5) *Venkatachalam* v. *Visvanatha*, 102 I.C. 618 : (1927) M. 725.

(6) *Rupsingh* v. *Rani Basini*, 7 A. 1 (19) P.C.

(7) *Cf.* S. 4, The Madras Impartible Estates Act, (II of 1904).

(8) *Gopal* v. *Raghunath*, 32 C. 158; *Madhusudan* v. *Krestabasi*, 8 Pat. 932 (940).

(9) *Cf.*, *Subba* v. *Chingalamma*, 22 M. 126 (widow's right in partible property which is in alienable by her).

(10) *See* S. 209 (2) §§ 1744-1749; *Sartaj Kuari* v. *Deoraj*, 10 A. 272 P.C.

vided in the Crown Grants Act[1] (§ 1706) which is then subject to no variation, unless the law or Crown grant itself permits it to be varied. But where it is inalienable by custom, no custom can make it absolutely so, since all estates whether legally or customarily inalienable are liable to be seized and sold for arrears of Government revenue or Government advance or loan recoverable as such revenue; and it is so provided by appropriate Acts of the Legislature or by the terms of the grant creating them, and in any case, such right is implied and would be assumed unless it is expressly excluded[2] in addition to which an estate only customarily impartible might be alienated for the purpose of saving it from forfeiture or sale for payment of the paramount charge. Such estates are further alienable for legal necessity, and it has been held that any custom making it immune from such alienation would itself be illegal and opposed to public policy. The question of its alienability is not then a question of personal law but one of general policy "because an estate which cannot be alienated for legal necessity (including even estates, dedicated to religious or charitable uses) is unknown to Hindu Law. Such a custom would not be merely in variation of Hindu Law of property, but it would be a custom repugnant to Hindu Law, and it is certainly against public policy to allow a family, by a custom created by itself, to establish a permanent monopoly of possession of any given area of land."[3]

Then again, such estate is further subject to the law of estoppel since the question of custom is one of fact and a person may have advanced money without knowledge of that fact which the holder may have done nothing to disabuse him of it. But there can be no estoppel of the manager so as to enlarge the estate belonging to a religious or charitable institution.

214. **In the absence of any law or custom to the contrary, succession to an impartible estate is subject to the personal law of the holder adapted to the nature of the tenure to the following extent:—**

Succession to impartible estate.

(1) Succession is ordinarily governed by the rule of primogeniture;[4]

(2) Where the holder is subject to the Mitakshara law, the heir is the eldest male issue of the deceased, or failing him, the eldest coparcener.[5]

(3) Where it passes by survivorship from one line of descent to another, it devolves not on the coparcener nearest in blood but on the nearest coparcener of the senior line;[6]

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(1) XV of 1895. For the history and scope of this Act, *see* 1 Gour's Law of Transfer (6th Ed.).

(2) S. 6, Transfer of Property Act, which supersedes any rule of Hindu Law to the contrary.

(3) *Ib.*, S. 2 (*d*), *per* Courtney Terrel, C.J., in *Madhusudan* v. *Khestabai*, 8 Pat. 932 (940, 941) dissenting from in *Gopal Prasad* v. *Raghunath*, 32 C. 158 (161) in which the legality of such custom was assumed.

(4) *Ishri Singh* v. *Baldeo Singh*, 10 C. 792 (805) P.C.; *Bhawani* v. *Deo Raj*, 5 A. 542; *Dinkarasami* v. *Bhas-Karasami*, 24 M. 613.

(5) *Parbati* v. *Chandrapal*, 31 A. 457 P.C.; *Subramanya* v. *Siva*, 17 M. 316 (325); *Raja of Kalahasti* v. *Achigadu*, 30 M. 454; *Balu* v. *Lahoo*, 1937 B. 508 (552) F.B.

(6) *Naraganti* v. *Venkatachalapati*, 4 M. 250; *Kachi* v. *Kachi*, 24 M. 562 affirmed O.A. 28 M. 508 P.C.; *Ravaneshwar* v. *Chandri Prasad*, 33 C. 721.

(4) In a case subject to the Dayabhag school, the heir is the eldest member of the class of persons who are the next heirs of the deceased.[1]

(5) Females are presumably excluded from succession in favour of coparceners if the estate is ancestral, but if it is a separate acquisition of the holder they are entitled to succeed;[2]

Explanation.—**In the absence of a custom determining seniority according to the seniority of the mother, seniority in age amongst brothers alone determines the seniority, irrespective of the seniority of the mother.**

Illustrations.

[*Note.*—In the following illustrations, *A* must be understood to be the owner of an impartible estate.]

(*a*) *A* dies leaving his son *B* aged 10 and a brother *C* aged 30. *B* succeeds in preference to *C*.

(*b*) *A* dies leaving his widow and a brother. The widow would succeed if the zemindari is in Bengal, otherwise it will go to the brother.

(*c*) *A* dies leaving him surviving *B*, elder brother of the half-blood, and *C*, a younger brother of whole blood. *B* succeeds in preference to *C* in Mitakshara country[3] while *C* will succeed in Bengal.[4]

(*d*) A dies leaving two sons, *B* aged 19 by his junior wife and *C* aged 10 by his senior wife. *B* succeeds.

(*e*) *A* dies leaving a grandson *B* aged 10 and a brother's son *C* aged 20. *B* succeeds.

1767. Analogous Law.—In describing the incidents of an impartible estate, it has been stated that succession thereto is subject to the personal law of the holder adapted to the tenure. The one incident of impartibility carries with it another necessary incident as to its succession being subject to the rule of primogeniture. (§§ **1770-1777.**) To this extent the personal law must necessarily stand modified. Partibility being the general rule, the succession of one heir is, therefore, an exception.[5] This section lays down the salient principles as regards succession. All the clauses are drawn from the decided cases.

1768. The explanation is, moreover, supported by the following text:—

Manu.—"150. As between sons born of wives equal in their class and without any other distinction, there can be no seniority in right of the mother, but the seniority ordained by law is according to the birth."[6]

1769. Law of Succession.—Generally speaking, succession to an impartible estate is subject to the personal law of the holder, varied by the nature of the estate or custom. Where the family is subject to the Mitakshara law, succession to it will follow survivorship, though while the holder is alive, his coparcener possesses none of the rights inherent in a coparcener. For example, he has no right of partition, residence, maintenance or the like, nor is the holder a mere manager holding for the family, whose rights qualify his own right of alienation, though, on his death, succession is governed by survivorship, and for that purpose, the

(1) Mayne's H.L. (8th Ed.), p. 767, Expl.; *Jagdish* v. *Sheo Partap*, 23 A. 369 (382) P.C.; *Ramalakshmi* v. *Sivanatha*, 14 M.I.A. 570; *Pedda* v. *Bangari*, 2 M. 286 P.C.

(2) *Tara Kumari* v. *Chaturbhuj*, 42 C. 1179 P.C.; *Lekhraj* v. *Harpal*, 30 A. 406, affirmed O.A. 34 A. 65 P.C.; *Rup Singh* v. *Basini*, 7 A. 1 P.C.; *Heranath* v *Ram Narain*, 17 W.R. 316.

(3) *Subramania* v. *Siva*, 17 M. 316.

(4) *Neel Kisto* v. *Beerchunder*, 12 M. I.A. 523.

(5) *E. I. Co.* v. *Kamachee*, 4 W. R. 42 P.C. s.c.; *Sub nom. Secretary of State* v. *Kamachee*, 7 M.I.A. 476.

(6) Manu, IX-125.

question of jointness of the family and of the estate becomes material, the Privy Council having gone the length of holding that so far as regards succession, the jointness of the family does not cease by a mere partition, and the presumed rule of its exhaustiveness, but continues unless the junior members renounce their right of succession,[1] or to put the same thing differently, in order to prove that the estate has ceased to be joint, there must be proof of intention, express or implied, that the members had separated *quad* the estate.

The difference between succession by primogeniture, survivorship and inheritance is that in the former the estate devolves not on the member nearest in blood but on the eldest member of the senior branch of the family.[2]

1770. Primogeniture or Selection.—The fact that an estate is impartible carries with it the incident that it must be held by and descend to a single individual. This person may be ascertained by the rule of primogeniture or some other mode of selection as might be customary. The fact that an estate is impartible does not necessarily imply that it is descendible according to the rule of primogeniture. If the estate be ancestral joint property, the question of selection of the head of the family is a part of the general law,[3] though in ordinary cases, such head is selected by the rule of general or lineal primogeniture. Where the estate is separate property, this complexity does not arise.

Custom of primogeniture.

1771. Succession of large *quasi*-principalities is regulated by the law of primogeniture, the history of which explains the origin of the rule. In the West, on the fall of the Roman Empire, a number of barbarous tribes, then inhabiting Germany, overran its territories and settled portions of them on *feuds,* a German word, meaning stipendiary estate. These service estates were, at first, personal but later on they were granted to a man and his male heirs. In later times, this system of service tenure became extended to France and was introduced into England by William the Conqueror. For similar reasons the military conquerors of the country, both Moghuls and the British, found this system useful and it continued first, on the ground of military service and later, of political service. But after the mutiny of 1858, these tenures were enfranchised and mostly settled on the primary feudal condition of impartibility to which inalienability was, sometimes, though not uniformly, added. But apart from the royal grants several old tenures in the hands of the fighting clan, the Rajputs, have continued to preserve their estates on the basis of their original tenures, which the courts have recognized as a *Kulachar* or family custom, which, however, being a marked departure from the general law which favours free disposal of property, such custom must be supported by precise pleading[4] and convincing proof supported by instances of its actual observance.[5]

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(1) *Shibaprasad* v. *Prayag Kumari,* 59 C. 1399 P.C.; *Collector of Goralchpur* v. *Ram Sundar,* 56 A. 468 P.C;. *Sellappa* v. *Suppan,* 1937 M.L.J. 422; *Bai Kesarra* v. *Shivasanji,* 56 B. 619.

(2) *Har Govind* v. *Collector,* (1937) A. 377.

(3) *Baijnath* v. *Tej Bali,* 43 A. 228 (244) P.C.

(4) *See* §§ 1737-1739, *Heeranath* v. *Burm Narain Singh,* 15 W.R. 375 (383); *Serumah* v. *Palathan,* 15 W.R. 47 P.C.

(5) *Ib., Serumah* v. *Palathan,* 15 W.R. 47 P.C.

1772. Meaning of Primogeniture.—The question is what is the meaning of primogeniture and how are the two kinds of it distinguished. The term primogeniture means "first-born", and the heir most senior in age, whatever his relationship to the last owner, will succeed under the rule in preference to other heirs of equal degree. So where the deceased has left several sons, the eldest succeeds and the fact that he was born of a junior wife is immaterial. As the Privy Council observed: "It is by the birth of his first-born son that a Hindu discharges the duty which he owes to his ancestors, and obtains a spiritual benefit for himself, and therefore, it is to that son that the pre-eminence should be given.[1] But as between a previously adopted son and a subsequently born natural son, an impartible estate goes to a natural son "the reason being that the adopted son is a substitute for the *auras* son and that, when the latter comes into existence, he excludes the substitute.[2]

1773. General and Lineal Primogeniture.—Primogeniture may be general or lineal. Now, since impartibility is the creature of law or usage, it must equally determine the rule of succession and whether it is one or the other, cannot be the subject of any *a priori* reasoning. It must depend upon the nature of the grant and the law or custom which regulates its succession, in the absence of which, the general law must apply. As this law does not exclude women from succession, there is no inconsistency between a custom of impartibility and the right of females to inherit, and the general law will prevail unless it is proved that they are excluded by custom.[3] That custom may shew what is the rule of succession, if it is by primogeniture, general or lineal, the one favours succession by proximity of degree,[4] while the other limits succession to the eldest member of the senior line. In the one case, nearness of blood and in the other nearness in line, is the ground of preference —that is to say, while in the one case, one nearer in blood, though belonging to the junior line, is preferred, in the other, succession goes to the eldest in the senior line without reference to the nearness in blood. It is settled in accordance with the rulings of the Privy Council that when impartible property passes by survivorship from one line to another, it devolves not on the coparcener nearest in blood but on the nearest coparcener of the senior line.[5] In other words, the ordinary rule governing primogeniture favours lineal as opposed to general primogeniture. But where general primogeniture is shown to be customary, and proximity of degree governs succession as amongst those who are equal in proximity, the older in line is to be preferred.[6] The question whether an estate is subject to the ordinary law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it.[7]

1774. In the Udayarpalayam zemindari case, the plaintiff sued for recovery of the zemindari on the ground of his nearness in blood. The

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(1) *Jagdish* v. *Sheo Partab*, 23 A. 369 (382) P.C.

(2) S. 53 (3), *ante*; Dattak Chandrika v. 32; *Ramaswami* v. *Sundaralingasami*, 17 M. 422 (434, 435).

(3) *Ram Nundan* v. *Janki Koer*, 29 C. 828 (852) P.C.

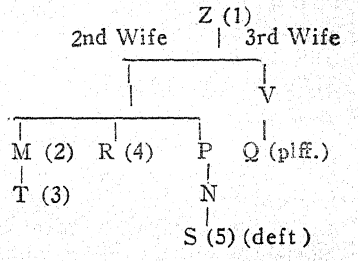
(4) *Muhammad* v. *Hussain*, 26 C. 81 (90) P.C.

(5) *Naraganti* v. *Venkatachalapati*, 4 M. 250 (267) F.B.; *Kachi* v. *Kachi*, 24 M. 562 (609) affirmed O.A. 28 M. 508 (512) P.C.

(6) *Mhd. Iman Ali* v. *Husain Khan*, 26 C. 508 (512) P.C.

(7) *Yarlagadda* v. *Yarlagadda*, 13 M. 406 P.C.

zemindari belonged to one *Z* who had three wives. By the first wife he had no issue. By the second he had three sons *M*, *R*, and *P*, and by the third one son *V*. On the death of *Z* the estate passed first to *M* then to *M's* son and then to *M's* brother *R*. On the latter's death possession was taken by *S* the grandson of his brother *P*. *Q* contested *S's* right on the ground that he was nearer in blood to *R*, but the Privy Council threw out his suit holding that *S* being a nearer coparcener of the senior line was preferably entitled.[1] In other words, the estate was subject to lineal primogeniture.



"The principle of representation places the first defendant (*S*) and the plaintiff (*Q*) in the position respectively of their grand-father (*P*) and father (*V*) and therefore, equally near to the deceased Zemindar (*R*) (apart from any question of half-blood) and that being so, the first defendant (*S*) being senior in age to the plaintiff would take the impartible property in preference to the plaintiff (*Q*):"[2]

1775. The case would have been differently decided if it were subject to the Dayabhag, which does not recognize survivorship as determining the devolution of property.[3] The same view was taken by the Privy Council in a competition between a junior uncle of the last Zemindar and a grandson of a senior uncle who was held to have a superior right.[4] Similarly, in another case, the custom of succession by lineal primogeniture was pleaded and proved. There the contest lay between the eldest male descendant of the second son of the original owner and the descendant of his fourth son nearer by one degree to the *propositus*. It was not disputed that a grandson whose father was dead succeeded to the grandfather's estate in preference to a surviving uncle. But it was contended that this did not prove that the rule of lineal primogeniture applied in cases of collateral relationship. But the Privy Council held it established from a family tradition, though unsupported by any actual instance in which the rule had neither been followed nor departed from, proving the custom and the title of dignity bestowed on the heir apparent.[5] The rule of succession by lineal primogeniture is then an exception to the general rule that a nearer heir excludes a remoter one. But though from the reported cases it would appear that this mode of succession is common to impartible estates, it cannot be so presumed. And he who relies upon it must prove it.[6] Again, the fact that the estate is held by a single heir does not necessarily

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(1) *Kachi* v. *Kachi*, 24 M. 562 (609), following *Naraganti* v. *Venkatachalapati*, 4 M. 250 (267) P.C., affirmed O. A. *Kachi* v. *Kachi*, 28 M. 508 (512) P.C.

(2) *Kachi* v. *Kachi*, 24 M. 562 (609, 610).

(3) *Neelkisto* v. *Beerchunder*, 12 M. I.A. 523, explained in *Naraganti* v. *Venkatachalapati*, 4 M. 250 P.C. and in *Subramanya* v. *Siva*, 17 M. 316 (325-330); *Kachi* v. *Kachi*, 24 M. 562 (608, 609), affirmed O. A. 28 M. 508 (512) P.C.

(4) *Naraganti* v. *Venkatachalapati*, 4 M. 250 (267) P.C.

(5) *Mohesh* v. *Satrugan*, 20 C. 543 P.C.

(6) *Achal Ram* v. *Udai Pertab*, 10 C. 511 (518, 519) P.C.

imply that it is subject to the rule of primogeniture,[1] or to any particular kind of primogeniture.

1776. In determining the right of succession to an impartible estate the class of kindred from whom a single heir is to be selected, should be first ascertained. Next, it should be seen whether family custom or *kulachar* disclosed a special rule of selection, and in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to the general Hindu Law. Nearness of blood is no ground of preference under the Mitakshara Law in case of disputed succession to coparcenary property which is partible, and it is likewise no ground of preference when such property is impartible. When, therefore, the family property belongs to a coparcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years.[2]

1777. The parties to a suit, first cousins once removed, contested the right to inherit an impartible zemindari, which had been acquired by their common ancestor, who had left two daughters by two different wives. The plaintiff was the son of the younger daughter, the defendant's father was the son of the elder. The younger half-sister survived the elder, and in 1863 was judicially declared to have inherited alone the impartible zemindari. On her death, the elder daughter's son, in litigation ending in 1881 made good his title to the estate being descendant in the elder line. It was held that this last male owner became the stock from which descent had now to be traced and that the successor was no longer of that stock, and that the son of this last male owner had a title to the zemindari on his father's death in consequence of the full and complete ownership of the latter who had himself become a fresh root of title.[3]

Order of succession.

1778. In a zemindari subject to the Mitakshara, a half-brother senior in age would have preference over a younger brother of full blood[4] but the very reverse is the case in a Dayabhag succession in which the doctrine of survivorship has no application either as a general part of inheritance or as an exception to it.[5] In the case of competition between two half-brothers, in the absence of custom seniority in years is alone the criterion. The seniority of the mother does not count.[6] But custom may decree otherwise. It may, for instance, confer priority by reason of the seniority of the mother and not by reason of the seniority in age. Such a custom was pleaded and affirmed by the Privy Council.[7]

(1) *Bhai Narindar* v. *Achal Ram*, 20 C. 649 (652) P.C.; *Muhammad* v. *Husain*, 26 C. 81 (90) P.C.; *Jeetnath* v. *Lokenath*, 19 W.R. 239; *Ramchandra* v. *Venkatrao*, 6 B. 598 (613); *contra* in *Bhawani* v. *Deo Rajkumari*, 5 A. 542; *Muthuvadugunada* v. *Periasami*, 19 M. 451 P.C.

(2) *Subramanya* v. *Siva*, 17 M. 316 (327); *Balu* v. *Lahoo*, 1931 B. 508 (552) F.B.

(3) *Muthuvadugunadha* v. *Periasami*, 19 M. 451.

(4) *Subramania* v. *Siva*, 17 M. 316 (330); *Ramasami* v. *Sundaralingasami*, 17 M. 422.

(5) *Sheo Soondary* v. *Pirthee Singh*, L.R. 4 I.A. 147 : O.A. from *Raj Kishore* v. *Gobind*, 1 C. 27 F.B.

(6) *Ramalakshmi* v. *Sivanatha*, 14 M. I.A. 570; *Pedda* v. *Banjari*, 2 M. 286 P.C.; *Ramasami* v. *Sundaralingasami*, 17 M. 422 (438).

(7) *Sundaralingasami* v. *Ramasami*, 22 M. 515 P.C.

Such was also the custom proved in a case that sons by a wife of the caste of the Raja take in preference to a son by a wife of a lower caste.[1]

1779. A half-brother succeeds in preference to the widow of the last owner.[2] So, where the Zamindar was a Shudra amongst whom the illegitimate son succeeds to his father, it was held that as between the son by a wedded wife and an illegitimate son, the ordinary rule of survivorship incidental to a family coparcenary applied and the illegitimate son having survived the legitimate upon his death without male issue, was entitled by survivorship to succeed to the partible Raj.[3] So if the owner died leaving no male issue, but two co-widows, they would jointly inherit if the estate is partible. But if the estate be impartible, the senior will take the estate and the junior will only receive maintenance. In other words, the rule of descent is the personal law of the parties. That determines the heir or heirs. If the estate is partible they all participate. If it is impartible, the eldest of them takes and the rest are excluded by reason of the impartible character of the estate. And since the heir is determined by the general law, it follows that if females are competent to inherit to an impartible estate, the fact that it is impartible is no reason for their exclusion though, here as elsewhere, custom may have ordained their exclusion; but in that case such custom must be strictly proved[4] in the absence of which in the absence of male issue, the widow of the late zemindar will succeed[5] and possess the absolute rights of the owner but may relinquish any of her rights in a compromise with her reversioner.[6] So it was proved that there was a custom applicable to the *Babuana* and *Sohag* grants from the Darbhanga Raj which excluded widows, daughters and descendants of the daughters from succession. These grants descend in the family of the Darbhanga Raj not to one male heir only, but to all the existing male heirs in the male line of the grantee as coparceners.[7]

1780. Though the heir is traced in conformity with the general law, the interest of the other members of a Mitakshara family is, as regards an impartible estate, no more than a mere *spes successionis*.[8] (§ **1750.**) It is not a vested interest as in the case of partible property. And while it is true that the clear and unequivocal declaration of his intention to separate from the holder of such estate would exclude him from the joint family to the same extent as in the case of the family holding partible estate, the fact that the person so separating forfeits his chance of inheriting the

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(1) *Bistooprea* v. *Basoodeb*, 2 W.R. 232.

(2) *Parbati* v. *Jagodis*, 29 C. 433 P. C.

(3) *Jogendra* v. *Nityanand*, 18 C. 151, (155) P.C.; approving *Sadu* v. *Baiza*, 4 B. 37; *Visvanatha* v. *Kamulu*, 24 M.L.J. 271: 21 I.C. 724 *contra* in *Parvathi* v. *Thrumalai*, 10 M. 334 (346), dissenting from *Sadu* v. *Baiza*, 4 B. 37, can no longer be maintained since the approval of the Bombay case by the Privy Council. The view taken in that case that there is coparcenary in an impartible estate, is equally erroneous; *Rama Rao* v. *Raja of Pittapur*, 39 M. 396, affirmed O.A. 41 M. 778 P.C.

(4) *Ramnundun* v. *Janki*, 29 C. 828 P.C.; *Tarakumari* v. *Narayan*, 42 C. 1179 P.C., O.A. from *Narain* v. *Tarakumari*, 5 I.C. 193.

(5) *Periasami* v. *Periasami*, 1 M. 312 P.C., followed in *Doorga* v. *Doorga*, 4 C. 190 (202, 203) P.C.

(6) *Harpal* v. *Lakraj*, 30 A. 406, affirmed O.A. *Lekraj* v. *Harpal*, 34 A. 65 P.C.; *Indar Sen* v. *Harpal*, 34 A. 79.

(7) *Ekradeshwar* v. *Janeshwari*, 42 C. 582 P.C.

(8) S. 6 (*a*) Transfer of Property Act, 1 Gour's Law of Transfer (6th Ed.) § 198, p. 136; *Laliteshwar* v. *Rameshwar*, 36 C. 481.

whole of the estate by survivorship, the courts require strong evidence to establish such separation.[1] This would be clear from the facts of the following case decided by the Privy Council. The Jagirdar had four sons, of whom the eldest was weak of intellect. He, therefore, settled his Jagir on the second son. The estate then descended from father to son for 92 years when the junior branch became extinct. Meanwhile there had been partitions of all partible property between the senior and his own branch and between his own branch and between the members of each branch *inter se*. On the death of the last owner issueless, in 1914, the senior member in the line of his eldest excluded son took possession of the estate, whereupon the mother of the last owner sued to dispossess him. It was found that although there had been several partitions the fact that the second son had been let into possession by arrangement, the zemindari remained and continued the joint family property in his line since "in order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession of the impartible estate."[2]

1781. As to this, it is submitted that even if a member of the junior branch had given up his chance of succession, it would not have sufficed to make the estate separate when it was otherwise joint.[3] But their Lordships hold that the other ground is more conclusive. It was argued that since all partitions are presumed to be complete, the several partitions had the effect of destroying coparcenary in the impartible estate to which their Lordships replied that since the impartible estate could not be partitioned, the members' right of succession could only be destroyed by renunciation. "Further, to lay down that members of a joint family could not partition their partible property without losing their rights of succession to the impartible estate, would impose on those families a restriction on the free right to partition which has been so fully recognised by the decisions of this Board in recent years."[4] In the end their Lordships upheld the rights of succession to be by survivorship.

1782. Succession by Selection.—It has already been seen that ordinarily an impartible estate is subject to the rule of lineal primogeniture, and that where the estate is impartible, but not inalienable, the owner for the time being is entitled to dispose of it by gift or devise. Where, however, it is inalienable, he may still possess the customary right of selecting his heir from amongst his sons. Such right is not merely confined to the impartible estates in this country; since it was equally the incident of an ancient Irish tenure known as *Tanistry*, which, however, has long since been obsolete,[5] but it seems to still survive in some Taluquadari estates in Oudh; *e.g.*, the Kanhmow estate, where the Taluqua-

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(1) *Jagadamba* v. *Wazir Narain*, 2 Pat. 319 P. C.; *Konammal* v. *Annadana*, 51 M. 189 P.C.

(2) *Konnammal* v. *Annadana*, 51 M. 189 (204) P.C.; *Collector of Gorakhpur* v. *Ram Sunder*, 56 A. 468 P.C.

(3) S. 6 (*a*), Transfer of Property Act, S. 225 (*a*), *post*; *Annada Mohan* v. *Gour Mohan*, 48 C. 536, O.A. 50 C. 929 P.C.

(4) *Konammal* v. *Annadana*, 51 M. 189 (205) P.C.

(5) From Ta, territor; also called *Tanistria*, which allotted the inheritance to the oldest and the most worthy of the deceased's name and blood without regard to proximity. It led to bloody wars and was abolished by James I.—*See* Wharton; 3 Hall, Const. Hist., C. 18, p. 377.

dar was found to possess the right to nominate one of his sons as his successor without reference to seniority.[1]

Clause (4).

1783. Dayabhag Succession.—The same rule holds good in the case of a Dayabhag family, that is to say, the heir is selected by the personal law and if there are more than one equally eligible, the eldest succeeds by his right of seniority. But as under this law there is no survivorship, the only rule of succession is by inheritance.

Clause (5).

1784. Position of Females.—The right of a female heir to inherit an impartible zemindari depends upon the law to which it is subject. In a zemindari subject to no special law or custom, the ordinary rule must prevail, *viz.*, a female cannot inherit an impartible ancestral estate, belonging to a joint family under the Mitakshara, when there are male members of the family who are qualified to succeed as heirs; a rule of law not dependent on custom, and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them.[2] This view would be intelligible if we remember that the rights which women possess as regards an ordinary partible property cannot be enlarged by the mere fact that the property to be dealt with is impartible. They succeed or are excluded irrespective of the nature of the property in accordance with their personal law. Such law entitles them to succeed to their husband's separate property[3] from which they cannot be excluded by reason of their sex unless they are excluded by custom.[4]

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(1) *Per* Lord Hobhouse, in *Ishri Singh* v. *Baldeo Singh*, 10 C. 792 (804, 805) P.C. In *Achal Ram* v. *Udai Pratab*, *ibid.*, 511 P.C., the rule was recognized, though the decision turned upon another point. But a similar tenure was found in *Afzul Khan* v. *Kasim Khan*, 30 C. 843 P.C.

(2) *Yenumula* v. *Ramandara*, 6 M.H. C.R. 93 (108, 109); *Hiranath* v. *Ram Narayan*, 9 B.L.R. 274, approved in *Chintamun* v. *Nowlukho*, 1 C. 153 P. C. *Rupsingh* v. *Basini*, 7 A. 1 (10, 11) P. C.

(3) *Ram Nundun* v. *Janki*, 29 C. 828 (851) P.C., following *Beer Pertab* v. *Rajendar*, 12 M.I.A. 1; *Udai Pratab* v. *Jagat Mohan*, (1928) P. 66 (77, 78).

(4) *Ram Nundun* v. *Janki*, 29 C. 828 P.C.

CHAPTER XVI.

TRUSTS, BENAMI TRANSACTIONS AND POWERS.

1785. Topical Introduction.—There is nothing technical in the root idea of Trusts. Where one person entrusts another with some work, it creates a trust, but arising out of the trust flow certain jural rights and obligations which invest the subject with a complexity and importance. The law of fiduciary relations was developed in the Civil Law which has guided the course of modern jurisprudence.

1786. Trust means confidence, and the law of Trust is the law which prescribes the mode in which such confidential relation arises and the manner in which the obligations arising therefrom may be discharged. So the Trusts Act defines the term "trust" as "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner."[1] The person in whom the confidence is reposed is called a trustee, and the person for whose benefit the trust is to be exercised is called a *cestui que trust*, or a beneficiary, and the property in respect of which the trust is created, trust property. Trusts are either (*a*) express, or (*b*) constructive, presumptive or implied. The former arises where the author defines its actual terms and the latter, where it is to be inferred from circumstances.

1787. Hindu Law recognizes Trusts. Indeed, it assigns it a prominent place because of its large and valuable religious endowments, the maintenance and administration of which involves the creation of trusts and the appointment of trustees. These Trusts remain unaffected by the Trusts Act which expressly excludes them. Apart from religious and charitable trusts, Hindu Law now recognizes the right of testamentary disposition which again calls for the intervention of trustees.

1788. All these, however, need the creation of express trusts. But implied trusts have equally a firm footing in Hindu Law, and an instance of it is to be found in the law of *benami* transactions, and the law of joint family, in which the manager has been assigned a position analogous to that of a trustee. Allied to the law of Trusts is the law of Powers, the existence of which is displayed in several transactions elsewhere considered. The law of Trusts is in fact the necessary sequence of the law of property, and there is no system which recognizes the right of property which does not equally recognize the law of Trust which is necessary both for its full enjoyment and disposition. Hindu Law has prescribed no formula for the creation of a trust. Words of recommendation, request, entreaty, wish or expectation, addressed to another, whether a relation, a friend, a devisee or legatee will suffice to create a trust, provided the direction is given with sufficient clearness and certainty, both as to the subject-matter and the object or objects of the intended trust. But while the Hindu, like other archaic systems of law, contains sufficient elementary principles applicable to cases of trust, it fails to furnish the detailed rules by which effect is to be given to its principles. These rules, therefore,

(1) S. 3, Act II of 1882.

supplement its provisions and must be read as if they were necessarily engrafted upon its scanty foundation.

Form of Trust.

215. (1) No form is necessary to create a trust for religious or charitable purposes.

(2) But a secular trust cannot be created otherwise than as provided in Sections 5 and 6 of the Trusts Act.

1789. **Analogous Law.**—Even under English Law, "technical language is not necessary to create a trust. It is enough that the intention is apparent. Thus it has been long settled that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him trustee for the person or persons in whose favour such expressions are used, provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter and the object or objects of the intended trust."[1] Where therefore, the testator by his will left to his wife the whole of his property in the confidence that she would act justly to their children in dividing the same when no longer required by her, the wife by her will, left to their children certain portions of such property, leaving to their child, amongst other things, certain banking shares. These were seized by her creditors, but the court released them holding that the wife took under her husband's will a life-interest only in his property with a power of appointment in favour of the children and that the shares belonged to the child and could not be sold in execution of the decree as part of the estate of the wife.[2]

1790. A trust is created when the author of the trust indicates, with reasonable certainty by any words or acts, (*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, (*d*) the trust property, (*e*) the transfer of such property to the trustee,[3] unless the trust is declared by will or the author of the trust is himself to be the trustee.

Reading Sections 5 and 6 of the Trusts Act together, it would seem that a specific oral declaration of trust on points (*a*) to (*d*) would be enough to create a trust without transfer where the author was himself to be the trustee.[4]

1791. **Imperfect Gift.**—Where there has been a clear intention to make a gift, but on account of some omission on the donor's part, that intention has failed, the courts will not erect a trust on the imperfect gift. When the intention is to make a gift, and the intention has failed for want of transfer or any other cause, the court will not convert what was meant to be an out and out gift into a trust.[5] No trust is created by words in the will to the effect that "the executors should give my brothers, their wives and children according to their (executors') wishes."[6] A person cannot do by intervention of a trustee what he cannot do directly by a gift.[7]

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(1) Jarman on Wills (3rd Ed.), cited in *Raynor* v. *Mussorie Bank*, 2 A. 55 (58).

(2) *Raynor* v. *Mussorie Bank*, 2 A. 55.

(3) *Sabnis*, (In re), (1937) B. 374 (378).

(4) *Manchershaw* v. *Ardeshir*, 10 Bom.L.R. 1209.

(5) *Milory* v. *Lord*, 4 De.G.F. and J. 274, followed in *Manchershaw* v. *Ardeshir*, 10 Bom.L.R. 1209 (1216, 1223).

(6) *Kumarasami* v. *Subharaya*, 9 M. 325; *Quare* in *Venkatachella* v. *Thathammal*, 4 M.H.C.R. 460.

(7) *Rajomoyee* v. *Troylukho*, 29 C. 260.

Object of Trust.

216 A trust may be created for any lawful purpose, whether secular[1] or religious.[2]

1792. **Analogous Law.**—Secular trusts are now subject to the Trusts Act,[3] which, however, exempts all "public or private religious or charitable endowments" from its operation.[4] Such trusts will be governed by Hindu Law, which recognizes the creation of trusts, as was stated in the Tagore case: "Property whether moveable or immoveable must for many purposes be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases. Implied trusts were recognized and established here in the case of *benami* purchases,[5] . . . . and in cases of a provision for charity or for other beneficial objects, such as the professorship[6] provided for by the will under consideration, where no estate is conferred on the beneficiaries and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary."[7]

Quoting this West, J., pointed out that while Hindu law insists as strongly as any on the suppression of fraud and the fulfilment of the promises, in India, it fails to furnish the detailed rules by which effect is to be given to its principles in case of trust, which have to be drawn from English law as embodying the rules of equity.[8] It was so held in a case in which the pensioner had dedicated some property for religious and charitable uses, vesting it in two trustees one of whom had since died. It was contended that the surviving trustee was well able to manage the trust, but the court appointed another trustee in place of the deceased.[9]

1793. It is clear that since Hindu Law permits the dedication of property to religious and charitable uses, it must necessarily permit the vesting of it in trustees but for whose intervention the purpose of the founder would be impossible of achievement. But the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that, for the determination of those interests, the beneficial interest in the residue of the property remains in the person, who, but for the will, would lawfully be entitled thereto.[10]

The subject of religious and charitable endowments occupies an important place in Hindu Law and will be the subject of another chapter.

Insurance by husband for benefit of wife.

217. (1) A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his

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(1) *Cf.* Ss. 5 and 6, Trusts Act, 1882.
(2) *Tagore* v. *Tagore*, 9 B.L.R. 377 (401, 402) P.C.
(3) II of 1882.
(4) *Ib.*, S. 1, *Sabnis*, (In re) (1937) B. 374.
(5) Citing *Gopeekrist* v. *Gunga Persaud*, 6 M.I.A. 53.
(6) The Tagore Law Professorship provided for in the will construed in *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.
(7) *Tagore* v. *Tagore*, 9 B.L.R. 377 (401, 402) P.C.
(8) *Kahan Das* (in re), 5 B. 154 (174).
(9) *Ib.* p. 175.
(10) *Tagore* v. *Tagore*, 9 B.L.R. 377 (402) P.C.

wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

(2) When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.

(3) And in reference to such sum, he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court under Act XVII of 1864 (to Constitute an Office of Official Trustee), section 10.

(4) Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors.

1794. Analogous Law.—This is section 6 of the Married Women's Property Act,[1] expressly extended to Hindus by another Act,[2] the necessity for which arose from the conflict of decisions on the subject. Ordinarily, a stranger to a contract cannot enforce its performance. Therefore, if *A* insured his life for the benefit of his wife *B*, the latter could not, on *A's* death, recover the money, nor indeed would *B* be entitled to it without a formal assignment of policy in her favour. This is the law as enacted in the Contract Act.[3] But this rule has been modified by section 6 of the Married Women's Property Act, which passes the benefit of assurance, effected and expressed to be in favour of the assurer's wife and children, without the requirement of a deed of transfer.

The question then arose whether this provision applied equally to Hindu assurers, which fact was denied both by the Calcutta and Bombay High Courts,[4] though the contrary was held by a Full Bench of the Madras High Court,[5] which has since received legislative approval in the enactment above referred to. It enables a Hindu married man to effect a policy of insurance for the benefit of his wife, or of his wife and children, or any of them, and a policy so effected operates as a trust for the benefit of the wife, or the wife and children, divesting the husband of all interest therein and entitling the beneficiaries to realize the policy in their own right without the necessity of its formal transfer by the assurer. It is apprehended that where the insurer effects a policy for the benefit of his wife and children, the beneficiaries would take unaffected by the special disabilities imposed by Hindu Law upon women.[6]

1795. The only exception recognized by the section is that such policy of assurance should not be effected with intent to defraud credi-

(1) III of 1874.

(2) Act XIII of 1923; Section 2 (*c*), Contract Act (IX of 1872), explained in *Balamba* v. *Krishnayya*, 37 M. 483 (494).

(3) Act IX of 1872.

(4) *Eshani Dasi* v. *Gopal Chandra*, 18 C.W.N. 1335: 20 C.L.J. 4; *Shankar* v. *Umabai*, 37 B. 471.

(5) *Balamba* v. *Krishnayya*, 37 M. 483 (504) F.B., overruling *contra* in *Oriental Life Assurance Co.* v. *Vanteddu*, 35 M. 162.

(6) *Bengal Insurance Co.* v. *Velayammal*, I.L.R. (1937) M. 990.

tors. It may raise some nice questions of Hindu Law, *e.g.*, if the manager of a joint Hindu family should, out of the family funds, insure the lives of his wife and children, the question might arise whether he is liable to account for the cost of insurance in a partition. It is clear that the coparceners cannot lay claim to a policy, and their only remedy is to call for a partition, should they feel aggrieved by the policy effected out of joint funds.

1796. The Hindu rule as to delivery of possession is now superseded by S. 123 of the Transfer of Property Act, under which a gift may be validly made if the gift deed is registered, though there is no delivery.[1]

1797. There is nothing in Hindu Law to preclude the donor from reserving to himself the usufruct of a part of the property for his own life, or postponing the enjoyment by the donee of a part of the profits till after the donor's death.

Benami transaction defined.

218. (1) *Benami* transfer or transaction means the transfer by or to a person who acts only as the ostensible owner in place of the real owner whose name is not disclosed.

(2) The question whether such transfer or transaction was real or *benami* depends upon the intention of the beneficiary.

(3) The real owner in such cases may be called the beneficiary and the ostensible owner the *benamidar*.

Illustrations.

A purchases property in the name of his relation *B*. *A* supplies the consideration and *B* merely lends his name. *A* is the beneficiary and *B* his *benamidar*.

Benami transfer.

219. (1) A person does not acquire any interest in property by merely lending his name.

(2) Where one person holds property for another, he will be deemed to hold it in trust for another.

1798. Analogous Law.—The habit of acquiring and holding property *benami*, so inveterate in India,[2] is not merely confined to the Hindus;[3] nor indeed, is the habit confined to India, since the purchase of property by one in the name of another is not unknown in England,[4] though such instances are comparatively rare. But in India, it is a habit which, though now on the decline, is yet maintaining a firm hold on the people. So, in one case their Lordships of the Privy Council observed: "The system of acquiring and holding property and even of carrying on business in names other than those of the real owners, usually called the *benami* system, is and has been a common practice in the country. There is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people."[5]

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(1) *Lallu Singh* v. *Gur Narain*, 20 A. L.J. 744 F.B.: 68 I.C. 798 (801); *Sahu Ram's case*, distinguished in *Kalyan Singh* v. *Dharam Singh*, 68 I.C. 794: 20 A.L.J. 721.

(2) Though not in Burma; *Ma Gyi* v. *Ma Me*, 4 R. 522.

(3) *Gopee Krist* v. *Ganga Prashad*, 6 M.I.A. 53; *Monevie Sayyad* v. *Bebee, Ultaf*, 13 M.I.A. 232; *Ameeroonissa* v. *Ashrufoonissa*, 14 M.I.A. 433.

(4) *Pelham* v. *Gregory*, 1 Eden. 516 followed in *DeSilva* v. *DeSilva*, 5 Bom. L.R. 784.

(5) *Gur Narayan* v. *Sheolal*, 46 C. 566 (574) P.C. following *Bilas Kunwar* v. *Desraj*, 37 A. 557 P.C.

1799. The case for *benami* may arise (*i*) where the father or manager acquires property in the name of the junior member for the benefit of the family; (*ii*) where the husband acquires property in the name of the wife; (*iii*) where similar acquisitions are made by strangers. Not only may property be acquired *benami* but it may be transferred and held *benami*. But the principle applicable to all cases is the same. In the first place, the mere fact that the property stands in the name of a certain person raises some presumption that the property is his own. But the strength of this presumption must vary with circumstances. If the holder be a close relation or dependent of the alleged beneficiary, very slight evidence would be needed to shift the burden of proof. If he was moreover a minor, the presumption would be negligible. In other cases it is a question of evidence in each case. But while on the one hand, there must be some evidence and not mere suspicion to rebut the presumption,[1] on the other, the evidence adduced need not be more than formal.[2] As Lord Hobhouse in one case observed: "even a slight quantity of evidence to show it was a sham transaction will suffice for the purpose."[3]

The two propositions formulated in this section may now be explained.

Clause (1).

1800. The first clause defines the term "*benamidar*" as a person who merely lends his name to another, but who thereby acquires no interest in the property, though he may possess—in fact he does possess—some of the indicia of ownership. There is nothing colourable or fraudulent in a *benami* transaction as such, though the term is at times loosely used to denote a fraudulent transaction from which it is wholly distinct.[4] The difference between the two lies not only in the intention but in the change of ownership. In a *benami* transaction, the intention merely is to conceal the name of the real owner who prefers to remain *incognito*. But a fraudulent transfer is both a transfer and one which is fraudulent the ulterior object of which is to defeat or defraud a third party. There can be no doubt that *benami* transactions may easily lend themselves to this purpose and are at times so resorted to, but nevertheless, a distinction must be made between the two, since the one is legal which the other is not.

1801. Indeed, the acquisition of property *incognito* is not unknown in other countries, though here the practice is perhaps more prevalent. But a *benami* transaction in England raises a strong presumption of title in favour of the *benamidar* and where the latter is the wife or son or any other relation it raises the further presumption of intended advancement. But in this respect the Indian rule differs and this clause is intended to emphasize that distinction. It makes clear that the English rule in favour of advancement does not apply to Hindus, though it might be applicable to persons of British parentage resident in this country.[5] (**S. 221**). Since the possession of the *benamidar* is possession of the trustee, he acquires no title by reason of his possession.

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(1) *Per* Lord Westbury in *Sreeman* v. *Gopichunder*, 11 M.I.A. 28 (48), followed in *Mahbub Ali* v. *Bharat*, 23 C. W.N. 321: 53 I.C. 54 P.C.

(2) *Uman Parshad* v. *Gandharp*, 15 C. 20 P.C., followed in *Mahbub Ali* v. *Bharat*, 23 C.W.N. 321: 53 I.C. 54 P. C.

(3) *Uman Prashad* v. *Gandharp Singh*, 15 C. 20 P.C.

(4) *Mina Kumari* v. *Bijoy Singh*, 44 M. 662 (670, 671), P.C.

(5) *Kerwick* v. *Kerwick*, 48 C. 260 P.C.; *Bilas Kunwar* v. *Deoraj*, 37 A. 557 (565) P.C.

1802. The second clause is more in conformity with the English Law. As the Privy Council observed: "It (*i.e.*, a *benami* transaction) has a curious resemblance to the doctrine of our English Law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law, that where a feoffment is made without consideration, the use results to the feoffer. The exception by way of advancement in favour of wife or child does not apply to India, but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not."[1]

Clause (2).

1803. Since the *benamidar* is a mere trustee for the real owner, it follows that his heirs inheriting that property succeed merely to the trust and would be liable as trustees on his death.[2] But being clothed with the outward emblems of ownership, he may sue[3] and be sued[4] in respect of the property which he so holds, and any decision given against him would be *res judicata* against the real owner. The latter may of course, protect himself by becoming a party to the suit, but whether he is made a party or not he is bound by the result of the suit. Of course, the right to sue carries with it the consequential right to execute a decree.[5] In other respects, too, he possesses all the rights of an ostensible owner, and can, in the circumstances mentioned in S. 41 of the Transfer of Property Act, even convey a good title to the property which holds against the beneficiary.[6]

But though by reason of his ostensible ownership a *benamidar* may create rights in others, it does not create in him any interest in the property, while at the same time, his obligation as trustee thereof to the beneficial owner remains.

220. A *benami* transaction is legal unless it is made with intent to defeat, defraud or delay, or results in defeating, defrauding or delaying a third party[7] or is prohibited by law or is against its policy.[8]

When benami tranaction is illegal.

Illustrations.

(*a*) *A* becomes heavily indebted to *B* who is expected to attach his property for the satisfaction of his debt. To screen it from *B*, *A* transfers some of it to *C*. The transfer is void.[9]

(*b*) *A* has innocently transferred his property to *B* who holds it for *A*, but getting involved in heavy losses, *B* compromises with his creditor *C* to whom he transfers *X* in satisfaction of his debt. *A* sues to eject *C* on the strength of his real title. *C* claims to be a *bona fide* purchaser from *B* without notice of *A's* title. *A* cannot eject *C*.[10]

(*c*) In execution of a decree passed against *A*, his village *X* is sold at Court auction. *A* finances *B* to purchase it *benami* for *A* which he does. *A* sues to eject *B* on the ground that *B* was his *benamidar*. The suit is not maintainable, as section 66

(1) *Bilas Kunwar* v. *Deoraj*, 37 A. 557 (565) P.C., followed in *Gur Narayan* v. *Sheo Lal*, 46 C. 566 (574) P.C.; *Kerwick* v. *Kerwick*, 48 C. 260 (263) P.C.

(2) *Raja of Deo* v. *Abdullah*, 45 C. 909 (918-919) P.C.

(3) *Gur Narayan* v. *Sheo Lal*, 46 C. 566 P.C.; *Vyadhiswara* v. *Srinivasa*, 42 M. 348 F.B.; *Singa Pillai* v. *Ayyaneri*, 41 M. 435; *Parmeshar* v. *Anardan*, 37 A. 113.

(4) *Tharat Karim* v. *Bal Kuar*, 2 Pat. L.J. 740.

(5) *Chelam* v. *Seeni*, (1918) M.W.N. 226: 43 I.C. 801; *Kamta Prasad* v. *Indomati*, 37 A. 414; *Prasanna Kumar* v. *Asutosh*, 18 C.W.N. 450: 20 I.C. 685.

(6) *See* 1 Gour's Law of Transfer (6th Ed.).

(7) S. 53, Tr. P. Act.

(8) *Sheo Narayan* v. *Mata Prasad*, 27 A. 73.

(9) S. 53, Tr. P. Act.

(10) S. 41, Tr. P. Act.

of the Civil Procedure Code prohibits a suit to shew that *B's* purchase was made *benami* for *A*.[1]

221. Presumptions in Benami. **(1) Save as provided in section 129, there is no presumption in favour of *benami*, and he who alleges that the apparent title is not the real title must prove it.**[2]

(2) There is no presumption that a purchase made by a Hindu or a Mahomedan in the name of his child, wife or mistress is by way of advancement, the question being one of intention which must be proved by the party alleging it; but such presumption shall be made where the purchaser is a British resident in India.[3]

1804. **Analogous Law.**—This section is supported by the following autorities.[4] It enunciates both a rule and an exception, the rule being that the apparent title is presumably the real title till the contrary is shewn, and the exception being the reversal of the presumption justified by the law of joint property. The second clause is in consonance with S. 82 of the Trusts Act and is a departure from the English Law which assumes the purchase by one in the name of a relation as a purchase by way of advancement. No such presumption arises here in the case of Hindus and Mahomedans[5] even in cases outside the scope of joint property —the result being that while a *benami* transfer in England suffices to convey a title to property in the transferee, no title of any kind is created in his favour here, but the English rule is held still to hold good in the case of British residents in India.[6]

1805. **Principle.**—This section along with S. 129 refers to *benami* transactions, the law regarding which is this. Both under the English as well as the Indian law, the general rule is the *ex facie* owner of a property must be presumed to be its real owner; where, however, such ownership is held in common by a family, the same presumption extends to them, namely that any property acquired by the manager in the name of a coparcener must presumably enure for the benefit of the whole coparcenary, since joint ownership is the rule and individual ownership an exception. Apart, however, from the joint family, the general rule must prevail that he who wishes to displace an apparent title can only do so by adducing proof that it is not the real title. Further, while both under the English and the Indian law, the rule is that the trust of the legal estate results to the man who pays the purchase money,[7] the English Law makes an exception when the purchase is in the name of the wife or child in whose favour it presumes an advancement. But no such presumption can arise in the

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(1) *Ganga Sahai* v. *Keeri*, 37 A. 545 (554, 555) P.C.

(2) S. 82, Trusts Act (II of 1882); *Mg. Po Kin* v. *Mg. Po Shein*, 4 R. 518 P.C.; *Arab Ali* v. *Mohmud Ali*, 67 I.C. 444: (1922) P.C. 84; *Mhd. Mahbub Ali* v. *Bharat*, 23 C.W.N. 321: 53 I.C. 54 P.C.; *Moti Lal* v. *Kundan Lal*, 21 C. W.N. 929: 39 I.C. 964 P.C.

(3) *Sayyuduchur Ali* v. *Ultai Fatima*, 13 W.R. 1 (2) P.C.; *Kerwick* v. *Kerwick*, 48 C. 260 (263) P.C.; *Mollaya* v. *Krishnaswami*, 47 M.L.J. 622 (1925) M. 95; *Raj Kunwar* v. *Rani Maharaj*, (1925) O. 243; *Dhurm Das* v. *Shama Soondri*, 3 M.I.A. 229.

(4) *Vide* foot-notes (1) & (2).

(5) *Sayyuduzhur Ali* v. *Ultai Fatima*, 13 W.R. 1 (2) P.C.; *Lakshmiah* v. *Kottan Danama*, 48 M. 605 (608) P.C.; *Bilas Kunwar* v. *Devraj*, 37 A. 557 P.C.

(6) *Kerwick* v. *Kerwick*, 48 C. 260 (264, 265) P.C.

(7) *Jagannath* v. *Abdullah*, 45 C. 909 P.C.; *Gur Narayan* v. *Sheo Lal*, 46 C. 566 P.C.

case of a Hindu or even a Mahomedan in this country,[1] though the English rule was held applicable to British subjects resident in India.[2]

Clause (1) of this section states the rule as one of general application; but as stated therein, it is subject to the exception which forms the subject of section 129. Apart from that section there is no presumption in favour of *benami*. The presumption is rather the other way, although the habit of *benami* is inveterate in India.[3]

1806. Evidence of Benami.—Where *benami* cannot be presumed, it must be proved like any other fact. "The burden is no doubt a difficult one to discharge, because in all these *benami* transactions, the very object of the parties is secrecy: but still the person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt."[4] Mere suspicion is insufficient,[5] and though direct evidence may at times be difficult to obtain, still the fact must be established by at least good circumstantial evidence.[6] In such cases, the questions to be considered are (*i*) who paid the consideration,[7] or if it is a gift, why it was made;[8] and its construction;[9] (*ii*) who was in possession;[10] and (*iii*) had the muniments of title; (*iv*) was the *benami* acted upon,[11] and if so, for how long; (*v*) was there any motive for a *benami* transaction or was the alleged *benamidar* so connected with the alleged principal as to render it probable that he should be selected as a *benamidar*.[12]

1807. Parties to a *benami* transaction are not estopped from showing that a transaction is *benami*.[13] The case is different, where it is not *benami* but fraudulent. The difference between these is distinct though often slurred.[14] (§ **1800.**) Where a person sells property nominally to avoid his creditors, the sale, though in a sense *benami*, is really nominal and may

(1) *Sayyuduzhur Ali* v. *Ultai Fatima*, 13 W.R. 1 (2) P.C.; *Bilas Kunwar* v. *Deoraj*, 37 A. 557 P.C.

(2) *Kerwick* v. *Kerwick*, 48 C. 260 (264, 265) P.C.

(3) *Buzloor* v. *Shumsoonissa*, 11 M.I. A. 551; *Ramabai* v. *Ramachandra*, 7 Bom. L.R. 293; *Shamlal* v. *Joharilal*, (1909) P.R. 37: 1 I.C. 732; *Uman Parshad* v. *Gandharp*, 15 C. 20 P.C.; *Akam Ali* v. *Mohamed*, 48 M.L.J. 104 P.C.; *Manik Lal* v. *Bijoy Singh*, 25 C.W.N. 409: 62 I.C. 356 P.C.; *Jasoda Lal* v. *Balaram*, 35 C.L.J. 589; *Bilas Kunwar* v. *Deoraj*, 37 A. 557 P.C.; *Gur Narayan* v. *Sheo Lal*, 46 C. 566 (574) P.C.; *Moti Lal* v. *Kundan Lal*, 21 C.W.N. 929: 39 I.C. 964 P.C.; *Mahbub Ali* v. *Bharat*, 23 C. W.N. 321: 53 I.C. 54 P.C.

(4) *Mg Po Kin* v. *Mg Po Shein*, 4 R. 518 (520) P.C.

(5) *Rai Radha Kishen* v. *Bisheshwar*, 49 I.A. 312: 67 I.C. 914: (1922) P.C. 336.

(6) *Mhd. Mahbub Ali* v. *Bharat*, 31 I.C. 586 O.A.: 23 C.W.N. 321: 53 I.C. 54 P.C.; *Promoda Kumar* v. *Madan Mohan*, 27 C.W.N. 305: 70 I.C. 555: (1923) C. 228; *Abdul Latif* v. *Abdul Huq*, 28 C.W.N. 62: (1924) C. 523; *Bhuban Mohini* v. *Kumudbala*, 28 C.W. N. 131: (1924) C. 467; *Lalit Mohan* v. *Manoranjan*, 38 C.L.J. 208: 72 I.C. 698: (1923) C. 13.

(7) *Bilas Kunwar* v. *Deoraj*, 37 A. 557 P.C.; *Srimati Nrityamoni* v. *Lakhan*, 43 C. 660 P.C.; *Vaithinatha* v. *Vaithinatha*, 29 I.C. (M.) 970; *Ram Sarup* v. *Maya Shankar*, (1918) P.R. 46: 43 I. C. 556; *Habibullah* v. *Nayah Khanam*, (1914) P.L.R. 74: 22 I.C. 536; *Abid Ali* v. *Asgar Ali*, 7 N.L.R. 159: 12 I. C. 721; *Pewand Bai* v. *Chetan Lal*, 15 S.L.R. 84: 82 I.C. 1002.

(8) *Marian* v. *Mhd. Ibrahim*, 28 C.L. J. 306: 48 I.C. 561.

(9) *Sailendra Nath* v. *Saraj Kumar*, (1935) P.C. 73.

(10) *Upendra Nath* v. *Bhupendra Nath*, 21 C.W.N. 280: 32 I.C. 267.

(11) *Raghunatha* v. *Aravamuthu*, 34 I. C. (M). 617; *Arab Ali* v. *Mhd. Ali*, 67 I.C. 444: (1922) P.C. 84.

(12) *Kalisahu* v. *Kedarmal*, 38 I.C. (P.) 561; *Almadi* v. *Udit Narain*, 17 O. C. 173: 25 I.C. 164; *Jasoda Lal* v. *Bala ram*, 35 C.L.J. 589: 69 I.C. 67: (1922) C. 488; *Periya* v. *Aiyappa*, 24 I.C. (M.) 924.

(13) *Dhirendra* v. *Chandra*, 36 C.L.J. 82: 68 I.C. 648: (1923) C. 154; *Nur Mahomed* v. *Kessumal*, 20 I.C. 523: 7 S.L.R. 11.

(14) *Mina Kumari* v. *Bejoy Singh*, 44 C. 662 P.C.

prove to be fraudulent. A Government servant who is precluded by the rules of his service from acquiring land purchased it *benami*. It was held that as his conduct did not amount to fraud, he was entitled to recover it from the *benamidar*.[1] Where the purpose of a *benami* transaction is fraudulent, a party seeking to avoid it must show that the purpose did not go beyond the stage of mere intention.[2] There is again a difference between a fraudulent and a nominal or a sham transaction, in that while in the one the transfer is real though the transferee holds it for the transferor's benefit, in the other case, there is no intention to make any transfer at all, but merely to create evidence of one.[3]

1808. Oral evidence is admissible to prove that a transaction was *benami*,[4] except in cases where the transaction was entered into with intent to defraud a third party, in which case, if the fraudulent purpose was accomplished, then the court applies the maxim *in pari delico potior est conditio possidentis*.[5] Another exception favours the certified auction-purchaser whose purchase cannot be shown to be *benami*.[6] But these are all exceptional cases, and where there is no legal impediment to the proof of *benami*, it may be proved by oral evidence. And where the oral evidence is inconclusive, it is necessary to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their action, and their subsequent conduct.[7]

1809. The courts even look with jealousy on *benami* transactions, requiring from one, claiming under such title, a strict proof,[8] though in view of its prevalence, even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose.[9] But though slight, it must be evidence and not a mere suspicion[10] though in considering the quantum of evidence the court will take into consideration the frequency of such transactions, remembering at the same time, that an apparent title is not to be legally displaced unless there is sufficient evidence to do so,[11] which may comprise of the fact that the person purchasing the property had no means of his own, and that the consideration was advanced by the beneficiary who had possession and control over the property.[12]

1810. Badges of Benami.—The first and most material criterion of beneficial ownership is the source from which the purchase-money is derived.[13] This does not mean the apparent passing of consideration—money from hand to hand—which is not sufficient to establish the *bona fide* charac-

(1) *Dhirendra* v. *Chandra*, 36 C.L.J. 82: 68 I.C. 648: (1923) C. 154.

(2) *Ismail* v. *Wasudeo*, 58 I.C. (N.) 285: 16 N.L.R. 129.

(3) *Secretary of State* v. *Dadi*, 36 M. L.J. 180: 50 I.C. 593; *Vyrecherla* v. *Dasiraju*, 57 I.C. (M.) 689.

(4) *Shamlal* v. *Amarendro*, 23 C. 463.

(5) *Pethepermal* v. *Muniandy*, 35 C. 551 P.C.; *Goberdhan* v. *Rutu Roy*, 23 C. 962; *Kalicharan* v. *Rasik Lal*, 23 C. 962 *n.*; *Banka Behari* v. *Raj Kumar*, 27 C. 231.

(6) S. 66 (1), C. P. Code, 1908; S. 317, C. P. Code, 1882.

(7) *Dalip Singh* v. *Nowal Kunwar*, 30 A. 258 P.C.; *Manmohan* v. *Mt. Raindei*, (1931) P.C. 175 (177).

(8) *Azimut* v. *Hurdwaree*, 13 M.I.A. 395; *Radha Krishna* v. *Bisheshwar*, 1 Pat. 733. P.C.; *Appa* v. *Babaji*, 46 B. 85; *Brij Kishore* v. *Harbans*, 2 Pat.L.J. 728: 62 I.C. 611.

(9) *Uman Parshad* v. *Gandharp*, 15 C. 20 P.C.; *Sreeman Chunder* v. *Gopal Chunder*, 11 M.I.A. 28 (43). To the same effect, *Faez Bax* v. *Fakiruddin*, 14 M.I.A. 234; *Radha Krishna* v. *Bisheshwar*, 3 Pat.L.J. 529 P.C.; *Jasoda Lal* v. *Balaram*, 35 C.L.J. 589.

(10) *Sreeman Chunder* v. *Gopal Chunder*, 11 M.I.A. 28 (43).

(11) *Uman Parshad* v. *Gandharp*, 15 C. 20 P.C.

(12) *Hoymobutty* v. *Sreekishen*, 14 W. R. 58.

(13) *Akbar Ali* v. *Faiz Buksh*, 15 W. R. 12.

ter of a sale. It is necessary to see that it is really the money of the alleged vendee that is actually paid to the vendor.[1]

(1) Payment of Consideration.

1811. Of the several indicia of *benami*, the payment of consideration is naturally the most important, since he who pays the consideration is naturally presumed to be the true owner. But this fact, though crucial, must not be regarded as conclusive as to the actual ownership of the property, since actual possession and receipts of rents of the property are matters which should not be ignored.[2] The question who paid the consideration is a question of fact: the fact that the ostensible owner had no means of his own,[3] and that the contract was made and all incidental negotiations concluded by another, would go far to show that the latter was probably the real purchaser. Even as regards the payment of consideration where it is denied, it is not sufficient to give formal evidence of the passing of consideration or of its acknowledgment, since it is necessary to shew who really paid it.[4]

(2) Possession.

1812. Next to consideration stands the question of possession. If the transfer was not *benami*, the transferee should be in possession of the title deeds and the property. But this again, though crucial, is not conclusive, since the motive which may have prompted the *benami* might suffice to keep the beneficiary in the background; and since secrecy is of the essence of such transactions, undue emphasis must not be laid upon the *benamidar's* possession, the mutation of names in his favour or the presence of other ostensible indicia or admissions of ownership. In cases of *benami*, the possession of the *benamidar*, after the motive which induced the *benami* has ceased, is vital to the issue. As between the vendor and the vendee, where the latter produces the deed and the former proves his possession, the burden is still on the vendor to show that he had only executed the sale deed *benami*, and that he had not received the consideration, though he acknowledged it in his sale deed.[5]

(3) Relationship.

1813. As *benami* implies repose of confidence between the *benamidar* and the beneficiary, the existence of relationship between the two is a circumstance which has a material bearing on the case. Consequently, very little evidence suffices to show that a purchase made in the name of the wife[6] is *benami* the daughter[7] or other near relations.[8] So the Privy Council said: "There can be no doubt now that a purchase in India, by a native of India, of property in India in the name of his wife, unexplained by other proved or admitted facts, is to be regarded as a *benami* transaction, by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife."[9] In this case, the wife's title was sought to be defended on the ground that the purchase was made in pursuance of an ante-nuptial agreement, but while their

(1) *Luchmee Kooar* v. *Fattehsingh*, 24 W.R. 400.
(2) *Ram Narain* v. *Mhd. Hadi*, 26 C. 227 P.C.
(3) *Hoymobutty* v. *Sreekishen*, 14 W. R. 58.
(4) *Akbar Ali* v. *Faiz Buksh*, 15 W. R. 12; *Luchmee Kuar* v. *Fatteh Singh*, 24 W.R. 400.
(5) *Durga Charan* v. *Khorda & Co.*, 29 I.C. (C.) 696.
(6) *Lakshmiah* v. *Kothandarama*, 48 M. 605 P.C.
(7) *Kadeerun* v. *Lallun*, 14 W.R. 366.
(8) *Roop Dharee* v. *Narain*, 1 W.R. 217.
(9) *Lakshmiah* v. *Kothandarama*, 48 M. 605 (608) P.C.

Lordships did not rule out such a plea, they held that it would be unwise of a Judge to act in a disputed Indian case upon oral evidence, unless there was contemporaneous written evidence to corroborate the oral evidence.[1]

1814. Presumption in Benami.—The purchaser of property does not usually cancel his purchase unless he has some motive for it. When fraud enters into his calculation, the transaction becomes void or voidable in accordance with the provisions of S. 53 of the Transfer of Property Act. Apart from fraud, the transferee may remain incognito for reasons of his own, or he may make a *benami* purchase, because he wishes to convey to the transferee some interest therein; but in either case, the mere fact of a purchase in the name of another would not, in the case of a Hindu (or for that matter, a Mahomedan), suffice to convey any interest in favour of the transferee, who must hold the property in trust for the beneficiary.[2] The case is, however, different where the *benamidar* and the beneficiary are British residents in India, for in their case the English rule applies;[3] that rule being that such purchase when made in the name of the wife or child is treated as an advancement, or the advance delivery of their inheritance before it becomes one. This is the presumption, but a rebuttable one. In the case of Hindus, the purchase by a Hindu in the name of his wife or child, may lead to the contrary presumption if the purchaser is a member of a coparcenary; but in other cases, though there is no presumption in the nature of an advancement, still it is a question of intention[4] to be decided with reference to the circumstances of each case. It may be that the purchase was made to benefit the transferee in whose name it was made. But where the intention is to confer a present benefit it must be accompanied by the other usual incidents of ownership, where, however, the intention is to confer a future benefit, such intention must be proved, but cannot be presumed.

Clause (2).

[*See* in this connection **Ss. 129, 336.**]

1815. Though ordinarily speaking, there is nothing illegal in a *benami* purchase, where it is a purchase of trust property by a trustee the purchase is void. It is so provided in the Trusts Act[5] and was so held in a case in which the purchaser, a *shebait* of a private endowment, created by one of his ancestors, had, in execution sale of a portion of *debutter* property, **purnhased it *benami* in the name of his son**, whereupon the High Court held the sale to be void, and its decision was affirmed by the Privy Council who said: "A trustee for sale cannot purchase, he cannot purchase because the same person cannot be both vendor and purchaser, and he who acts for another cannot also act for himself. But even if he be not a trustee for sale, if in any capacity he is trustee for the estate, although his incapacity to buy is not absolute and is subject to different limitations, it is equally well established. A trustee may indeed acquire from beneficiaries, who are *sui juris*, an estate in which they are interested, but he can only do this if he has made the fullest disclosure to

Benami Purchase When Void.

(1) *Lakshmiah* v. *Kothandarama*, 48 M. 613.

(2) *Sayyuduzhur Ali* v. *Ultai Fatima*, 13 W.R. 1 (2) P.C.; *Bilas Kunwar* v. *Deoraj*, 37 A. 557 P.C.; *Gur Narayan* v. *Sheo Lal*, 46 C. 566 P.C.; *Kerwick* v. *Kerwick*, 48 C. 260 (263) P.C.

(3) *Kerwick* v. *Kerwick*, 48 C. 260 (263) P.C.

(4) *Ismail* v. *Hafiz*, 33 C. 773 P.C.; *Chandernath* v. *Ramjoy*, 15 W.R. 7 P.C.

(5) S. 52, Trusts Act (II of 1882).

them of all the relevant and material facts within his knowledge affecting or that might affect the value and condition of the estate and that parties are at arm's length, the *cestui que trust* knowing that he is dealing with the trustee. Otherwise, the purchase is bad, and it is bad because any person who occupies a fiduciary relationship, may be able by virtue of his position to acquire information with regard to the trust estate which he is not permitted to use for his own benefit."[1]

Power defined.

222. (1) "Power" is a right which a person acquires over another, or over things not his own.

(2) The person who confers the power may be called the donor of the power, and the person upon whom it is conferred the donee of the power.

(3) The exercise of power is discretionary with the donee.

1816. **Analogous Law.**—The term "power" is a technical term and is distinct from the dominion which a man has over his own property[2] It is used to denote the use of delegated authority of which a power of attorney is an example.

Hindu Law recognizes powers of which the power of adoption conferred by the husband upon his wife, the power of appointment, the power to appoint an heir[3] or an executor[4] are examples. But the exercise of power by a Hindu is necessarily subject to and circumscribed by the requirements of his personal law, and while the English Law on powers furnishes analogies, it is not to be applied generally to Hindu wills.[5]

1817. **Creation and Exercise of Powers.**—Under English Law, powers relate to property, but under Hindu Law, they may relate both to persons and property. This is due to the parental authority which still survives the *patria potestas*. The power of adoption has already been the subject of a previous discussion (**S. 38**). It is stated there that the father possessed the power to authorize his widow to make an adoption.[6] He is also conceded the power of appointing a guardian of his minor children (**S. 81**). He is equally entitled to confer upon a person the power of appointing an heir. Such a case arose upon the following facts: A testator had devised his immovable property upon trust for the income to be appropriated to the maintenance of his widow and of his daughter Mamu and the children that might be born of her, the property to be divided among the heirs of such children. If there should not be any children born of the daughter, the property under the will should devolve upon them "to whom she might direct it to be delivered by making her will." The daughter having had no children and questions having arisen between the daughter and the widow as to the administration of the estate according to the will, it was held that there was no absolute gift to the daughter, and that the persons to whom the property was given, though to be designated by her, did not take the gift from her, but from the testator. In so holding

(1) *Peary Mohan Mukerjee* v. *Monohar*, 26 C.W.N. 133: 62 I.C. 76 P.C., following *Nugent* v. *Nugent*, (1907) 2 Ch. 292 O.A.: (1908) 1 Ch. 546 (disqualification of a Receiver to purchase).

(2) *Armstrong*, (In re), 17 Q.B.D. 521; *Commissioner of Stamps* v. *Stephen*, (1904) A.C. 137; *Goatley* v. *Jones*, (1909) 1 Ch. 557.

(3) *Brij Lal* v. *Sura*, 34 A. 405 P.C.

(4) *Lallubhai* v. *Mankuverbai*, 2 B. 338 (406); *Dossee* v. *Taruchurn*, Bourke (Pt. VII) 50.

(5) *Motivahu* v. *Mamubai*, 21 B. 709 (722) P.C.; for the English law on "Powers," *see* Hindu Code, (3rd Ed.) §§ 2143-2146, pp. 1064-1065.

(6) *Indar* v. *Jaipal*, 15 C. 725 P.C.

the Privy Council said: "The remaining question is whether his substituting Mamu, and giving her power to designate the person by her will, is contrary to any principle of Hindu Law. There is no analogy to it in the law of adoption. A man may, by will, authorize his widow to adopt a son to him, to do what he had power to do himself, and although there is a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu Law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu Law are applicable to this power, and that it is their duty to hold it to be valid. But whilst saying this, they think they ought also to say that, in their opinion, the English Law of powers is not fit to be applied generally to Hindu wills."[1] Similar construction was placed by the same high tribunal on a will in which the testator had bequeathed his estate to his wife, and on her death to her daughter-in-law, and thereafter "she shall have power to nominate any one whom she may think fit as 'heir' so that the name of the family may continue as formerly with honour."[2]

1818. It was at one time held that in order to be operative the donee of the power must have been in existence at the death of the testator.[3] But since the passing of the Hindu Disposition of Property Act, this is by no means now necessary, and the Hindu Law of appointment and power is now subject only to the provisions of that Act and Ss. 13, 14 and 20 of the Transfer of Property Act.

1819. In one case, the testator made a bequest to such person "and in such manner as his brother Jamnadas should by deed or deeds, writing or writings appoint, with or without power of revocation or new appointment." It was held that there was no principle of Hindu Law which forbade such a bequest being construed and given effect to according to its plain and literal terms; always, however, subject to the same restrictions as the Hindu testamentary law imposes on the testator himself, *viz.*, that the appointment should be made so that the appointee might be ascertained when the event arose on which he was to take. In this case, the testator had by his will, after appointing his brother J to be his executor, bequeathed all his estate to J (*i*) upon trust to pay his debts and the residue in trust for the testator's wife and the wife of the executor J during the life of both, or the survivor of them for their or her sole use; (*ii*) and from and after the decease of the survivor of them, in trust for the male issue of J if any there were; and (*iii*) in default of such male issue, in trust for any person or persons in any shares or share, and in such manner as his brother J should, by any deed or deeds, or writing or writings, appoint, with or without power of revocation or new appointment. The court upheld the last as a valid power of appointment which was not opposed to any principle of Hindu Law.[4]

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(1) *Motivahu* v. *Mamubai*, 21 B. 708 (722) P.C.

(2) *Brijlal* v. *Suraj*, 34 A. 405 (411) P.C.

(3) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.; *Motivahu* v. *Mamubai*, 21 B. 709 P.C.; *Yethirajulu* v. *Mukunthu*, 28 M. 363 (375); *Upender* v. *Hem Chundra*, 25 C. 405 P.C.; *Narayan* v. *Lal Ramesh*, 11 O.C. 271.

(4) *Javerbai* v. *Kabli Bai*, 16 B. 493 (499, 500), reversing O.A. 15 B. 326; *Girdharji* v. *Madhowdas*, 17 B. 600 (617).

1320. The conferral of power must of course be legal. For instance, the husband possesses the power to authorize only his wife to make an adoption. If, therefore, he authorizes his widow who was also the executrix of his will conjointly with two other executors, the power is void.[1]

But there is nothing illegal in a testator conferring two or more separate powers upon separate individuals. So where the testator empowered his two wives to make *patni* settlement of his immovable property and empowered three other persons to arrange for the performance of the family rites and ceremonies and the debts and dues, the court upheld them as in no way clashing with one another.[2] Where a testator leaves a *kani* out of a certain land to a certain person, the whole land measuring more, the legatee has the right of selection and is entitled to one *kani* out of a specified portion of the estate.[3]

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(1) *Amrito Lall* v. *Surnemoni*, 25 C. 662, affirmed O.A. 27 C. 996 (1003) P. C.

(2) *Promode* v. *Krishna*, 1 C.L.J. 301.

(3) *Narayanasami* v. *Periathambi*, 13 M. 460.

CHAPTER XVII.

ALIENATIONS, GRANTS AND GIFTS.

1821. Topical Introduction.—This chapter deal with the Hindu notion of property, alienations and grants, other than gifts and wills, now governed by the statute law, which lays down rules in some respects more liberal than the Hindu law. When the Succession Act, 1865 was enacted, it was generally felt that its narrow crystallized provisions should not extend to Hindus, whose law contained no such restrictions as that Act was going to embody. But to the surprise of the Hindus, several years later, the Tagore case was decided in which the Lords of the Privy Council held that Hindu law contained many rules far narrower than the statute law. The full effect of their Lordships' decision was not realized even in 1882, when the Transfer of Property Act was enacted, with the result that Hindu law was exempted from its chapters, II and VII. But when the decision in the Tagore case was reaffirmed by their Lordships in subsequent pronouncements, public opinion became aroused to the necessity of Legislative amendment, resulting in the enactment of the three Acts[1] which later became absorbed in the more comprehensive amendments of 1929.

1822. A grant is a generic term and includes the creation of any interest in property; the interest so created may amount to a mere personal right short of an interest in property. A license is such a grant, though a license creates no right *in rem* but merely legalizes another to do a thing which, but for the license, would be wrongful. But a license may be coupled with a transfer of a right *in rem*. A gift is a transfer of property and creates a right *in rem*, which is *prima facie* both transferable and heritable. The difference between the two is one of degree. A maintenance grant affords an apt illustration of a right which the grantee enjoys in the property, which, when coupled with a transfer of property, develops into a gift investing the donee with a title, the attributes of which are well defined and enumerated in Ss. 122-129 of the Transfer of Property Act, which now extend to Hindu gifts.

1823. In popular parlance, the two are sometimes spoken of as if they were synonymous; but in law, a grant is a wider and perhaps a looser term, including as it does the divesting of any right, howsoever small, in favour of another. Law has not yet formulated any rules for the creation and control of grants; but whatever is given it treats as a grant, and whenever it rises to the level of an interest, which it treats as property, it fastens on to it the rights which are its inalienable attributes. Even in cases in which it falls short of it, it has prescribed certain rules to define its enjoyment, as in the case of an easement, which arises out of an express or assumed grant and is a right short of property.

1824. Leaving out of account such grants, also those which fall into the class of gifts, grants may be both testamentary or non-testamentary,

(1) Hindu Transfers and Bequests Act, 1914; Hindu Disposition of Property Act, 1916; Hindu Transfers and Bequests (City of Madras) Act, 1921. *Kuppusami* v. *Jayalakshmi*, 58 M. 15.

and may be made to take effect at any time, subject to the restrictions which Hindu Law imposes upon their creation, continuance or enjoyment. Four well-known classes of grants recognized by it are those known as (1) Religious, (2) service, (3) charitable, and (4) personal grants. The Crown grants, which account for a large number of estates, are subject to the general law and are now, as regards their extent, subject to the provisions of the Crown Grants Act. Other grants are also now the subject of several enactments, and all these must be left out of account.

In point of rights, to which grants may give rise, they vary according to their terms, nature and purpose, and while, on the one hand, they may at times create absolute rights, they may, on the other, be little distinguishable from mere licenses.

The various modes in which they are created, the various rights to which they give rise, and the incidents which become attached to them are matters which will be found discussed under the appropriate chapters elsewhere in this Code. In this chapter it is proposed merely to set out the leading provisions of law applicable to grants and gifts in which Hindu Law is still paramount.

1825. By the enactment of two amending Acts in 1929[1] the law of gifts and wills has been removed from the domain of Hindu personal law to that of the statute law, as enacted in the Transfer of Property Act and the selected sections of the Succession Act, dealing with the operation and construction of a will executed by a Hindu anywhere in British India. Before the Acts of 1929, the general principles enunciated in Chapter II (**Ss. 5-53-A**) of the Transfer of Property Act did not apply if they purported to contravene any rule of Hindu law to the contrary. Similarly, all Hindu gifts were exempted from the provisions of the chapter relating to gifts, except section 123 which provided for its registration. Under the amending Act, both the general principles as well as the specific sections relating to gifts will supersede the rules of Hindu law on the subject.

In extending these provisions to Hindus, it was stated that they were so extended because they were in consonance with Hindu law. That this is an optimistic statement would be apparent from the facts set out in the sequel in which the two laws have been compared and contrasted, but the Hindu law on these subjects is now decadent and is limited only to gifts and wills that they may have still to be construed in its light.

In the two ensuing chapters an attempt is made to set out the two laws to enable the appropriate one to be applied.

Definition of property. **223. (1) "Property" is anything which may be the subject of ownership.**

(2) It may be movable or immovable.

1826. Analogous Law.—The general notion of property will be found discussed in the author's work on the Law of Transfer.[2] It is proposed here to set out its meaning under Hindu Law, which, however, contains no disquisition on the meaning of the term. "Property" is a creature of law. It includes only those things which law recognizes as capable of ownership. As such, the term is necessarily elastic, comprising as it does such objects as law from time to time throws into that category.

(1) Transfer of Property (Amendment) Act, XX of 1929; Succession (Amendment) Act, XVIII of 1929.

(2) 1 Gour's Law of Transfer (6th Ed.), §§ 66-80.

Besides the ordinary objects and things which are classed as property by the general law, Hindu Law treats the following as property.

1827. Idols.—An idol is treated by Hindu Law as a juridical person and property. As property, idols may be the subject of partition. So, where the plaintiff and defendant were jointly entitled by rotation to the profits from an idol in the defendant's temple, and the defendant having obstructed the plaintiff's use and worship of the idol in his temple, the plaintiff was declared entitled to remove the idol to her own house during the period that she was entitled to the profits from it.[1] So in another case, it was laid down that in the eye of the law, idols are property, and the right to deal with such property must, in the event of disputes arising, be determined by a Civil Court.[2] The idol is again a juridical person, in perpetual minority and capable of holding property through its manager.[3] As such, the individuality of one idol cannot, it is said, be validly transferred to its substitute.[4] Nor is it clothed with any existence till it is consecrated, and has so become spiritualized or rather individualized.[5] But it is submitted, and is now held, that neither of these conditions in essential, since an idol is a person in an ideal sense and its personality is not destroyed by the substitution of one image for another. In fact, the wooden image of the god Juggunnath has to be so renewed from time to time. A permanent image does not, therefore, seem to be indispensable for dedication to a deity of which the image is merely the visible expression.[6] Such are other ideal persons such as *muths*[7] and colleges, which lead the dual existence of being both persons and properties, since they are both owners and the things owned.

The subject will have to be further examined in the sequel in connection with the law relating to Religious Endowments (Ch. XXII.)

1828. Sub-division of Property.—Though the General Clauses Act[8] as well as the Transfer of Property Act[9] contain definitions of "immovable property", they do not dispense with a reference to Hindu Law. The definition of that term in the Transfer of Property Act is negative and incomplete[10] and that adopted in the General Clauses Act describes it as including "land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth." This definition only provides a working definition of that term as used in the Imperial Act.[11] Even as such, it does not define what is a "benefit to arise out of land," which may have to be considered with reference to Hindu Law. This is all the more necessary as Hindu Law prescribes special rules for the alienation of immovable property by the manager, the Hindu widow, and other qualified owners of family property.

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(1) *Dwarkanath* v. *Jannobee*, 4 W.R. 79.

(2) *Subbaraya* v. *Chellappa*, 4 M. 315 (316); *Damodar Das* v. *Uttam Ram*, 17 B. 271.

(3) *Narayan* v. *Roodur Narain*, 2 Hay 490; *Bippro* v. *Kenae Dayee*, 3 W.R. 165: 5 W.R. 82; *Bhuggabutty* v. *Goroo Prosonno*, 25 C. 112; *Mandhar* v. *Lakshmi Ram*, 12 B. 247.

(4) *Doorga Pershad* v. *Sheo Prasad*, 7 C.L.R. 278.

(5) *Upendra* v. *Hem Chunder*, 25 C. 405; *Rajomoyee* v. *Troylukho*, 29 C. 260 (274).

(6) *Asita* v. *Nirode*, 20 C.W.N. 901: 35 I.C. 127.

(7) *Jagadindra* v. *Hemanta*, 32 C. 129 P.C.

(8) Act X of 1897, S. 3 (25).

(9) Act IV of 1882.

(10) S. 3; *see* 1 Gour's Law of Transfer (6th Ed.), §§ 66-80.

(11) General Clauses Act (X of 1897), S. 3.

1829. Property may be variously sub-divided according to the standpoint from which it is viewed. Hindu Law divides it into land and goods, or immovable and movable property. So far Hindu Law does not differ from the general law. It, however, regards certain incorporeal rights as immovable property. The leading text on the subject is as follows:—

Yadnyavalkya.—"Let a king, having given land or assigned a corrody, cause his gifts to be written for the information of good princes who will succeed him."[1]

To this Jagannath adds the following explanatory note: "In the Dipkalika a corrody is thus explained: The gift of a future thing by a previous agreement in this form: 'I will give a hundred *suvarnas*[2] every month of *Kartik* or out of this mine or this village, I will annually give a hundred *suvarnas*, or I will monthly give one *suvarna*.'"[3]

1830. Nibandh.—What is then a *nibandh*[4] translated as corrody?[5] It is thus explained in the *Ratnakar*: "That which is fixed or made fast (*nibadhayate*) is a *nibandh* (or corrody), fixed pension receivable out of mines or the like."

The co-relation of *nibandh* with land shows that the two were regarded as closely allied. The question then arises what they comprise and whether they are similar in their nature and quality. There can be no doubt that there are several incorporeal rights which Hindu Law classes as immovable property. Such is a hereditary office which it treats as immovable property,[6] unless it is an office which carries no emoluments at all.[7] So is also a right to officiate as a priest at funeral ceremonies,[8] a right to worship an idol[9] and such is a *nibandh* or corrody,[10] which is an allowance, whether secured on land or not.[11] For the purpose of limitation, since the Limitation Act does not define immovable property, the character of such allowances must be judged by a reference to Hindu Law.[12]

1831. This view is supported by a decision of the Privy Council in which the same view was taken of a *Toda Giras hak*, which is a customary due owing its origin to the annual payment exacted by the Girasias from the village communities in certain territories in the West of India by vio-

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(1) 2 Dig. pp. 162, 163. "*Corrody*—the gift of a thing assigned on a fund."—Colebrooke's *note*. The Sanskrit word is *Nibandh*, cited in Mayukh, II-I-6 (Mandlik), 19.

(2) "Gold pieces."

(3) 2 Dig., p. 163. To the same effect, Mayukh, II-I-6.

(4) The word *Nibandh* originally signified any piece of composition. It was then applied to a piece of composition issuing from a king. Thence by the transference of idea the word came to signify any hereditary office conveyed by a royal charter.

(5) "Corrody" is a word of mediæval origin; properly signifying a peculiar right, *viz.*, the grant, by the royal or other founder of an abbey, of certain allowances out of the revenues of the abbey in favour of a dependent or servant; *Fatesangji* v. *Kalyanrayaji*, 10 B.H.C.R. 281 (288, 289) P.C.

(6) *Sinde* v. *Sinde*, 4 B.H.C.R. 51; *Balvantrav* v. *Purshotam*, 9 B.H.C.R. 99, approved in *Futtehsangji* v. *Desai*, 13 P.L.R. 254 (263, 264) P.C.; *Beema* v. *Jamasjee*, 2 M.I.A. 13.

(7) *Manohar* v. *Bhupendra Nath*, 60 C. 452 (479) F.B.

(8) *Futtehsangi* v. *Desai*, 13 B.L.R. 254 P.C.; *Krishnabhat* v. *Kapalibhat*, 6 B.H.C.R. 137; *Balvantrav* v. *Purushotam*, 9 B.H.C.R. 99; *Collector* v. *Krishnanath*, 5 B. 322; *Appana* v. *Nagid*, 6 B. 542; *Raghoo v. Kassy*, 10 C. 73; *Sukh Lal* v. *Bishambhar*, 39 A. 196.

(9) *Eshan* v. *Manmohim*, 4 C. 683, followed in *Jatikar* v. *Mukunda*, 39 C. 227 (230).

(10) *Government* v. *Kahanrai*, 14 M.I.A. 551; *Government* v. *Gosvami*, 9 B.H.C.R. 222 (226); *Krishnaji* v. *Gajanan*, 33 B. 373.

(11) *Kristodhone* v. *Nandarani*, 35 C. 889 (894).

(12) S. 1 (12), Act XIV of 1859. *Collector* v. *Hari*, 6 B. 546 (559) F.B., overruling O.A. *Collector* v. *Krishna Nath*, 5 B. 322 (in which the allowance was erroneously, not treated as immovable, because it was not charged on land).

lence and wrong, in the nature of blackmail, but which, on the assumption of Government by the British, acquired by long usage a *quasi*-legal character of *hak* could not be considered with reference to Hindu Law. were made to Girasias who might be Mahomedans, the question of the character of *hak* could not be considered with reference to Hindu Law. They then added: "Whatever may have been the origin of the *hak*, it must be assumed to be now a right to receive an annual payment which has a legal foundation and of which the enjoyment is hereditary; and that the liability to make the payment is not personal to the respondent but one which attaches to the Inamdar *virtute tenure*. This being so, their Lordships have come to the conclusion that the interest of the *hakdar* does possess the qualities both of immobility and of indefinite duration in a degree which, if the question depended on English Law, would entitle it to the character of a freehold interest in or issuing out of a real property,[1] that upon the general principles of construction applicable to an Indian statute, it must be held to be an interest in immovable property within the meaning of Act XIV of 1859."[2]

This case is then an authority for the proposition that a fixed perpetual payment, assured by the ruling power, must be regarded as immovable property even though it is not charged on land. Such is the *vritti* or office of a hereditary priest.[3] As compared to this, *varshasans*[4] are unquestionably immovable property since they are annuities charged on land.[5]

Such is also a *malikana*[6] and a *nankar* allowance receivable out of the profits of a particular village,[7] and such is the right to manage *saranjam*.[8]

But the emolument of an office, due by custom, is not immovable property,[9] nor is a claim for maintenance unless it is charged on land.[10]

Alienation defined.

224. **The term "alienation" in this chapter includes any disposal by a person of any right in the property, in whatever form, by any act or omission, voluntary or involuntary, intended to take effect *in praesenti* or *in futuro*.**

Illustrations.

(*a*) The mortgage by a person of his co-parcenary right is an alienation.
(*b*) Its sale in execution of a decree is an alienation.
(*c*) Its disposal by will is an alienation.
(*d*) The sale by the reversioner of his reversionary right is an alienation.

Alienation subject to Hindu Law.

225. **(1) The execution and construction of all transfers, as defined in section 5 of the Transfer of Property Act, and of all wills and codicils as defined in S. 2 (*h*) and S. 2 (*b*) of the Succession Act, executed on and after the coming into force of the Transfer of Property (Amendment) Act, 1929[11] and the Succession (Amendment) Act, 1929,[12] shall be subject to the provisions of the former Act; and those**

(1) *See* 1 Cruse's Digest, p. 47, plac. 10.
(2) *Fatesangji* v. *Kalianrayaji*, 10 B. H.C.R. 281 (291) P.C.
(3) *Girja Shankar* v. *Murlidhar*, 22 Bom.L.R. 1202.
(4) "Annual allowances."
(5) *Keshav* v. *Vinayak*, 22 B. 22.
(6) *Heeranund* v. *Ozeerun*, 9 W.R. 102; *Bhoalee Singh* v. *Neemoo*, 12 W.R. 498; *Gobind* v. *Ramchunder*, 19 W.R. 94.
(7) *Deputy Commissioner* v. *Jagiwan*, 33 I.C. (O.) 461.
(8) *Narayan* v. *Vasudeo*, 15 B. 247.
(9) *Rathna* v. *Tiruvenkata*, 22 M. 351; *Raoji* v. *Bala*, 15 B. 135; dissenting from *contra* in *Chhagan Lal* v. *Bapubhai*, 5 B. 68.
(10) *Beer Chunder* v. *Raj Coomar*, 9 C. 535 (555).
(11) Act XX of 1929.
(12) Act XVIII of 1929.

of S. 57 of the latter Act, including such sections of Schedule 3 thereof as are referred to therein.

(2) All other alienations including grants not covered by the provisions of the two aforementioned Acts shall continue to be subject to Hindu Law.

1832. **Analogous Law.**—This section is adapted from S. 6 of the Transfer of Property Act which supersedes any rule of Hindu Law to the contrary. But as there is no rule of Hindu Law to the contrary, it follows that that section always applied to Hindus. This rule renders the properties therein specified as generally untransferable. It implies that other property is transferable unless it is made untransferable by some other law.

Grant defined.

226. (1) "Grant" is the passing of an interest in one's property to another.

(2) The person who creates such interest may be called the grantor, and the person in whose favour the interest is created, the grantee.

(3) A grant includes a gift; but a grant may not amount to the transfer of an interest in property.

1833. **Analogous Law.**—The word "grant" is not a term of art, and possesses no legal significance. It is a general term and implies what its etymology connotes—the mere conferral of a right by one upon another. As such, the term deserves no further notice. But it is just as well that its limitations should be borne in mind. The incidents of a grant must depend upon other factors: the rights possessed by the grantor, the nature of the right created by the grant, its terms, and its motive and purpose.

1834. Some grants, such as *inam* and *saranjam,* (which is the same as *inam*)[1] are presumably grants of a personal nature, being *prima facie* merely grants of revenue and not of the soil, and as such, resumable at pleasure. As such, they are impartible and have been dealt with in the chapter dealing with impartible estates (Chapter XVII). Grants from the Indian sovereigns, and those made by the British Government are the subject of general law and possess no special incidents under Hindu Law. Other grants, such as for maintenance, have already been the subject of a separate notice. (§ 952.)

Hindu Gift and Devise Subject to Hindu Law.

227. (1) Apart from a "gift" as defined in section 122 of the Transfer of Property Act, a Hindu may make a gift or a devise of his property, movable or immovable, to a person, real or fictitious, directly or indirectly, through the medium of a trust, and where such transfer is not covered by any provisions of the statute law, it would be still subject to Hindu Law.

(2) As such, all gifts and devises, when governed by any express provision of the statute law, will be subject to that law, provided that where they do not infringe on that law, their incidents remain subject to Hindu Law.

(3) Gifts and devises affecting the personal law of the parties will, subject to that limit, be subject to that law.

(4) As such, all gifts and devises made for a religious or charitable purpose are subject to Hindu Law and, as such, subject to the rules stated in chapter XXI.[2]

(1) *Guru Rao* v. *Secretary of State,* 41 B. 408.

(2) *Vidya Varuthi* v. *Balusami,* 44 M. 831 P.C.; *Manohar* v. *Bhupendra Nath,* 60 C. 452 (502, 503) F.B.

(5) As such, the surrender or relinquishment by a female or other limited owner of an estate in favour of her next reversioner, male or female, though it may amount to a gift as defined in section 122 of the Transfer of Property Act, is still subject to Hindu Law.

Illustrations.

(*a*) **To clause (1).**—A gift as defined in section 122 of the Transfer of Property Act can only be made to a living person called the donee. But a gift under Hindu law may be made to an idol, in which case, its acceptance by the idol is not possible, nor indeed, is it necessary. Such gift may take any form from a mere *sankalpa* or renunciation to formal dedication with or without conditions as to the mode of its administration and management. When it is unaccompanied by any conditions, its management would follow the usage. Otherwise the conditions would have to be observed if they do not contravene the statute law.

(*b*) **To clause (2).**—A childless Hindu devises his separate estate to his wife *B*. If the devise is effective *B* would take an absolute estate; otherwise she would inherit only a widow's limited estate.

(*c*) **To clause (3).**—*A*, a Hindu dies leaving him surviving his widow and a daughter, the widow takes the estate and makes it over to her daughter. The daughter dies. Her estate will revert to the donor if she be alive, failing which it devolve on *A's* heirs unaffected by the gift.[1]

1835. Statutory Abrogation of Hindu Law.—Under sections 13 and 20 of the Transfer of Property Act and section 113 of the Succession Act which applies to Hindus, a gift or bequest to a person not in existence at the time of the gift or death of the testator, as the case may be, is perfectly legal; but under Hindu law, the rule is that there can be no valid gift or devise unless the donee or devisee was in existence at the time of the gift or the death of the testator when the devise takes effect.[2] As such, a Hindu could not make marriage settlements and provide for his descendants, not in existence at the time of his death. A single instance will show the iniquity of this law. A testator makes a bequest to his son and grandsons. He dies. The son has only one son alive at the time. Several sons are born to him thereafter. The grandson, alive at the time of the testator's death, takes to the exclusion of the other grandsons, though the testator intended that all of them should participate in his bounty. This inequity was first set right in Madras by a local act[3] and elsewhere by the Hindu Disposition of Property Act[4] incorporated in the general amending Acts of 1929,[5] the result of which is to abrogate this narrow rule in favour of more literal provisions of the three sections above cited.

Again, Hindu law demanded that the corpus and income must be vested in the same person, with the result that it did not permit of accumulations, and if at all, its term was limited to one year.[6] But the courts had long broken through this rule and permitted accumulations, subject to the English equitable principles, embodied in sections 17 and 117 of the Transfer of Property Act and the Succession Act respectively, which permit accumulations for a period of 18 years or longer as therein provided from the date of the transfer or death of the testator, as the case may be.

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(1) *Rup Ram* v. *Revati*, 32 A. 582.

(2) *Tagore* v. *Tagore*, 9 B.L.R. 377 (397, 400) P.C.; *Padmanand* v. *Hayes*, 28 C. 720 (732) P.C.

(3) Hindu Transfers and Bequests Act, 1914; Hindu Transfers and Bequests (City of Madras) Act, 1921.

(4) Act XV of 1916.

(5) Transfer of Property (Amendment) Act (XX of 1929) and Succession (Amendment) Act (XVIII of 1929).

(6) *Amrito Lall* v. *Surnomoni*, 25 C. 662; *see* Ss. 104, 107, Succession Act (Act XXXI of 1925) amended by Act XXI of 1929. Under the unamended Act accumulations were permitted for only one year after the testator's death.

Connected with the law of accumulations is the law against perpetuity, on which both the Acts lay down specific rules[1] that supersede any rule that may have been deduced from Hindu law. That law recognized no clear distinction between vested and contingent interests[2] defined in sections 20 and 21 of the Transfer of Property Act and sections 119-121 of the Succession Act.

1836. Other rules of Hindu Law that had long become established are those which relate to the construction of gifts and bequests. Such is for example, the rule of Hindu law that since women usually take only a limited estate, a gift or devise to a female would be so construed unless there is anything to shew to the contrary.[3] But by the extension of the general provisions of the two Acts, which contain sections 8 and 95 respectively, to the gifts and bequests of Hindus, the presumption is now not limited by the sex of the donee or devisee who would take the quantum of such interest as the transferor or the devisor can pass, unless he has limited it.[4] Such interpretation had in fact preceded its legislative recognition. In other respects either Hindu law had no rule of its own, or the rules treated as part of that law were drawn from the English cases, which the courts applied as embodying the rules of equity, and therefore, of universal application. For example, in a case decided in 1883, the testator, an Oudh Taluqdar had executed an unregistered will bequeathing his estate to his junior wife, and on her death to his son *C* by her. His eldest son sued to eject both on the ground that the will, being unregistered, failed to vest the estate in *B* under the provisions of section 13 of the Oudh Estates Act[5] and that intermediate estate failing, the remainder also failed, but the Privy Council held that the remainder accelerated by the failure of the intermediate estate[6] and it is so provided in section 27 of the Transfer of Property Act and sections 129 and 130 of the Succession Act.

Grant how made.

228. (1) A grant may be made in any of the modes and to the extent allowed by law;

(2) Whenever a grant amounts to a gift, as hereinbefore defined, it can only be made by a registered instrument, the execution of which must be attested by two or more witnesses.

(3) A grant when it is not coupled with a transfer of property, and is not subject to the provisions of the Transfer of Property Act, may be made without writing.

Clause (1).

1837. Grant Allowed by Law.—If law permits a grant, it is not rendered invalid by any provision of Hindu Law inconsistent therewith. As an illustration, the Hindu Disposition of Property Act[7] permits a grant to an unborn person

(1) S. 18, Transfer of Property Act; S. 114 Succession Act; *see* author's Law of Transfer, (6th Ed.), pp. 271, 272.

(2) *Bipradas* v. *Sadhan Chandra*, (1927) 56 C. 790 (construction of a gift to a daughter in 1921).

(3) *See* these cases collected in 1 Law of Transfer, (6th Ed.), 399 f.n. (16), pp. 271, 272.

(4) *Bipradas* v. *Sadhan Chandra*, (1927) 56 C. 790 (construction of a gift to a daughter in 1927); *Shalig Ram* v. *Charanjit Lal*, 11 L. 645 P.C.; *Jagmohan* v. *Sri Nath*, (1930) P.C. 253; *Pramath Nath* v. *Suprakash*, (1931) 58 C. 77 (gift to wife in 1921); *Provabati* v. *Sarojini*, (1933) C. 72; *Krishnaswami* v. *Ramachandra Rao*, (1934) M. 646 (gift to a wife).

(5) I of 1869.

(6) *Ajudhia* v. *Rajhman*, 10 C. 482 (488) P.C.; following Turner, L.J. in *Laison* v. *Lainson*, 18 Beav. 1.

(7) Act XV of 1916.

subject to the restrictions therein specified, which Hindu Law did not permit. The Act abrogates Hindu Law to that extent.

Clause (2).

1838. Gift Allowed by Law.—Similarly, a gift now can only be made in accordance with the provisions of S. 123 of the Transfer of Property Act, though, apart from that Act, a gift could be completed by mere delivery of the property gifted. The provisions of the statute law have abrogated Hindu Law to that extent.

But both a grant and a gift, not falling under the terms of S. 123 of the Transfer of Property Act, may still be made without a registered instrument. It has accordingly been held that a dedication of property may be so made.[1]

Clause (3).

1839. Grants and Gifts Distinguished.—The term "grant" is generally used with reference to an estate, office or privilege, or a right granted by the sovereign, a corporation or a public body or officer. It is distinguishable from a sale, lease or gift in that it need not possess any of their incidents. Take, for example, the grant of a *jagir*, an *inam* or an annuity, which are all comparable to a gift, but easily distinguishable from it in that the *jagir* is presumably a personal grant resumable on the death of the grantee, and may, for its continuance, depend upon its terms. It may be supported by past or future consideration, and may be otherwise conditional upon the grantee's rendering certain services, whereas a gift implies the absence of any consideration, and from the moment of its completion, vests the donee with ownership. The distinction between a gift and a grant would be apparent if we recall the essential ingredients of a gift as defined in S. 122 of the Transfer of Property Act. A gift is there defined to be the transfer of a *certain existing* movable or immovable property made voluntarily and without consideration, whereas a grant may or may not amount to a transfer of property, and when it *does* amount to a transfer of property, it need not be the transfer of certain *existing* property, nor need it be made without consideration. A gift, from the moment of its completion, devests the donor of all control over the subject matter of the gift, whereas the grantor may, and often does, retain some control over the subject-matter of his grant. There can be no gift of *future* property,[2] which may still be the subject of a grant. At the same time, the term "grant," being a generic term, embraces within its comprehension all transfers, whether by sale, exchange, gift or devise. Referring to this word, Sheppard's Touchstone observes: "This word is taken largely where anything is granted or passed from one to another. And in this sense, it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like, for he that doth give or sell, doth grant also. And thus it is sometimes in writing or by deed, and sometimes it is by word without writing."[3] Of grants, then it may be said that when they fall within the scope of the Transfer of Property Act, they must be made in the manner therein provided; but grants other than those comprised in the term "transfer," as defined in the Transfer of Property Act, may be made by parol. So, while a license, coupled with the transfer of property, can be made only as required by the Transfer of Property Act, a license

(1) *Pallaya* v. *Ramavadhanulu*, 13 M. L.J. 364; *Ramalingam* v. *Sivachidambara*, 42 M. 440; *Tammireddi* v. *Gangireddi*, 45 M. 281 (296).

(2) S. 124, Transfer of Property Act (IV of 1882).

(3) 2 Sheppard's Touchstone, Ch. XII, on "Of a Grant," p. 228.

otherwise may be made without writing as provided in S. 52 of the Easements Act.

Who may make a gift.

229. Any adult may make a gift of his property or of any interest therein over which he possesses the disposing power.

Historical Retrospect.

1840. Analogous Law.—The sacerdotal lawgivers naturally commended the making of gifts to the Brahmins as the highroad to heaven. But as a curb upon his cupidity, Manu declared that "though permitted to receive presents, let him avoid a habit of taking them, since by taking many gifts, his divine light soon fades."[1] But, all the same, the donor was encouraged to make continual gifts.

Ladnavalkya's dissertation on gifts is contained in the *Achar Kand* (Chapter on Rituals) and proceeds on the lines of Manu.[2] It has no legal value. The Mitakshara[3] and other texts follow the same line. All regard gift as a pious act and, therefore, relegate it to the *Achar Kand* of their works.

1841. Hindu Law divides gifts into four classes: (1) *Deyam* or that which should be given; (2) *Adeyam* or that which should not be given; (3) *Dattam* or valid gifts; and (4) *Adattam* or invalid gifts. As to the *quantum* of interest, Hindu Law divides gifts as stated by Wilson, J.: "Gifts are of three kinds—those which convey present title and interest and a present right of enjoyment; those which are vested, that is, present in interest, but in which the enjoyment is deferred; and those which are contingent, that is to say, in which neither title nor right of enjoyment is given at present; both depend upon future uncertain events. All these kinds of gifts are admissible among Hindus. All are recognized by the Succession Act, the Hindu Wills Act and the Transfer of Property Act."[4] But the development of the modern law has rendered the old texts[5] wholly obsolete.

1842. The authority to make a gift depends upon the donor's power of disposal over the subject-matter of gift. If it is his self-acquired property, he is entitled to dispose of it by gift or devise at his discretion. But if it is his joint property, then his power of disposal is necessarily limited by the rights of his coparceners.

Again, his power of disposal may depend upon the nature of the property. If it is impartible, he cannot alienate it in parts; if inalienable, he cannot alien it at all. Then again the *quantum* of interest taken by the donee may depend upon the terms of the gift but irrespective of the sex of the donee. These will be the subject of a future discussion.

The subject of gift of coparcenary interest has already been the subject of discussion in the foregoing pages. (*See* **S. 126.**)

The subject of individual property and the extent to which it may be disposed of by gift will now be considered.

1843. Father's Power of Gift.—As regards the father's power of gift, it is settled that, under the Dayabhag law, the father being the sole and undivided owner of all property, whether movable or immovable,

(1) Manu, IV-186; 226, 228 (*see* also 229-233).
(2) Yad. (Mandlik), pp. 186, 187.
(3) Mit., III, V-VI.
(4) *Ramlal* v. *Kanai Lal*, 12 C. 663 (668).
(5) Narad, IV-6; IV-8-11, 12; 33 S.B.E. 120, 128, 129, 130. To the same effect, Manu VIII-212, XI-7; Yad., I-124; Vashisth, VIII-10; Vishnu, IX-8.

ancestral or self-acquired, can make a valid gift or devise of any such property.[1] But the powers of the Mitakshara father are limited, for the Mitakshara declares that "the father has independent power in the disposal of effects, other than immovable, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth, but he is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor."[2] But, as pointed out by the Privy Council, this text can no longer be literally enforced.[3] The question then arises: What are the limits within which the father is entitled to make a gift of his joint or separate property? It cannot be denied that the true measure of his power is to be found in the cases and not in the texts. His present power has been the result of gradual growth. At first, the text was literally construed so far as to protect the sons. And the Privy Council, accordingly, laid down that if the father had no male issue, he was free to dispose of all his self-acquired property, whether movable or immovable.[4] But later on it was discovered that the Mitakshara texts were themselves contradictory; for, while in one place the father's wealth is declared to be "subject to the control of the sons."[5] in another place, it is said that the "sons must acquiesce in the father's disposal of his own self-acquired property."[6]

1844. These conflicting texts supported the conflicting decisions[7] till the law was finally settled by the Privy Council, who upheld the father's unqualified power to dispose of his self-acquired property, whether movable or immovable.[8] In so holding, their Lordships said: "It appears to them that the subject is one of those in which, from the earliest times, there have been two conflicting principles of law, one favouring the paternal integrity and the fixed succession of family property, and the other, the free use of such property for the circumstances of the day. The controversies and conflicting decisions on the father's powers of mortgage and sale, for the payment of his debts out of the inheritance, and on the testamentary power, will occur to everybody who is familiar with Indian litigations of the past half century or so. On each of those subjects, there has been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles, *viz.*, the use of property by the living generation or its living heads."[9] They then held that the father had full power for disposal of all his self-acquired property, whether by sale, mortgage, gift or devise, and that the presence of the sons was no curb on his power.

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(1) Mit., I-I-27, cited in *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (164) P.C.

(2) Mit., I-I-27, *Hari Shanker* v. *Ram Sarup*, (1938) L. 113.

(3) *Suraj Bunsi* v. *Sheo Pershad*, 5 C. 148 (164, 165) P.C.

(4) *Beer Pertab* v. *Rajender*, 12 M.I. A. 38.

(5) Mit., I-I-27.

(6) Mit., I-V-10.

(7) That he had full power of disposal was held in the following cases: *Sudanund* v. *Bonomallee*, 2 Hay 205; *Mudhu Gopal* v. *Rani Buksh*, 6 W.R. 71; *Ojoodhya* v. *Ramsarun*, 6 W.R. 77; *Rajaram* v. *Tewary*, 8 W.R. 15; *Bishen Perkash* v. *Bawa*, 10 W.R. 287; *Sudanund* v. *Soorjo*, 11 W.R. 436; *Bishen Perkash* v. *Bawa*, 20 W.R. 137 P.C.; *Sipal* v. *Madho*, 1 A. 394; *Gangabai* v. *Vamanji*, 2 B.H.C.R. 318; *Jugmohun Das* v. *Manguldas*, 10 B. 528: *Contra* 1 Str. H.L. 261; 2 Str.H.L. 436, 441, 450; *Meenatchee* v. *Chetumbra*, (1853) Mad. D. 61; *Muttumaran* v. *Lakshmi*, (1860) Mad.D. 227; *Nallatambi* v. *Mukunda*, 3 M.H.C.R. 455; *Ponnappa* v. *Pappuvayyangar*, 4 M. 47; *Madhasookh* v. *Budree*, 1 N.W.P.H.C.R. 153.

(8) *Balwant Singh* v. *Ram Kishore*, 20 A. 267 (288) P.C.

(9) *Balwant Singh* v. *Ram Kishore*, 20 A. 267 (288) P.C.

Gift how made.

230. (1) A gift of movable property must be accompanied by delivery.

(2) And a gift of immovable property must be made in the form prescribed by section 123 of the Transfer of Property Act.

1845. Analogous Law.—The Hindu Law of gifts is, since the passing of the Transfer of Property (Amendment) Act, 1929 (Act XX of 1929), subject to the provisions of Ch. VII (Ss. 122-129) of the Transfer of Property Act.

1846. Requirements of Hindu Gift.—It has already been seen that the term "gift" in Hindu Law is used in a much wider sense as connoting anything movable or immovable given for no valuable consideration. A gift under the Transfer of Property Act postulates the presence of two persons, called the donor and the donee. It is an *inter vivos* gift, and is even then limited because it must be accepted during the life-time of the donor. But a testamentary gift need not be made *in praesenti* or accepted by the donee during the donor's life-time. Nor, indeed, need the subject of bequest be in existence when it is made, though it must be necessarily in existence when it takes effect. The subject of such gifts is dealt with in Ss. 90-199 of the Succession Act,[1] many of which now apply to Hindus. Leaving out all these statutory gifts, there remain for consideration gifts which are yet unaffected by statute, and are so recognized by Hindu Law. Such gifts are completed by mere delivery.[2] The Madras Court inclines to the view that a Hindu religious gift, made on the occasion of marriage or funeral, need not even satisfy that requirement, that such gift is in the nature of a dedication made to a person, real or ideal, and in fact, not even to him.[3] But even where the donee is an idol or a temple, the dedication need not conform to the provisions of S. 123 of the Transfer of Property Act. Once the gift is made, the owner becomes the custodian and trustee of the property and must "appropriate to pious purposes the corpus of a property, or its income according as it may have been resolved."[4]

Clause (2).

A Gift or devise to unborn persons.

231. Notwithstanding the rule of Hindu Law to the contrary, a settlement gift or devise to an unborn person, at the time of the settlement or gift or at the testator's death when the devise takes effect, shall be valid if it conforms to the provisions of the Transfer of Property Act and the Succession Act, respectively.

1847. Analogous Law.—This section is adapted from the Hindu Disposition of Property Act, 1916,[5] which was enacted to abrogate the rule of Hindu Law of devise, which did not allow a gift or devise to be made in favour of a person,[6] real or juridical, *e.g.*, an idol,[7] not in existence at the time it took effect. Now, since, under Hindu Law, an estate cannot remain in abeyance, but must vest in some one at the time of the donor's or testator's death, it followed that where the donee or the devisee was not in existence

(1) Act XXXIX of 1925.

(2) 3 Gour's Law of Transfer, (6th Ed.).

(3) *Ramalinga* v. *Sivachidambara*, 42 A. 440 (442, 443); *Tammireddi* v. *Gangireddi*, 44 M. 291 (296); *Bhupati Nath* v. *Ramlal*, 37 C. 128 (153) F.B.

(4) *Mahanirvan Tantra*, S. XII, vv. 92-94; cited in *Bhupati Nath* v. *Ramlal*, 37 C. 128 (137) F.B.

(5) Act XIV of 1916.

(6) *See* the subject discussed in 1 Gour's Law of Transfer, (6th Ed.).

(7) *Bhagabati* v. *Kalicharan*, 38 C. 468 (472) P.C.; *Rai Upendra* v. *Hemchandra*, 25 C. 405 P.C.; *Motivahu* v. *Mamubai*, 21 B. 709 P.C.; *Rajamoyee* v. *Troylukho*, 6 C.W.N. 267.

at the time of the former's death, his disposition failed altogether.[1] English Law permitted, however, the creation of such future estates, subject to the limitations contained in Ss. 13, 14 and 20 of the Transfer of Property Act. With the passing of the Hindu Disposition of Property Act, it is now possible to extend the same rule to Hindus.

1848. Though the operation of this section will best be seen in the subsequent discussion on the effect of future devises, it is not to be understood as confined merely to gifts and devises, but applies equally even to transfers for consideration.[2]

1849. The net result of the Hindu Disposition of Property Act is to legalize the creation of future estates, subject to the provisions of Chapter II[3] of the Transfer of Property Act, 1882, between its enactment in 1916, and its merger in the Transfer of Property, and the Succession Acts as amended in 1929.

This Act has overruled a series of cases decided by the Privy Council and the courts in India, in which the orthodox Hindu rule was enunciated and applied.[4]

Gift or devise to female relations.

232. **(1) Notwithstanding any rule of Hindu Law to the contrary, gifts and devises to females, made since the amendment of the Transfer of Property Act and the Succession Act, by Act XX of 1929, which came into force on 1st April, 1930, and Act XVIII of 1929, which came into force on 1st October, 1929 respectively, shall be construed in accordance with the rules as there enacted.**

(2) In particular and without prejudice to the generality of the foregoing provision, it shall not be presumed that, in the absence of words amplifying the terms of a grant, a gift or devise should be ordinarily construed as intended to convey only a limited estate to a female donee or devisee relation of the donor or devisor.

(3) That all gifts and devises shall thenceforth be construed in accordance with the principles embodied in section 8 of the Transfer of Property Act and section 95 of the Succession Act.

1850. Analogous Law.—For a commentary on this section *see* §§ 1821-1825.

Conditional gift or devise.

233. **(1) A gift or devise may be absolute or conditional.**

(2) A conditional gift or devise takes effect upon the fulfilment of the condition, except in the following cases:—

(*a*) Where the condition is a condition subsequent;

(*b*) Where it is illegal or immoral or

(*c*) Where it is repugnant to the nature of the grant.

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(1) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.

(2) *Ramasamy* v. *Chinnan*, 24 M. 449 (469); *Chundichurn* v. *Sidheswari*, 15 C. 71 P.C.

(3) *Cf.* S. 12 of Transfer of Property (Amendment) Supplementary Act, XXI of 1929.

(4) *Tagore* v. *Tagore*, 9 B.L.R. 377 (394) P.C.; *Soorjeemoney* v. *Denobundo*, 6 M.I.A. 555; *Motivahu* v. *Mamubai*, 21 B. 709 P.C.; *Kally Prosonna* v. *Gopee*, 7 C.L.R. 241; *Kristnaramani* v. *Ananda*, 4 B.L.R. (O.C.) 231; *Colgan* v. *Administrator-General*, 15 M. 424; *Javerbai* v. *Kalli Bai*, 16 B. 492; *Kashinath* v. *Chinnaji*, 30 B. 477 (490); *Bhagabati* v. *Kalicharan*, 32 C. 992 (1009), O.A. 38 C. 468 P.C.

(3) A substantial fulfilment of the condition may be sufficient if its literal fulfilment is impossible or impracticable.

(4) A gift once completed cannot be revoked except on a ground which would suffice to cancel a contract.

1851. Analogous Law.—Conditional transfers are subject to the provisions of Ss. 25-27 of the Transfer of Property Act, and conditional bequests subject to those of Ss. 126-130 of the Succession Act. And as there is nothing in Hindu Law to the contrary,[1] their principles are equally applicable to Hindus. The Privy Council have upheld the validity of conditional gifts, holding it competent to the donor to create an absolute estate defeasible on the failure of issue.[2] So, where the donor gave a taluq to his sister for her support and "for the generation born of your womb successively and no other heirs of yours shall have a right or interest," it was held that the grant was absolute and defeasible on the failure of issue living at the death of the donee.[3]

1852. Gift is Irrevocable.—The following texts bear on the subject of this clause:—

Brihaspati.—"Things once delivered on the following eight accounts cannot be resumed: for the pleasure of hearing poets, musicians or the like, as the price of goods sold, as a nuptial gift to a bride or her family, as an acknowledgment to a benefactor, as a present to a worthy man from natural affection or from friendship.

"What is given by a person in wrath or excessive joy, or through inadvertence or during disease, minority or madness, or under the influence of terror, or by one intoxicated or extremely old, or by an outcast or idiot, or by a man afflicted with grief or with pain, or what is given in sport, all this is declared ungiven or void. If anything be given for a consideration unperformed, or to a bad man mistaken for a good one, or for any illegal act, the owner may take it back."[4]

Yadnavalkya.—"Let the acceptance be public, especially of immovable property, and delivering what may be given and has been promised, not a wise man resume a donation."[5]

Dayabhag.—"Accordingly, Harit says: 'A father, during his life distributing his property, may retire to the forest or enter into the order suitable to an aged man; or he may remain at home having distributed small allotments and keeping a greater portion; should he become indigent, he may take back from them.' "[6]

A gift once complete cannot be revoked,[7] except upon grounds which suffice to cancel a contract.[8] Such grounds are fraud, misrepresentation, undue influence and the like. In this respect, Hindu Law agrees with the statutory provisions contained in S. 126 of the Transfer of Property Act.

With the solitary exception of the Dayabhag text, all texts declare a gift irrevocable, Katyayan even going so far as to make the offer of a gift for a religious purpose specifically enforceable. But though this part of the law contravenes the express provisions of the statute law and is there-

(1) *Soorjeemoney* v. *Denobundhoo*, 9 M.I.A. 123 (135); *Tarokessur* v. *Soshi*, 9 C. 952 P.C.

(2) *Bhoobun* v. *Hurrish Chunder*, 4 C. 23 P.C.; *Sham Shivendra* v. *Janbi Kuar*, 36 C. 311 P.C.

(3) *Bhoobun* v. *Hurrish Chunder*, 4 C. 23 P.C., explained in *Tarokessur* v. *Soshi*, 9 C. 952 (959) P.C. To the same effect, *Sham Shivendra* v. *Janbi Kuar*, 36 C. 311 P.C.

(4) 2 Dig., 174, 197.

(5) Cited in *Kalidas* v. *Kanhaya Lal*, 11 C. 121 (132) P.C.

(6) Dayabhag, Ch. II-57.

(7) *Bishenchand* v. *Asmaida*, 6 A. 560 (575) P.C., *Rajaram* v. *Ganesh*, 23 B. 131.

(8) *Nasir Hussain* v. *Mata Prasad*, 2 A. 891 (895); *Bishenchand* v. *Asmaida*, 6 A. 560 (575) P.C.; *Ganga Baksh* v. *Jagat Bahadur*, 23 C. 15; *Rajaram* v. *Ganesh*, 23 B. 131; *Sita Ram* v. *Harihar*, 35 B. 169 (Alludes to text stating that a gift cannot be resumed if it is to 'a benefactor' or to father, but it does not imply that a gift to any other person is resumable).

fore obsolete, the fact remains that Hindu Law does not countenance the resumption of a gift.

234. (1) A person may dispose of by gift, made in contemplation of death, any movable property which he was competent to dispose of by will.[1]

Gift in contemplation of death.

(2) A gift so made divests the giver of the property given and he is not entitled to resume it upon his recovery, unless his gift was to that extent conditional.[2]

1853. **Analogous Law.**—The section is drawn from S. 191 of the Succession Act which, however, being based on the English law of *donatio mortis causa*, and influenced by the Statute of Frauds, has not been extended to apply to Hindus. But apart from it, it was laid down in two cases decided in 1869 and 1871 that Hindu law does recognize gifts made in contemplation of death, though such gifts vary in their incidents from the English *donatio mortis causa*.[3] Both were deliveries of Government promissory notes to the donee without endorsement and the question was whether property in the notes passed to the donee without endorsement and the executor of the donor was liable to complete the formality of an endorsement. Both the courts held in the affirmative, distinguishing a Hindu gift from a *donatio mortis causa*, in which the donee secures the gifted property in trust for the donor till his death, on which property therein vests in his executor, who treats it as a legacy to be made over to the donee. The main difference between the statutory *donatio mortis causa* lies in its main incidents which may be thus stated. Under the statutory provision, as under English law (1) the gift must be made in contemplation of death; (2) the subject must be movable property; (3) it must be accompanied by actual delivery of the subject in question. (4) The gift takes effect only after the giver dies of the illness and not if he recovers therefrom; (5) the gift does not take effect if the donor survives the donee. (6) The gift may be resumed by the donor. But such a gift under Hindu Law (1) divests the donor of his ownership immediately the gift is made. (1) Its resumability does not necessarily follow his recovery, but depends upon the donor's express or implied intention at the time he made the gift. (3) Though the gift must relate to movable property, in view of S. 123 of the Transfer of Property Act, still that term is wider in its scope, covering as it does any actionable claim, bond or security, though perhaps not if it a security of immovable property.[4]

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(1) S. 191, Succession Act.

(2) *Cf.* Peacocok, C.J., in *Coomar Krishna* v. *Woopendra*, 12 W.R. (App. from O.J.) 4 (6).

(3) *Coomar Krishna* v. *Woopendro*, (1869) 12 W.R. (Appeals from O.J.) 4; *Visalatchmi* v. *Subbu Pillai*, (1871) 6 M.H.C.R. 270.

(4) As to which *see* 1 Law of Transfer, (6th Ed.) 70, pp. 55, 56.

CHAPTER XVIII.

WILLS.

1854. Topical Introduction.—Hindu Law, as such, contains no provision for wills, which have come into vogue in the following manner described by the Privy Council: "As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both here and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman Law, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator, as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The law of wills, has, however, grown up, so to speak, naturally from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case, new in the instance, to be governed by the established principles and the analogies which have hitherto prevailed in like cases."[1]

1855. Before the enactment of Act XXXVII of 1926, which came into effect from the 1st January 1927, wills of Hindus, Buddhists, Sikhs and Jains, except those provided in S. 57 of the Succession Act need not have been in writing; but it was held in Madras that otherwise the provisions of the Succession Act afforded a good aid to the construction of all wills, since it embodied the principles in consonance with justice, equity and good conscience.[2] As such, two years later, the legislature passed another Act[3] formally extending the provisions of Part VI of the Succession Act, set out in Schedule III, to such wills, with the result that the law of wills has since become statutory, and as the law of gifts is allied to that of wills, similar amendments were made to the Transfer of Property Act by an amendment Act of the same year[4] by which all rules of Hindu Law in conflict with the general rules stated in chapter II thereof, and those in conflict with the law of gifts, as enacted in chapter VII were abrogated.[5] The net result of all these amendments is to remove the Hindu Law of gifts and that of wills from the Shastras to the statute which must thenceforth govern those transactions.

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(1) *Tagore* v. *Tagore*, 9 B.L.R. 377 (397) P.C.

(2) *Ratna* v. *Narayanaswami*, 26 M.L.J. 616: 24 I.C. 796.

(3) Act XVIII of 1929 which came into force on 1st October, 1929.

(4) Act XX of 1929 which came into force on the 1st April, 1930.

(5) *See* repeal of the saving clauses Ss. 2 (*d*) and 129 by Act XX of 1929.

1856. Logically, these two subjects must be removed from this Code, but they have been retained to set out to shew the interplay of the two authorities in some cases in which the rules of the personal law still survive, distinguishing them from those in which those rules have now become extinct.

Thus, the testamentary power, though a graft upon the archaic law, has now become well established.

The ensuing sections present the leading principles thus evolved out of the analogies from gifts.

235. (1) **"Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.**[1]

"Will" defined.

(2) "Codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will.[2]

"Codicil" defined.

1857. Analogous Law.—These two definitions are copied from S. 2 (*h*) and S. 2 (*b*) of the Succession Act,[3] as they now extend to Hindu wills, which, since the enactment of the Succession (Amendment) Act 1926[4] has become equally applicable to all Hindu wills and codicils, which extends to Hindus, Buddhists, Sikhs and Jains all the provisions of S. 63 of the Succession Act; and since the definitions given in S. 2 thereof apply to all the provisions of the Act, unless there is anything repugnant in the subject or context, it follows that a will or a codicil executed by a Hindu on or after the 1st January, 1927, must conform to these definitions.

A will is described as a "legal declaration", meaning a declaration in conformity with law, not in any set form prescribed by the law, since law has prescribed no forms, though under Hindu law, an informal and even a casual statement is sufficient.

1858. It has already been seen that Hindu law contains no provision for wills which had become evolved out of the law of gifts before their passing under statutory control. (§§ **1854-1855.**) The provisions of the Succession Act relating to wills have been taken from the English law, which in its turn received its main principles from the civil law. The definitions of "will" and "codicil" as enacted is an instance in point. The word "will" means "wish", which in its turn is drawn from the Code of Gaius and Ulpian where it is so described.[5] Similarly, a "codicil" is the English form of the Roman term *"codicilli"* where it meant an informal will, though it means a postscript to a will adding, altering or explaining it.

1859. Pre-requisites of a Will.—It will be seen from the wording of the definition formulated in this section that a will is a declaration—but a declaration which must possess the following essential elements:—

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(1) S. 2 (h), Suc. Act, 1925.
(2) S. 2 (*b*), *Ib.*
(3) Act XXXIX of 1925.
(4) Act XXXVII of 1926.
(5) *"Testamentum est mentis; nostrae justa contestatio in id sollemniter facta ut post mortem nostram valeat"—XX-I.*

(1) It must be legal.

(2) It must relate to a disposition of property.

(3) It must relate to the testator's property or to property over which he has the disposing power.[1]

(4) It must dispose of it so as to take effect from the testator's death.

(5) It must be revocable at the testator's pleasure.[2]

1860. Legal Declaration.—Prior to, legislative control, a Hindu will, like the Roman *codicilli,* might be oral or in writing, and if in writing, law permitted it to assume any form, provided its intention was clear. And since it needed no attestation, it might be contained in a writing which was intended to be merely a petition or a letter, or in fact, any document, the context of which may bear no relation to the statement which constituted the will.[3] Such wills were subjected to no set rules of construction and were permitted to be construed with the utmost latitude, the only rule being to ascertain the intention, regardless of the form and the mode of expression except so far as it threw any light on the intention.[4]

But that wide latitude is no longer possible in the treatment and construction of a document as a will; since the first requisite of a will is that it must be the legal declaration of a person's intention. The term "legal" is taken from the civil law, under which it must be *"justa"*, meaning in conformity with the forms of law. The classical lawyers paid unduly excessive attention to the form rather than the substance of a disposition. The modern tendency is to reverse that order of consideration, and in the case of Hindu wills, the Privy Council[5] have counselled such course, as will be presently seen in the chapter dealing with the construction of wills. (Ch. XXI.) The term "legal" does not mean valid under law, since the validity of a will has nothing to do with its formal legality, which is all that legal declaration means and which is to be distinguished from a legal disposition of property.

1861. Secondly, a will must be couched in the form of a declaration, that is, in a formal statement as the best evidence of intention. But the term "declaration" must not be too literally construed, since it has been held that, however irregular in form or inartificial in expression, "the form of the instrument is not conclusive against its testamentary effect,[6] although it may not be valid in the form in which it was drawn up. Again, a will may be conditional or contingent, as witness the will of a man who said that he was starting for Delhi and in case he died, which he hoped by the grace of God he will not he would cancel it. He returned but had not cancelled his will. The Privy Council accepted it to be an effective will.[7] A will may be in the form of "Instructions to be followed if I die at sea or abroad."[8]

It is not necessary that the declaration, constituting a will, should be embodied in a single document or a single passage, since it may be

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(1) *Bijra* v. *Puraj Sundari,* 42 C. 56 P.C.

(2) *Rajammal* v. *Authiammal,* 33 M. 304.

(3) *Din Tarini* v. *Krishna,* 36 C. 149 (150).

(4) *Thakur Ishri Sinah* v. *Thakur Baldeo Singh,* 10 C. 792 (801, 802) P.C. (a case of a will executed under the Oudh Estates Act, I of 1869).

(5) *Ibid.*

(6) *King's Proctor* v. *Daines,* (1830) 3 Hagg. 221.

(7) *Jagannath* v. *Ram Bharosa,* 60 I.A. 49: (1933) P.C. 33; but *see, Porter,* In re, L.R. 2 P. 22: *Robinson,* In re, L.R. 1 P. 71. (The distinction is one of construction for which *see post*).

(8) *Lindsay* v. *Lindsay,* L.R. 2 P. 459.

scattered over several documents, all of which will have to be treated as jointly constituting a will. So the nomination of beneficiary in his life policy by a subscriber will amount to a will, provided, of course, it is now duly executed and attested. But a statement in revenue papers as to who are a person's heirs on his death would lack those essentials and would not, therefore, be treated as a will.[1]

There is a presumption against treating a deed as a will unless its circumstances compel the court to do so.[2]

1862. Will Distinguished from Gift.—Although the notion of wills is evolved out of gifts, the two classes of dispositions are distinguishable and must be distinguished. A gift confers a present interest, relates to *existing* property and takes effect *immediately,* while a will confers a *deferred* interest, may comprise *future* property and does not take effect until the *death* of the testator.[3] A gift once completed cannot be revoked; but a will may be revoked at any time and is by its nature ambulatory and revocable by the testator and again and again by him.[4]

Then, again, a person may give what he cannot devise. In this respect the power of gift and devise are not identical.[5]

1863. Disposal of Property.—Another essential condition of a will is that it must be accompanied by what the civil law required *animus testandi,* that is, the intention and power of disposal of his property. It is not necessary that the subject of his will is his property over which he possesses complete ownership or any right *in presenti,* since a will takes effect from his death and as in the case of a life policy, the property disposed of may only take shape on his death. On the other hand, he may possess such property over which his rights will cease on death, in which case, though he may execute a will, it will be infructuous. If he has then any property as will survive his death, its disposal must be such disposal as he would have made if he were able to do so after his death. The disposal of property is then *in futuro* and it may be conditional or contingent. Any number of persons may execute a will, and they may execute mutual wills, that is, such wills as are inter-dependent, in which case, one testator may alter his will after notice to the other, but he cannot do so after the other's death.[6]

The property to be the subject of a testamentary bequest may be any property held jointly or severally over which the testator has disposing power.

1864. Will Revocable.—The last condition of a will is that it is voluntary, ambulatory, and revocable in that it may be altered, amended or cancelled at any time and as often as the testator wishes to do so. Consequently, if the property rests in another immediately, it would not be a will even though it contains a scheme of settlement on his death.[7] On the other hand, an instrument described as a deed of settlement, executed on

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(1) *Ma Na* v. *Ma Gun,* (1925) R. 8.
(2) *Balraj* v. *Mahadeo,* 44 I.C. (O.) 89.
(3) *Bishenchand* v. *Asmaida,* 6 A. 560 (572) P.C.
(4) *Sagat* v. *Dwarka,* 14 C.W.N. 174: 3 I.C. 381; *Sita* v. *Deonath,* 8 C.W.N. 514; *Rammonir* v. *Ram Gopal,* 12 C.W.N. 942.
(5) In *Lakshmi Bai* v. *Ganjat,* 4 M.H. C.R. 150 (158), this question was held unsettled by judicial decisions; *Mulchand* v. *Mancha,* 7 B. 491 (493); *Lakshman* v. *Ramchandra,* 5 B. 48 (61) P.C.
(6) *Dias* v. *De Livera,* 5 App. Cas. 123 (136).
(7) Reference under Stamp Act, 20 B. 210 F.B.: 21 M. 422.

his taking a son in adoption, provided *inter alia* that his wife and son should live together, and in case of disagreement, the wife should enjoy the land described during her life-time in lieu of maintenance was held to be a will.[1] One vital difference between a settlement and a will is that the latter is revocable.[2]

1865. **Codicil.**—A codicil is an appendix to a will intended to explain,[3] amplify or vary its terms. As such, it must be executed with the same formalities as a will and is to be treated as a part of it. There is no limit to codicils, nor any rule as to their contents. A codicil may survive even though the will itself is revoked.[4]

1866. **Trust.**—It is immaterial by what name the will is called, or what was the primary intention of the testator, provided that its eventual and resultant intention was such disposal as falls within the terms of its definition. Of course, a person may effect the purpose of a will by transferring his property to trustees, charging them to dispose of his estate after his death, according to his instructions. Such course is usually resorted to by persons who do not trust the written word, and at the same time, they escape payment of the probate duties. And for the same reason, by the conversion and disposal of one's estate through the medium of a private company, one can escape the death duties since a company never dies, and consequently, there is no liability to pay the consequential death duties. But, of course, both probate and death duties are revenue duties and may be altered any moment to rope in such examples.

Who may make a will or codicil.

236. (1) "Every person of sound mind, not being a minor, may dispose of his property by will."[5]

(2) Any property may be disposed of by will over which the testator possesses a disposing power, by an act *inter vivos* without consideration.

(3) "A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will."[6]

(4) A codicil must be executed in the same manner as a will.

1867. **Analogous Law.**—The Indian Majority Act excepts Hindus only as regards marriage, dower, divorce and adoption, but not as to the power to make a will, which is subject to it.[7] Consequently, a person, who is major under the Hindu personal law, but not so under the statute, is not competent to make a bequest.[8] Where, therefore, a guardian is appointed or declared under the Guardian and Wards Act, the minority of the ward does not cease till he attains the age of 21 years and he is incompetent to make a will till then, it being immaterial whether the guardian dies, is removed, or otherwise ceases to act.[9]

(1) *Lakshmi* v. *Subramanya*, 12 M. 490.
(2) *Rajammal* v. *Authiammal*, 33 M. 304.
(3) *Rameshwar* v. *Balraj*, (1935) P.C. 187.
(4) *Greig*, (In re), L.R. 1 P. 72.
(5) S. 59 Succ. Act; Four explanations and three illustrations appended thereto are omitted.
(6) *Ib.*, S. 62.
(7) S. 2 (9), Act IX of 1875; *Golab* v. *Thakorlal*, 36 B. 622; *Krishnama* v. *Veeravelli*, 38 M. 166; *Dekram* v. *Somanchi*, (1911) M.W.N. 383: 12 I.C. 551.
(8) *Gulab* v. *Thakorlal*, 36 B. 622; *Hardurai* v. *Gomi*, 8 A.L.J. 385; *Dipa* v. *Lakshmi*, 6 I.C. (C.) 6.
(9) *Jayaram* v. *Mahadeb*, 36 C. 768; *Dipa* v. *Lakshmi*, 6 I.C. (C.) 6; *Deheram* v. *Soman Ali*, (1911) 2 M.W.N. 383: 12 I.C. 551.

1868. Power of Bequest.—The testator's competency to make a will is distinct from its validity. The former depends upon his age, the latter upon his disposing power.[1] A person cannot make a bequest of property which he could not have conveyed by a transfer *inter vivos*. The rule on the subject was thus stated by Willes, J.: "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts, to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred."[2] The power of a Hindu to make a will is not of modern introduction nor is it of local origin. Wills were known to and in use amongst Hindus not in the presidency towns only, but from one end of the peninsula to the other. The right to make a will is a part of Hindu Law itself.

Now, since a Hindu coparcener in some provinces[3] is permitted to alien his undivided interest *inter vivos* only for value, it follows that he has not the power to alien it by gift or bequest.[4] But except in Bengal, where the coparcener holds his share in *quasi*-severalty, he is competent to make a gift of his interest, and is held equally competent to devise it by will so as to deprive his widow of her share on partition.[5]

1869. A person may make a bequest of his self-acquired property,[6] or even of his ancestral coparcenary property, if he had no coparceners at the time,[7] since the right of alienation in such cases is subject to the right of coparceners. Hence the son may challenge the father's bequest even if made before he was born.[8] And since the manager of a joint family is in the position of a trustee, he has no power to make a will in respect of any portion of the property.[9]

Since the will takes effect from the death of the testator and the coparcenary interest vests from the moment of conception,[10] occasion's may arise when the right of survivorship is in conflict with the right of devise when the right of survivorship, being the prior right would take precedence over that by devise.[11] In other words, in a competition between a right acquired by survivorship and that by devise the farmer prevails.

It is now settled that since the holder of an impartible estate has no active coparceners, it follows that he is competent to will away his estate.[12]

1870. The power of a person to bequeath by will is here declared to be co-extensive with his power to alienate his property *inter vivos*. This is the rule, but it may appear to conflict with the manager's power to make small customary gifts to his relations on ceremonial occasions, or

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(1) *Pitum* v. *Joykishan*, 6 W.R. 101 (102); *Court of Wards* v. *Venkata*, 20 M. 167; *Vallinayagam* v. *Pachche*, 1 M.H.C. R. 326.

(2) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.

(3) S. 126 *ante*.

(4) S. 126, *Lakshman* v. *Ramachandra*, 5 B. 48 P.C.; *Bhujanga Rao* v. *Maloji Rao*, 5 B.H. C.R. (A.C.) 161.

(5) *Debendra* v. *Brojendra*, 17 C. 886.

(6) *Narainasami* v. *Arunachala*, 1 M. H.C.R. 487-*n*; *Bawa* v. *Bishen*, 10 W.R. 287; *Nana* v. *Haree*, 9 M.I.A. 96.

(7) *Nagalatchmee* v. *Gopoo*, 6 M.I.A. 309.

(8) *Vithabai* v. *Balwant Rao*, (1893) B. P.J. 72.

(9) *Lalta Prasad* v. *Mahadeo*, 42 A. 461.

(10) *Sabapathi* v. *Somasundram*, 16 M. 76.

(11) *Vitla* v. *Yamenamma*, 8 M.H.C.R. 6; *Gooroova* v. *Narainaswamy*, 8 M.H.C.R. 13-*n*; *Lakshmi* v. *Subramanya*, 12 M. 490 (492); *Subbarami* v. *Ramamma*, 43 M. 824.

(12) *Rama Rao* v. *Raja of Pittapur*, 41 M. 778 P.C.; *Mathuraswamy* v. *Bangarammal*, 8 I.C. (M.) 332.

grants for maintenance and the like. But in doing so, the manager does not exercise his proprietary power. He rather acts as the agent of the joint family. The rule stated in this clause, therefore, holds good.

1871. A person cannot bequeath his undivided share in the joint property, even with the consent of his coparceners, since the testator's interest in the property becomes extinct from the moment his will is to take effect.[1] The case might be different if, though in form a will, it was in reality an arrangement acted upon by the coparceners during the testator's lifetime, in which case, it would operate as a partition of the joint property.[2] The right of enjoyment is much less than ownership, and it cannot be bequeathed. And since a widow is incompetent to transfer by gift her limited estate, it follows that she has no power to bequeath it even with the consent of the next reversioner.[3] For the same reason, though the widow of the donor of a religious bequest is, on the failure of the appointed manager, entitled to manage the property, and may even nominate a manager, such nomination to take effect after her death, she has no power to do so by will.[4] But she is not incapacitated by her sex from bequeathing property to which she is absolutely entitled.[5] For instance, though the widow of the founder of a religious trust is, on the failure of the appointed manager, entitled to manage the property, and may even nominate a manager, the nomination taking effect after her death, she has no power to do so by will.[6]

237. Form of will. **(1) A will executed on or after the first day of January, 1927, can only be made subject to the provisions of section 63 of the Indian Succession Act, 1925, that is to say, it must be in writing and attested by two or more witnesses as therein provided.**

(2) A will executed before the first day of January, 1927 may be oral or in writing, and, if in writing, it need not be attested or registered:

(3) Provided that all wills and codicils made after the first day of September, 1870, by a Hindu, Buddhist, Sikh or Jain in the province of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or relating to immovable property situated within those territories or limits shall be made only subject to the provisions of section 57 and Schedule III of the Indian Succession Act, 1925.

Exception.—**Nothing herein applies to the privileged will of an adult soldier, employed in an expedition or engaged in actual warfare, or of an airman so employed or engaged, or of a mariner at sea, which may be executed as provided in section 66 of the Succession Act.**

1872. Analogous Law.—The Hindu Law of Wills falls in to four stages. Before the enactment of the Hindu Wills Act, 1870,[7] there was

(1) *Seth Lakhmichand* v. *Anandi*, 48 A. 313 P.C.; *Bhikhabhai* v. *Purshottam*, 50 B. 558 (565, 566), citing *Anand Rao* v. *Administrator-General*, 20 B. 450, distinguishing *Brij Raj* v. *Sheonandan Singh*, 35 A. 337 (346) P.C.; *Jamnadas* v. *Gordhandas*, 28 Bom. L.R. 532: 96 I.C. 181: (1926) B. 463.

(2) *Seth Lakhmichand* v. *Anandi*, 48 A. 313 P.C.; *Subbarami* v. *Ramamuka*, 43 M. 824 (826-828).

(3) *Raghava* v. *Narayanasami*, 4 M.L. J. 89; *Gooroova* v. *Narainaswamy*, 8 M. H.C.R. 13.

(4) *Puran Lalji* v. *Rao Bihari*, 44 A. 590 (601).

(5) *Beukot* v. *Jeshankar*, (1881) B.P. J. 271.

(6) *Puran Lalji* v. *Rao Bihari*, 44 A. 590 (601, 602).

(7) XXI of 1870.

no statutory bar to the execution of a will, which might be nuncupative or in writing. That Act, for the first time, made writing obligatory in the case of wills executed by Hindus, Buddhists, Sikhs or Jains throughout Bengal and within the local limits of the original jurisdiction of the High Courts of Madras and Bombay, and in the case of wills and codicils outside those territories and limits so far as they relate to immovable property situate within those territories and limits. The third stage was reached by the enactment of the Succession (Amendment) Act, 1926,[1] which made writing in accordance with the provisions of S. 63 of the Succession Act obligatory on all Hindus, Buddhists, Sikhs and Jains.[2] The fourth stage was reached by the passing of another amendment in 1929, which brought into line all Hindu wills with those subject to the Bengal wills Act.[3] (§§ **1854-1856.**)

1873. Since a codicil is included in the term will,[4] of which it forms a part, it follows that it must be attested in the same manner as a will.[5] There is of course, now no scope for implementing the text of a will or codicil by parol evidence.

1874. The provision of Act XXXVII of 1926 does not overrule the provisions of other local Acts, as for example, the Oudh Estates Act,[6] which makes a special provision for the execution of wills by a Taluqdar. S. 20 of this Act provides that any bequest to any religious and charitable use of any interest in the estate of more than Rs. 2,000 in value shall not be made "except by will executed not less than three months before his death and registered within one month from the date of its execution."

1875. True Test.—From these and similar cases, it is clear that whatever may be the form of the instrument, whether it is formal or informal, a deed or a memorandum, the one essential thing is: Has it the effect of a will? Now, since the one characteristic or distinguishing feature of a will is its revocability, it follows that if the grant was revocable, then it is a will: otherwise it is not.[7] The fact that the grant is stated to operate *in præsenti* or that it is expressed to be operative in future is, though relevant, equally indecisive, since there is no magic in the future tense.[8] The fact that the document is called an agreement is no doubt a circumstance which cannot be ignored, but it should not be overrated. As stated in a case: "This *per se* is not much.[9] So, conversely, the fact that the document is called a will does not make it so unless it has that effect. Such was the document executed by the father who divided his estate amongst his sons, and after setting out its details, provided that "if I at any time come back from pilgrimages and find mismanagement or the character of any one bad, then I shall have power to cancel this will which shall be enforced from the date of its execution." And it concluded thus: "All the three sons were put in a separate possession of the estate in the beginning of the year 1303 Fasli. I have no other heir having a right besides those mentioned in this will. I have, therefore, executed this will in order that it may serve as evidence."

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(1) Act XXXVII of 1926.
(2) *Ibid.*
(3) Act XVIII of 1929.
(4) S. 3 (57), General Clauses Act (X of 1897); S. 2 (*b*) Succession Act (XXXIX of 1925); *Good* v. *Colyer*, (1876) P. R. No. 33.
(5) *Good* v. *Colyer*, (1876) P.R. No. 33.
(6) S. 19 of Act I of 1869.
(7) *Rajammal* v. *Authiammal*, 33 M. 304.
(8) *Per* Kekewich, J., in *Johnston* v. *Mappia*, 64 L.T.R. 49 (51).
(9) *Rambhat* v. *Lakshman*, 5 B. 630 (636).

On the father's death, two of his sons sued for partition on the strength of his "will". The defence was that the deed was a partition deed, and was miscalled a will. The Privy Council held it to be a family arrangement,[1] by which all the sons were bound.

1876. It is said that an instrument which confers or reserves a life-estate to the maker, is not a will.[2] But it is submitted that this statement is too wide, since there is nothing to prevent the testator from executing a composite deed, reserving a life-interest for himself.[3]

Execution and proof of will.

238. (1) A will, subject to the provisions of section 57 of the Succession Act must be executed as provided in section 63 thereof.

(2) A will otherwise executed must be proved so as to show that it is a complete instrument and expresses the deliberate intention of the testator.

(3) The words of an oral will made before the 1st day of January, 1929, must be proved with the utmost precision, with every circumstance of time and place.

1877. Analogous Law.—Since the enactment of the Succession (Amendment) Act, 1926, a Hindu will can no longer be made otherwise than as provided in S. 57 of the Succession Act.[4] As such, it must be executed as provided in S. 63 of the Succession Act. The will does not require to be registered, and even if registered, its terms can be varied by an unregistered codicil.[5]

A will, subject to the provisions of S. 57 of the Succession Act must be executed as provided in S. 63 thereof.

1878. Proof of Execution.—A will subject to S. 57 of the Succession Act must be executed in accordance with S. 63 thereof, which enacts that it should be in writing signed and attested by at least two witnesses. The signature of the testator includes a mark, made by him or by any other person, in his presence and by his direction.[6] These formalities cannot be dispensed with even in a holograph will. The attesting witnesses are not required to be informed of the contents of the will they attest: all they do attest is its execution or its admission by the executant.

1879. Proof of Will.—As already stated, all wills are now subject to statutory control which provides for their proof. The statute defines a will as a "legal declaration", but there is no set form for such a declaration, and all that the phrase implies is that it should be a formal expression of his wish as to how the disposal of his property will take effect on his death. In order to assure him of the certainty of his wishes being given effect to, law has provided certain checks against perjury and fraud. These include the necessity of a written memorial of his intention attested by at least two witnesses.[7] In this respect, the legal formality of a will is the same as that of a gift,[8] but with this difference, that while a gift may also be com-

(1) *Brij Raj Singh* v. *Sheonandan Singh*, 35 A. 337 (352) P.C.
(2) *Persab* v. *Guruppa*, 38 B. 227 (235, 236).
(3) 20 B. 210 (214) F.B.; followed in *Rajammal* v. *Authiammal*, 33 M. 304 (307).
(4) XXXIX of 1925.
(5) *Sham Rai* v. *Goverdhan*, 78 I.C. (S.) 249.
(6) *Dasu* v. *Venkatasubbammal*, 57 M. 979.
(7) S. 63, Succession Act.
(8) S. 123, Tr. P. Act.

pleted by delivery, a will cannot be so effected, since, in point of time, it becomes effective only from the moment of the testator's death. Again, while a gift of immovable property is ineffective unless it is effected by an instrument not only attested by at least two witnesses, but also registered, a will is effective if it is so attested, though it is not compulsorily registrable, and if its registration is desired, it can be closed in a sealed cover, which may be deposited with the Registrar as provided in part IX (Ss. 42-46) of the Registration Act. But its proof is in either case subject to the provisions of the Evidence Act. Apart from its formal proof, several questions especial to the will arise, *e.g.*, its officiousness, the mental condition of the testator, his freedom from fraud, coercion and undue influence, all of which are questions of evidence, dealt with by the Evidence Act, while the subject of its import and construction is dealt with in Chapter VI of the Succession Act, several sections of which have now been extended to Hindus.

It is not proposed to cover the ground of the two Acts; but they raise certain questions which infringe upon Hindu law and cannot, therefore, be left out.

One such question is deduced from the fact that wills are comparatively new in any part of India, and the will is consequently not a familiar instrument to the people who prepare it or those who sign it, while the testator is afraid lest he should be treated as having lost control over his property in his life-time, a fear that prompted the testator in one case to declare that even on his death he intended to remain the owner of his property, which if strictly construed would have invalidated the will, but the Privy Council overlooked this reservation and gave effect to the substantial characteristics of the disposition.[1]

1880. The question whether the will was an officious or an inofficious will is material as operating upon its probability or improbability.[2] The court will treat an officious will as *prima facie* improbable, being regardless of the ordinary preferences[3] of natural ties and affection. So, where a person, subject to the Mitakshara law, made a will in favour of the first cousin who lived in joint estate with him to the disinherison of his widow, except a small provision for her maintenance, in the event of her leaving the family home, the will was held, in the circumstances, proved.[4] But this is a question of antecedent probability upon which the English Judges rely upon the opinion of Hindu Judges who are more conversant with the habits and trend of thought of their co-religionists.[5] So, on the point of vernacular writing, the opinion of an Indian Judge is to be preferred to that of a European. As their Lordships observed: "Now, with great respect for the knowledge which the two learned Judges of the High Court possessed, as their Lordships doubt not, of the Bengali language, their Lordships cannot but think that upon such a point as that the native Judge, examining a letter in his own alphabet, is more likely to be a competent Judge than the two European Judges."[6] These remarks occur with reference to the construction of the letter which the moribund testator was stated to have mustered strength to write, for the word "manzur," (or "agreed") which the Sadar Amin had held to be

(1) *Isri Singh* v. *Baldeo Singh*, 10 C. 792 (801, 802) P.C.; *Uday Raj* v. *Bhagwan*, 32 A. 227 (240) P.C.

(2) *Soorendranath* v. *Heeramoni*, 12 M.I.A. 81 (97, 98).

(3) *Soorendranath* v. *Heeramoni*, 12 M.I.A. 81 (98).

(4) *Ib.*

(5) *Rajendra* v. *Jogendro*, 14 M.I.A. 67 (80).

(6) *Rajendra* v. *Jogendro*, 14 M.I.A. 67 (80).

in the testator's handwriting, from whom the High Court had disagreed. After expressing their preference for the Indian Judge, their Lordships proceeded: "But it is impossible from the mere inspection of the letter, as it appears to their Lordships, to be able to predicate with any degree of certainty or accuracy, that he was too weak to make the impression with his pen which he is said to have made. It is impossible to say what momentary rally of strength might take place to do an act of such brevity as that: and therefore, their Lordships are unable to give to that, which is after all merely the impression of these two judges derived from actual inspection, the weight which has been given to it."[1]

1881. A will is not invalidated merely because some person other than the devisee is competent to confer greater spiritual benefit on the testator.[2] The will of a childless Hindu, giving power to adopt a son, though opposed to the interests of the widow and the next heir in reversion, is not officious.[3]

Under English Law, a will traced to the testator's possession and not forthcoming at his death, is presumed to have been destroyed by him *animo revocandi*. But the same degree of presumption, if at all, does not arise under Hindu Law.[4]

1882. **Nuncupative Will.**—Before the enactment of 1926, a nuncupative will was valid.[5] "But if any party is bound, in strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies with every circumstance of time and place."[6]

Clause (3).

239. (1) All corrections in a will or codicil must be signed and attested where they are made, or in the margin or otherwise, so as to show that they were made and witnessed before its execution.

Correction.
Alteration.
Revocation.

(2) Any alteration made in a will or codicil must be executed and attested with the same formality as a will, and be in conformity with the provisions of section 71 of the Succession Act.

(3) The revocation of a will or codicil may be effected by destruction of the writing evidencing it, or by a writing which must be executed and attested and otherwise be in conformity with the provisions of section 70 of the Succession Act, save that the marriage of the testator has not the effect of revoking his will or codicil as provided in that section.

Illustrations.

(*a*) *A* has made an unprivileged will. Afterwards *A* makes another unprivileged will which purports to revoke the first.

This is a revocation.

(*b*) *A* has made an unprivileged will. Afterwards *A*, being minded to make a privileged will, makes a privileged will which purports to revoke his unprivileged will.

This is a revocation.

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(1) *Rajendra* v. *Jogendro*, 14 M.I.A. 67 (84).

(2) *Rookmonee* v. *Krisno*, 20 W.R. 147

(3) *Sarado* v. *Tincowry*, 1 Hide 223.

(4) *Shibi Sabitri* v. *Collector*, 29 A. 82 (89).

(5) *Sreenivasammal* v. *Vijayammal*, 2 M.H.C.R. 37; *Tarachand* v. *Nobin Chander*, 3 W.R. 138; *Sudanand* v. *Soorjo*, 8 W.R. C.R. (A. C.) 224; *Bhagwan* v. *Kalashankar*, 1 B. 641 (644).

(6) *Per* Sir James Colville in *Beer Partab* v. *Rajender*, 12 M.I.A. 1 (28); *Mahabir Prasad* v. *Syed Mustapha Husain*, (1937) P.C. 174; *Hargovind* v. *Collector*, I.L.R. (1937) A. 292; *Dhurilal* v. *Dhania*, 5 N.L.R. 85.

1883. Analogous Law.—Before the enactment of the Succession (Amendment) Act 1929,[1] there was one rule for the revocation and alteration of a will subject to the Hindu Wills Act, 1870 and another applicable to the mofussil wills. But since the passing of that enactment, and the amendment of S. 57 of the Succession Act, Schedule III thereof, which includes Ss. 70 and 71 of that Act, has been extended to all wills made by a Hindu, Buddhist, Sikh or Jain, on or after the 1st January 1927,[2] which abolished nuncupative wills, with the result that all wills have now to be in writing.

Under the Hindu usage, a will is revocable without any of the restrictions enacted in the Succession Act. All that is necessary is the *intention*,[3] This was the law of England before the Statute of Frauds was passed.[4] It is not necessary that the will itself should be cancelled, torn up or destroyed. Nor, indeed, need the revocation be formal or in writing.[5] But though this was the law, its dangers were obvious, justifying the statutory control now effected.

1884. Correction, Alteration and Revocation.—A correction is the alteration of a document before its completion. A correction after its completion is an alteration, and an alteration amounting to its cancellation is revocation. S. 70 of the Succession Act treats marriage as a revocation. But this clause has been omitted in its application to Hindus, Buddhists, Sikhs and Jains.[6] A correction is intended by the executant, while an alteration is presumed to alter that sense. The one precedes execution while the other follows it.[7] In either case, the general provision of S. 71 will apply; that is to say, all such corrections and alterations should now be signed and attested near to the changes made or in the margin opposite or otherwise to show that they have been made by the testator. If they are not so executed and attested, it may be presumed that they are unauthorised, unless it appears from the condition of the will, internal evidence or direct proof that they are genuine.[8]

Alteration:

S. 71 of the Succession Act provides that no alteration of a will is effective unless (*a*) it is evidenced by a writing executed with the formalities of a will; but (*b*) if it is altered by obliteration, interlineation, or otherwise, *e.g.*, by erasure;[9] overwriting such alteration is ineffective unless the meaning of the will has been thereby rendered illegible or undiscernible.

The subject of revocation is now controlled by S. 70 of the Succession Act, which, apart from its reference to marriage, applies to Hindus.

1885. Revocation of Will.—The power of revocation of a will is a necessary incident of a will and inherent in the maker, who may make and unmake it as he chooses till the hour of his death.[10] Persons may agree to make mutual wills which remain revocable during their joint lives by either with notice to the other. But where the joint will is a disposition by each testator of his own property, without any arrangement between the two, the will

Joint Wills.

(1) S. 3, Act XVIII of 1929, which came into force on 1st October, 1929.

(2) Succession (Amendment) Act, 1926, (Act XXXVII of 1926) which came into force on Ist January, 1927.

(3) *Pertab Narain* v. *Subhao*, 3 C. 626 (638) P.C.

(4) *Ib.*, p. 643.

(5) *Venkayyamma* v. *Venkata Ramanayamma*, 25 M. 678 (685) P.C.

(6) Sch. III, Succession Act.

(7) *Pandrang* v. *Vinayak*, 16 B. 652.

(8) *Surendra* v. *Rani Dassi*, 47 C. 1043 (1066); *Cooper* v. *Backett*, 4 Moo. P.C. 419; *Grenville* v. *Tyler*, 7 Moo. P.C. 320 (328).

(9) *Broughton*, In the goods of, 29 C. 311 (312).

(10) S. 49, Succession Act; *Rambhojan* v. *Gircharan*, 27 A. 14; *Basant* v. *Muna*, 20 C. 226.

is revocable at the will of either and cannot be proved till the death of the survivor.[1]

1886. A will, whether single or joint, is revocable. No formal words are necessary to constitute revocation. As Lord Denman, C.J., said: "Some doubt has been entertained whether any declaration could be sufficient without the word 'revoke,' but upon full consideration, we think it impossible so to limit the testator's power of revocation, and that any equivalent word or words and expressions would be sufficient for that purpose. But further, we are now required to consider whether, without any language at all, a testator may revoke a will by the conduct he exhibits. And this appears to be tantamount to an enquiry whether conduct *can* give a positive declaration of intent. If it can, there can be no more *necessity* for words than for the use of a particular expression. Now, nothing is easier than to imagine such gestures and proceedings connected with the will, as must fully convince every rational mind that the testator intended to revoke his will, and thought he had done so by the means he took for that purpose. But if he who has power to revoke by declaring a present resolution then to do so, does in fact make that resolution manifest, it seems clear that the act of revocation is complete in every essential part."[2] But in a will subject to the Succession Act, no such revocation is possible, since both the making and revoking and altering of a will is now subject to the statutory control which permits of writing or the destruction as the only means of revocation.

But a will may contain its own terms of revocation. Such was the will of a testator who had stated in the preamble to it that it was executed for that year only. He died without doing anything afterwards, to indicate his intention to keep it as a testamentary instrument, and it was held that the will had no force whatever and that the testator must be presumed to have died intestate.[3]

1887. Revocation is not only possible by the formal execution of a codicil or an instrument cancelling an executed will, but also by "the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same."[4] The extreme point of this law was illustrated in a case in which the testatrix had revoked that will written and covered in a bookform of 12 pages, by drawing on its first page two cross lines and adding on the top of that page "This will is cancelled," which was signed but not attested. The will contained a codicil on pages 10 and 11. On an application for its probate, a caveat was filed and Davar, J., believed the two witnesses who swore that the writing was intended to cancel the whole will together with the caveat, and found as a fact that the testatrix had cancelled the will, but he rejected the caveat, holding that the revocation was not in accordance with the express words of S. 70, in which the words "or, otherwise" were to be read as *ejusdem generis* with the previous words.[5] The revocation of a will even if valid has not necessarily the effect of revoking the later codicil.[6]

Revocation by destruction.

(1) *Minakshi* v. *Viswanatha*, 20 M.L.J. 339: 5 I.C. 794.

(2) *Reed* v. *Harris*, 8 A. & E. 11, cited and followed in *Chelikini* v. *Appa*, 20 M. 207 (209, 210), reversed O. A. on a different point *Venkayyamma* v. *Venkata Ramanayyamma*, 25 M. 678 (685) P. C., as to which *see* now *Mhd. Husain Khan* v. *Krishna Nandan*. I.L.R. (1937) A. 655 P.C.: (1937) P.C. 233.

(3) *Gnanambal* v. *Ammalu*, 5 M.L.J. 94.

(4) S. 70, Succession Act.

(5) *Kharshetji* v. *Kekohad*, (1928) B. 194 (197).

(6) 16 Eq. 19: 2 P.D. 78: 8 P.D. 109.

1888. **Effect of Marriage and Birth or Adoption of a Son.**—Under S. 69 of the Succession Act, a marriage operates as a revocation of the will, but it is expressly provided in S. 57 of the Act that marriage has not that effect on a will or a codicil of a Hindu. Consequently, neither marriage nor the birth or adoption of a son[1] has the effect of revocation, though, as already remarked, the son may defeat a devise by his own claim by survivorship.

Clause (3).

1889. In England, a presumption of revocation arises from the non-discovery of the will, last shown to be in possession of the testator.[2] But no such presumption arises in this country.[3] Even in England, it raises only a presumption more or less varying in strength with the circumstances of each case,[4] and the same rule is applicable in India.[5]

Non-discovery of will.

240. (1) The validity of a will depends not upon the validity of the testator's disposing power at the execution, but upon such power possessed by him when the will becomes effective.

Subsequent invalidity of wills.

(2) As such, a will, good or bad at its execution may become invalid or valid by a subsequent event, depriving the testator of his disposing power or upon his acceding to such power when the will takes effect.

Illustrations.

(*a*) *A* and *B* are two coparceners of a Mitakshara family. *B* makes a will of his coparcenary interest which he has no right to do. But *A* predeceases *B*, and on the latter's death, the will takes effect, because, as the sole surviving coparcener, he had every right to dispose of his property.[6]

(*b*) *A* and *B* are two coparceners of a Mitakshara family. *A* dies, whereupon *B* survives to his interest. He bequeaths it to *C* whereupon *A's* widow adopts *D*. *D* is entitled to defeat *B's* survivorship by his adoption, though he could not have devested *B's* heirs if the estate had vested in them by inheritance.[7]

Void will.

241. (1) A will made without free will is void.

(2) As such, it is void if it appears to have been induced by coercion, fraud, undue influence, misrepresentation, apprehension of divine displeasure, constant importunity or the like.

(3) A will made by one whose power of judgment had been weakened by age, disease, distress or intemperance and infirmity of any kind is void.

(4) A will made by accident, inadvertence or mistake is void.

Explanation 1.—**The term "will" in this section includes any part of the will, and the causes that render the will void apply equally to its revocation and alteration.**

Explanation 2.—**Where the relationship between the testator and the beneficiary is one of fiduciary character, there is a presumption that**

(1) *Bodi* v. *Venkataswamy*, 39 M. 369 (373); *Subba Redi* v. *Doraisami*, 30 M. 369 (371); *Harendra Nath* v. *Shibo*, 3 L. C. (C.) 376; *Vinayak* v. *Govindrao*, 6 B. H.C.R. (A.C.) 224; *Shib Sabitri* v. *Collector*, 29 A. 82 (85).

(2) *Finch* v. *Finch*, 1 P. & D. 37 (*per* Sir J. P. Wilde): "It is the non-existence of the paper at the time of death which leads up to the legal presumption of revocation"; *Welch* v. *Phillips*, 1 Moo. P.C. 299; *Brown* v. *Brown*, 8 E. & B. 876; *Sugden* v. *Lord St. Deonards*, L.R. 1 P. D. 154.

(3) *Chidambara* v. *Swaminathan*, 13 M. L.J. 135; *Hanwata* v. *Padam*, (1909) P. W.R. 160; *Shib Sabitri* v. *Collector*, 29 A. 82 (89); *Anwar Hossain* v. *Secretary of State*, 31 C. 885.

(4) *Brown* v. *Brown*, 8 E. and B. 876.

(5) *Welch* v. *Phillips*, 1 Moo. P.C. 299.

(6) *Balu* v. *Lahoo*, I.L.R. (1937) B. 508 (543) F.B.

(7) *Ib.*

a bequest to him was induced by his undue influence, and it lies upon the beneficiary to rebut such presumption.[1]

Illustrations.

(*a*) *A* threatens to shoot *B*, or to burn his house, or to cause him to be arrested on a false charge unless he makes a bequest in favour of *C*. *B*, in consequence, makes a bequest in favour of *C*. The bequest is void as induced by coercion.

(*b*) *A* falsely informs *B* that his son is dead and thereby induces *B* to bequeath his estate to *A*. The bequest is void.

(*c*) *A*, being in so feeble a state of mind as to be unable to resist importunity, is pressed by *B* to make a will of a certain property, and *A* does so merely to purchase peace and in submission to *B*. The will is void.

(*d*) *A* wishes to revoke his will made in favour of *B*. *B* threatens to kill *A* if he revoked it. The will is void.

(*e*) *A* makes a will in favour of *B* on his death-bed. He is induced by importunities of *C* to alter it in favour of *C*. The alteration is void.

(*f*) *A* is induced by the adulation and flattery of *B* to make a bequest in his favour. The bequest is not rendered invalid by reason of *B's* adulation and flattery.

1890. Analogous Law.—This section is adopted from S. 61 of the Succession Act which now applies to all Hindu wills, but even before its application, it was held to embody an equitable principle and so applied to them.[2] The section as set out here is explanatory of the statutory provision enlarged in the light of leading cases. The language of S. 61 of the Succession Act, which follows the vocabulary of English law, specifies importunity but omits "undue influence", though both are a species of coercion. Similarly, "misrepresentation" is included in "fraud", while age, diseases and drunkenness, mistake and the like fall out of the requirement of "intention" in the definition of "will".

1891. Free Will.—To be operative, the will must emanate from the free will of the maker, who must have then possessed a disposing mind. This does not mean that the making of a will must originate with the testator;[3] nor is it required that proof should be given of the commencement of such a transaction, provided it be proved that the testator completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument, if made, itself embodied such disposition.[4] If a part of a will has been obtained by fraud or any of the other means above enumerated, it is to that extent invalid, unless it alters the sense of the remainder, so that there is a question whether there is a valid will at all.[5]

1892. Force and fraud are sufficient to vitiate all transactions. As such, they vitiate a will. But apart from these, a will may be vitiated if it is caused by the exercise of undue influence. As Eyre, C.B., said: "There is another ground which, though not so distinct as that of actual force, nor so easy to be proved, yet, if it should be made out, it would certainly destroy the will, that is, if a dominion was acquired by any person over a mind of sufficient sanity to *general purposes*, and of sufficient soundness and discretion to regulate his affairs *in general;* yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind."[6] To which Williams adds in his work on Executors: "But the

(1) *Wright* v. *Carter*, (1903) Ch. 27.
(2) *Bali* v. *Husani*, (1894) P.R. 55; *Khashalal* v. *Administrator-General*, 5 C. W.N. 505.
(3) *Constable* v. *Tufnell*, 3 Knapp 122: Hyde 250; *Trimbston* v. *D'Alton*, 1 D. & G. 85.
(4) *Constable* v. *Tufnell*, 3 Knapp 122.
(5) *Rhodes* v. *Rhodes*, L.R. 7 App. Cas. 192.
(6) *Mountain* v. *Beinett*, 1 Cox 355.

influence to vitiate an act must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was dictated by his coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear."[1]

1893. The same view was taken by Lord Cranworth in delivering the judgment of the House of Lords, in the course of which he said: "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider the habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if, in these circumstances, the young man, influenced by his regard for the person who has thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man to dispose of his property; provided only that, in making such a will, the young man was really carrying into effect his own intention, formed without either coercion or fraud. I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish.

"In order therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be 'undue' within the meaning of any rule of law, which would make it sufficient to vitiate a will, must be an influence exercised by coercion or by fraud. In the interpretation, indeed, of these words, some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used, or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency; a will thus made may possibly be described as obtained by coercion. So, as to fraud, if a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural object of his bounty, and, by contrivance, keeps him from intercourse with his relatives, to the end that these impressions, which, she knows, he had thus formed to their disadvantage, may never be removed; such contrivance may, perhaps, be equivalent to positive

(1) Williams on Executors (9th Ed.), 40, citing *Williams* v. *Goode*, 1 Hagg. 581; *Constable* v. *Tufnell*, 4 Hagg. 485; *Sefton* v. *Hopwood*, 1 Fost & F. 578; *Lavett* v. *Lavett*. 1 Fost & F. 481; *Hall* v. *Hall*, L. R. 1 P. & D. 481: enacted as S. 48. Succession Act, and followed in *Jajneshwari* v. *Ugneshwari*, 11 C.W.N. 828.

fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud."[1]

1894. The undue influence vitiating a will must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But, as pointed out by Lord Cranworth in the case last cited, this principle must not be carried too far. "Where a jury sees that, at and near the time when the will sought to be impeached was executed, the alleged testator was, in another important transaction, so under the influence of the person benefited by the will that, as to them, he was not a free agent, but was acting under a control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing direct on the execution of the will, that, in regard to that also, the same undue influence was exercised."[2] So, in another case Sir J. Wilde (afterwards Lord Penzance) directed the jury in these words: "To make a good will, a man must be a free agent. All influences are not unlawful. . . . But pressure, of whatever character, whether acting on the fears or the hopes, if so exerted as to empower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. The importunity or threats, such as the testator had assented and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute 'undue influence', though no force is either used or threatened. In a word, a testator may be led but not driven, and his will must be the offspring of his own volition and not the record of some one else."[3]

1895. It will be thus seen that the term "undue influence," as used in relation to wills, has a more limited meaning than it bears as operating on contracts and gifts. These latter are set aside, if it can be shown that, by reason of a relationship, one was in a position to dominate the will of the other. But in the case of a will, such relationship is no evidence of coercion or dominion exercised over the testator against his will, or of coercion so strong that it could not be resisted.[4]

1896. The question of undue influence must not be mixed up with that of incapacity, since incapacity is one thing and undue influence another,[5] though the proof of one is not irrelevant to the proof of another,[6] for the exercise of undue influence is greatly facilitated by feeble health, produced by disease, distress or age.[7]

Burden of proof.

242. (1) The burden of proving a will lies upon the person who propounds it, and not upon the person who impeaches it.[8]

(1) *Boyse* v. *Rossborough*, 6 H.L.C. 1.
(2) *Boyse* v. *Rossborough*, 6 H.L.C. 1 (6), followed in *Sayad Muhammad* v. *Fatteh Muhammad*, 22 C. 324 (336, 337) P.C.
(3) *Hall* v. *Hall*, L.R. 1 P. & D. 481.
(4) *Parfitt* v. *Lawless*, L.R. 2 P. & D. 462.
(5) *Sayad Muhammad* v. *Fatteh Muhammad*, 22 C. 324 (336) P.C.
(6) *Levett* v. *Levett*, 1 F. & F. 581.
(7) *Woomesh Chunder* v. *Rashmohini*, 21 C. 279; *Bur Singh* v. *Uttam Singh*, 38 C. 355 P.C.
(8) *Sukh Dei* v. *Kedarnath*, 23 A. 405 P.C.; *Bindeshri Prasad* v. *Balakha*, 24 C. W.N. 674: 61 I.C. 431 P.C.

(2) Such proof must comprise not only the proof of the execution, but also that the executant was of a sound disposing mind, though, if nothing appears to the contrary, this may be presumed.[1]

Explanation.—**A person is said to possess a disposing mind if he possesses sufficient understanding and reason to be able to form an intelligent judgment as to the disposal of his property.**

1897. Analogous Law.—Both the clauses of this section are supported by the decisions of the Privy Council. If a party writes or prepares a will under which he takes a benefit, or if other circumstances exist which excite the suspicion of the court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew, and approved of, the contents of the will, and it is only where this is done that the *onus* is thrown upon those who oppose the will to prove fraud, or undue influence, or whatever they rely on to displace the case for proving the will.[2]

1898. Ordinarily, proof of due execution will be sufficient if only execution is proved, it being presumed that the testator was competent. But where his competency is challenged, it must be proved as a part of "due execution," that is to say, he who proves execution by a person must also affirmatively establish his competency to the extent that he possessed, at the time, a sound disposing mind.[3] But when once it is proved that the will was executed with due solemnization by a person of competent understanding, apparently as a free agent, the burden of proving that it was executed under undue influence would rest on the party who alleged it. That burden would not be discharged merely by showing that the beneficiary under the will had the power to unduly overbear the will of the testator. It must be shown that in the particular case, the power was exercised and that it was by means of the exercise of that power that the will was obtained.[4]

1899. Disposing Mind.—The testator must be known to possess a disposing mind, that is to say, a mind sufficiently sound to understand the nature of the act.[5] A man may be a monomaniac,[6] but it does not incapacitate him from making a will. Even a lunatic may make a will in his lucid intervals, the only difference being that, upon proof of general insanity, it will be on those relying upon the will to prove its execution during a lucid interval.[7]

The amount of intelligence which constitutes a disposing mind was thus defined by Warren, J.: "A man is competent to make his will if he has sufficient memory and intelligence to be able to comprehend the nature of his property, to remember and understand the claims of relations and friends, and to have a judgment of his own

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(1) *Shunmugaroya* v. *Manikka*, 32 M. 400 P.C.

(2) *Lachho* v. *Gopi*, 23 A. 472.

(3) *Woomesh Chunder* v. *Rashmohini*, 21 C. 279; O.A. *Rash Mohini* v. *Umesh Chander*, 25 C. 824 P.C.; *Bur Singh* v. *Uttam Singh*, 38 C. 335 P.C.

(4) *Craig* v. *Lamorense*, (1920) A.C. 493.

(5) *Woomesh Chunder* v. *Rashmohini*, 21 C. 279; *Bur Singh* v. *Uttam Singh*, 38 C. 355 (366, 367) P.C.; *Saradindunath* v. *Sudhirchandra*, 50 C. 100; *Purandar* v. *Tulsa*, 9 C.P.L.R. 139; *Anandi* v. *Harlal*, 15 C.P.L.R. 1 (2).

(6) *Vanks* v. *Goodfellow*, L.R. 5 Q.B. 549.

(7) *Cartwright* v. *Cartwright*, 1 Phillim. 100.

in disposing of his property. . . . If a man possesses this amount of memory and intelligence, he is a competent testator; if he is not able to perform the mental acts mentioned, then he is not a competent testator."[1] "It is not sufficient, in order to make a will, that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more 'mind' than suffices for that. He must have what the old lawyers called 'a disposing mind.' He must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible will, or a reasonable will, or a kind will. . . . But he must be able to understand his position, he must be able to appreciate his property and to form a judgment with respect to the parties whom he chooses to benefit by it after death; and if he has capacity for that, it suffices.[2]

1900. The term "disposing mind," is thus defined by the Privy Council: "In order to constitute a sound disposing mind, a testator must not only be able to understand that he is, by his will, giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his will, he is excluding from all participation in his property. . . . The question is not whether Mr. Baker knew when he was giving all his property to his wife and excluding all his other relations from any share in it, but whether he was at the time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property."[3]

1901. Proof of Will.—Two things are essential to the proof of a will: (*i*) That the executant had a disposing mind, and (*ii*) that he had executed it. Mere proof of execution is not sufficient, but if added to execution, there is the proof of the executant's disposing mind, then the requirements of law are satisfied. It is then on him who challenges its execution to disprove it. It is of the utmost necessity that the will should be proved by the evidence of the attesting witnesses; if they are not procurable, their absence must be explained satisfactorily.[4] Law does not require that the attesting witnesses should know anything more than that the executant had signed the will or acknowledged its execution by him.[5] But this is the minimum, though not the only requirement of law; since it is for the attesting witnesses to satisfy themselves that the testator then possessed a 'sound disposing mind,' was free to act and was so acting without undue influence, fraud, coercion or the importunity of any of those surrounding him. Moreover, if the testator be a *pardanashin* lady, this necessity becomes doubly great, for, in that case, law throws round her a special cloak of protection. It demands that the burden of proof shall, in such a case, rest, not with those who attack, but with those who found their claim upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the will

(1) *Longford* v. *Purdon*, Ir. R. Ch. 75 (77).

(2) *Per* Creswell, J., in *Sefton* v. *Hopwood*, 1 F. & F. 579; *Parker* v. *Telgate*, 8 P.D. 171; *Saradindunath* v. *Sudhirchandra*, 50 C. 100.

(3) *Bacry* v. *Butlin*, 2 Moo. P.C. 480; 12 E.R. 1089; *Harwood* v. *Baker*, 3 Moo. P.C. 282 (290); *Gopessur* In re, 16 C.W.N. 265 (269).

(4) Ss. 68, 69, Ev. Act.

(5) S. 63 (*c*), Succession Act.

was not signed under duress, but arose from the free and independent will of the grantor.[1]

1902. Law does not require that the attesting witnesses should possess any special qualifications. But what it does expect is that they must be honest, truthful and independent men. The fact that the will is attested by the testator's servants and dependents is, of course, no ground for holding it invalid, though that fact becomes material when there is a reasonable suspicion that the will is not the voluntary act of the testator and has been procured by the undue influence of members of his household.[2] That such influence must be connected with the execution of the will and be not merely general, which may have influenced its execution, has been laid down in several cases, both English and Indian.[3]

1903. Though the will be in writing, and even registered, the courts require it to be proved with the same degree of precision as a nuncupative will. In an ordinary case, "proof of the testator's signature is all that is needed; but in case of doubt or dispute, justice requires that the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard, is a matter which, though it may not be fatal, is a serious defect."[4] The fact that the deceased had previously expressed a desire to make a will, or made previous wills, is admissible to prove not only the *animus testandi*[5] but also the genuineness of the will to be proved.[6] Its naturalness or unnaturalness is another important element for consideration.[7] It is sufficient for the proof of the will that the attesting witnesses prove that the executant had affixed his signature in their presence and that he was then in a 'sound disposing mind.' But there is no rule of law that on proof of the fact that the testator had himself read the will, or that it was read over to him, it must be presumed that he had understood all that he had read or heard.[8] But, as their Lordships observed: "A will is one of the most solemn documents known to the law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called, either to deny his signature or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of the law.[9]

1904. What is, then, the degree of consciousness and intelligence that is sufficient to uphold the will of a dying man? "To constitute a good testamentary disposition, the testator must retain a degree of understanding to comprehend what he is doing—to have a volition or power of choice: so that what he does must really be his own doing and not the doing of anybody else.

"The faculties in those two great divisions, of the understanding, and the will, must still exist. They have declined from their former comprehensiveness and vigour, they may be, and often are, on such occasions, weak and actually on the point of being extinguished; still though they may be, as it were, flickering in the socket, yet, if they suffice to show the genuine and last behests of a rational creature, and a free agent, that is a good will in point of law. Wills are too frequently made by the sick

(1) 1 Gour's Law of Transfer (6th Ed.), § 316.
(2) *Chot Narain* v. *Ratan*, 22 C. 519 (532) P.C.
(3) *Sala Mahomed* v. *Janbai*, 22 B. 17 (37, 38) P.C. (case of Khoja merchant of Zanzibar who followed Hindu customs as regards his property).
(4) *Ram Gopal* v. *Apina Kunwar*, 44 A. 495 (500) P.C.
(5) "The intention of making a will."
(6) *Palchur* v. *Palchur*, (1922) P.C. 315.
(7) *Biro* v. *Atmaram*, (1937) P.C. 101.
(8) *Fulton* v. *Andrew*, L.R. 7 H.L. 448.
(9) *Ram Gopal* v. *Apina Kunwar*, 44 A. 495 (500) P.C.

and dying; the degree of understanding, therefore, which the law requires, is such as may reasonably be expected from persons in that condition. It is not enough that the testator is able to answer familiar and usual questions. That has always been laid down. He must be able to exercise a competent understanding as to the general nature of the property, as to the state of his family, and as to the general condition and claims of the objects of his bounty, as to the nature of the instrument which he executes, and as to the general nature and general objects and the provisions which it contains, if he can do that, though he may be very feeble and debilitated in understanding, and be at the point of death, it is enough."[1]

1905. These observations were applied to the will of a person, executed during his last illness, which the court held had not been executed in a state of mind where he could deliberate upon its nature and character.[2] But in another case, the Privy Council upheld the will of a moribund testator, against whom all that was proved was that he was generally intemperate and at the time seriously ill, and as to the charge of undue influence, all that was shown was that there was motive and opportunity for its exercise, which, in their Lordships' view, was a ground for suspision such as should justify the scrutiny, with special care, of the evidence of those who propound the will. "But in order to set it aside, there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property."[3] Such evidence was lacking in the case, and the circumstances attending the making and execution of the will were not reasonably consistent with it.

1906. A will is not invalidated on the ground of its having been executed under pressure, unless the pressure was such as the testator could not resist.[4] But in an ordinary case, this must be proved by the party who pleads its invalidity upon that ground.[5] The fact that the will is unjust to the testator's wife and children does not rebut proof of execution,[6] though it would invalidate it, if it is shown that his estrangement towards them had been brought about by misrepresentations concerning their attitude towards the testator.[7]

1907. In an ordinary case, it lies on him who propounds the will to prove it. But where the propounder is himself the beneficiary and the relationship between him and the testator was one of a fiduciary character, law presumes that the bequest to him was induced by undue influence and it lies on him to rebut such presumption.[8] The question of evidence in such cases depends largely on the nature and amount of the benefit taken by him and all the circumstances of the case.[9] It is then on the court to exercise great vigilance and scrutiny in judging of his evidence to satisfy itself that the beneficiary had not exercised undue influence over the testator in procuring the will.[10]

Onus on the Propounder.

(1) *Swinfen* v. *Swinfen*, 1 F. & F. 584, followed in *Woomesh Chunder* v. *Rashmohini*, 21 C. 279 (293, 294.)

(2) *Woomesh Chunder* v. *Rashmohini*, 21 C. 279.

(3) *Bur Singh* v. *Uttam Singh*, 38 C. 355 P.C.

(4) *Janeshwara* v. *Ugneshwari*, 11 C. W.N. 824.

(5) *Mriti Bai* v. *Jamsetjee*, 29 C.W.N. 45: 80 I.C. 777: (1924) P.C. 28.

(6) *Monghi Bai* v. *Pragji*, 30 C.W.N. 462: (1925) P.C. 198.

(7) *Govindaswami* v. *Kannammal*, 51 M.L.J. 747.

(8) *Fulton* v. *Andrew*, L.R. 7 H.L. 448 (461).

(9) *Gangabai* v. *Bhagwandas*, 29 B. 530 (559) P.C.

(10) *Barry* v. *Butlin*, 2 Moo. P.C. 480 (482), followed in *Fulton* v. *Andrew*, L.R. 7 H.L. 448 (461); *Vellaswami* v. *Shivaraman*, 8 R. 179.

CHAPTER XIX.

CONSTRUCTION OF GIFTS AND WILLS.

1908. Topical Introduction.—The first and the only object of construction is to fathom the true intention of the executant. For this purpose the court has to take its seat in the easy-chair of the executant and think his thoughts—which is sometimes not an easy thing to do. All rules of construction have this one object in view, namely, how to hold communion with the dead and obtain his message of what he intended by his words and expressions, which baffle those who have to give effect to them. In England, the rules of construction have become interwoven with the history of real property which, again, has followed the peculiar tenures, which are the offspring of its political history. India is in this respect happy, because its land tenures have no history prior to the establishment of the British rule, when all land was technically held on sufferance, though, in reality, Indian rulers recognised that possession was nine points of the law, and suffered succeeding generations to hold and thrive upon their ancestral domains.

1909. When the British assumed the Government of this country, they naturally found land held under grants and gifts, which they, after inquiry, formally reaffirmed and ratified. In doing so, they found the grants of previous rulers ambiguous, defective, incomplete or imperfect. It then became necessary to construe them. The first tendency of the courts was to construe them in the light of the voluminous rules of interpretation which centuries of Judicial dicta had multiplied and developed. But it was soon perceived that Indian deeds could not be construed with the aid of these rules, which had grown up side by side with a very special law of property and a very artificial system of conveyancing which follows the rules of construction, in the light of which formal documents are ordinarily framed and interpreted. Expert conveyancing in India outside the Presidency towns is yet unknown and even in the Presidency towns, deeds and wills of Hindus and Mahomedans are drawn up upon forms modelled on English conveyancing, without adverting to the radical difference which the two systems present.

1910. Apart from such deeds, which must be banned as outlaws from the domain of this chapter, the vast majority of deeds and wills are drawn up with bucolic simplicity, in which the barest outline of the executant's intention is disclosed. These documents have to be construed by the courts, which, in this respect, are courts of conscience, but now bound by the technical rules of construction enacted in sections 74-111 (except sections 91-94, 99 and 100) of the Succession Act. To them the few rules here set out must appeal as rules based upon no peculiarity of English Law, but rather rules which are the outcome of robust commonsense which, in the language of law, passes as "justice, equity and good conscience," and which, in so far as they are not covered by the statutory rules, must be treated as supplementary to them.

1911. In the construction of a man's words law takes account of the varying degree of the human mind. If his dominant motive was to benefit a person as a centre of his affection, then it ignores his description of him. If his intention was to pass the benefit to a person who answers his description, then it ignores the fact that he is named unless the description fits him. If his gift is conditional, it is then a question whether the condition was a condition precedent to its validity. And since human language is at best an inadequate vehicle for expressing human thought, and people take many things for granted, law cannot ignore this infirmity of the human mind. In this country, it is a trite learning that people affect loose expressions in their ordinary intercourse, which they do not eschew in writing. The task of the construer becomes difficult when he is confronted with a string of such expressions in a deed or will, penned by a penny-a-liner whose services have been (it may be) requisitioned from the adjoining village, who formulated his draft, giving it the garb of a solemn scroll, adapting it, as far as he can, to his own notion of what he is accustomed to regard as embodying the instructions received from his employer, assisted (it may be) by the assembled quidnuncs, using terms and expressions which he has got by heart and which he uses in caprice but which, as often as not, would not have been more bewildering if he had used them with malignity.

1912. A document of this character, seldom reflected on, and often hurried through, can only be liberally construed, as has been so often emphasized in the decided cases. But the liberality of construction, too, has its limits. And the sections formulated in this chapter are intended to set out some of the leading rules which the courts have been driven to adopt for their own guidance. Some of these are self-evident and others self-explanatory, but all are such as the wisdom of the Judges have commended as calculated to lighten the labour of those upon whom rests the duty of understanding the true meaning of other men.

Deed includes will.

243. In this chapter, unless there is anything repugnant in the subject or context, the term "deed" includes a "will".

1913. Analogous Law.—In English Law, the term "will" is treated as distinct from a "Deed," since the one operates on the executant's death, while the other conveys an interest *inter vivos*. But the rules governing their construction are mostly the same, and the following rules, therefore, apply equally to both.

Construction of Indian deeds.

244. Gifts and wills must be liberally construed so as to give effect to the grantor's true intention ascertainable, as far as possible, without the aid of any artificial rules of construction.[1]

1914. Analogous Law.—There are two modes of construction favoured by law, *viz.*, the literal and the benignant construction. The English Law enacted in several sections of chapter II of the Transfer of Property Act and of chapter VI of the Succession Act, favours the first method of interpretation which is natural owing to the advanced stage of English conveyancing and its phraseology, adapted to the rules of inter-

(1) *Indirarani* v. *Akshaykumar*, 60 C. 554 (565) P.C., following *Nagendra Nath* v. *Kamal Basini*, 23 C. 563 (572) P.C.

pretation, which have become an integral part thereof, but the same rule of literal construction cannot be extended to this country where the law of property is different and the art of conveyancing outside the Presidency towns practically unknown.

1915. The only rule possible for this informal mode of expression is that laid down by the Privy Council who said: "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."[1] The court must not lay undue emphasis upon what the deed is called and ignore what it is actually.[2] This rule their Lordships have repeated in other cases,[3] in one of which they emphatically called their attention to the following passage in the judgment of Wilson, J., which they approved. "It is no new doctrine that the rules established in English courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining the intention and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing and the success of those rules in giving effect to the real intention of those, whose language they are used to interpret, depends, not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently and speak differently from Englishmen and have never heard of the rules in question."[4]

A document may be intended to operate as a will, but that failing, it may still operate as a family arrangement, as where the widow executes two simultaneous documents at the same time, one a will, making provision for her grand-daughter and another an adoption deed. The adopted son attests the deed in token of his consent, in which case, the will failing, it will be held good as evidencing a family arrangement.[5]

1916. So in the *Tagore* case, the same High Tribunal had observed that the construction of the will of an Indian, even though it was drawn up by an English solicitor and containing phrases borrowed from the English forms of conveyancing was no exception to the rule.[6] So where a will is

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(1) *Hunooman Prasad* v. *Mt. Babooee*, 6 M.I.A. 393 (411, 412); *Indirarani* v. *Akshaykumar*, 60 C. 544 (565) P.C.

(2) *Kondapalli* v. *Sudarsana*, 48 M. 614 P.C.

(3) *Sreemutty* v. *Sibchunder*, 6 M.I.A. 1; *Gokuldas* v. *Rambux*, 11 I.A. 126; *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.; *Rai Bishen* v. *Asmaida*, 6 A. 560 P.C.; *Mathura Das* v. *Narain*, 19 A. 39 P.C.; *Vassonji* v. *Chanda Bibi*, 37 A. 369 P.C.; *Ramlal* v. *Kanai Lal*, 12 C. 663 P.C.; *Bhagabati* v. *Kalicharan*, 38 C. 468 P.C.

(4) *Ramlal* v. *Kanailal*, 12 C. 663 (678), cited with approval in *Bhagabati* v. *Kalicharan*, 38 C. 468 (474) P.C., affirming O.A. 32 C. 992; *Skinner* v. *Naunihal Singh*, 36 A. 105 P.C., *Sardar Nisar Ali* v. *Mhd. Alikhan*, (1932) P.C. 172.

(5) *Kashibai* v. *Tatta*, 40 B. 669; *Venkoba* v. *Ranganayaki*, (1936) M. 967.

(6) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.

drawn up in English language by a Hindu testator whose mother tongue is an Indian vernacular "it is comparatively easy to determine what the Indian testator meant to say. The difficulty is to be satisfied judicially that in his English language he has succeeded in saying it."[1]

1917. Where the recitals are in conflict with the operative words, the latter prevail.[2] The question whether a writing operates as a gift or a will depends upon whether the interest conveyed is irrevocable or not, and upon what is the point of time from which the interest is intended to pass.[3] In the case of repugnancy, the rule is that the earlier part in a deed and the latter one in a will prevails. Where the testator made two wills, the fact that the later will failed would not create intestacy if the testator had cancelled the earlier will on the assumption that his second will was valid.[4] (§ **1964**).

1918. An Oudh Taluqdar, in a settlement of his estate to take effect after his death, provided that after the deaths of himself, his son and the widow of his eldest son (to each of whom a life-interest was given), his second son Lachman "and his heirs and representatives shall succeed to the estate as provided by S. 22 of Act I of 1869."[5] Lachman died, bequeathing the estate absolutely to his second son Narain Singh, superseding his eldest son Ram Prakash, whose son disputed the validity of the will, *inter alia* on the ground that the interest conveyed to Lachman was not absolute, being expressly limited "as provided by S. 22 of Act I of 1869." That section, however, lays down special rules of succession, only applicable to intestate Taluqdars and their grantees. It was held that the bequest to Lachman, his heirs and representatives conveyed to him an absolute and not merely a limited estate, and that the reference to S. 22 was a surplusage and could not limit what had already been given away by the preceding words of sufficient amplitude. In other words, as those words derogated from the grant already made, they were inoperative.

Grant or bequest conveys grantor's entire interest.

245. A grant or bequest *prima facie* conveys the entire interest of the grantor unless it is limited expressly or by necessary implication.[6]

***Explanation.*—The fact that the grantee or devisee is a female relation does not limit the extent of her interest by reason only of her sex relationship.**[7]

Illustrations.

(*a*) *A*, the proprietor of the estate *B*, bequeaths it to *C* with words: "I give *B* to *C*." The *quantum* of interest bequeathed to *C* is that possessed by *A* at the moment of his death.[8]

(*b*) *A*, the proprietor of the estate, *B*, bequeaths it to his wife *C* with the words: "I give *B* to *C*." The *quantum* of interest bequeathed to *C* is *prima facie* the same as was possessed by *A* at the moment of his death.

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(1) *Indirarani* v. *Akshayakumar*, 60 C. 554 (556, 565) P.C., following *Narendra* v. *Kamal Basini*, 23 C. 563 (572) P.C.

(2) *Hussain* v. *Chin Chong*, 3 R. 83.

(3) *Sengamalam* v. *Logambal*, 86 I.C. 8: (1925) M. 471.

(4) *Govinda* v. *Ramcharan*, 52 C. 748.

(5) *Lal Ram Singh* v. *Deputy Commissioner*, 45 A. 596 (603) P.C.

(6) *Cf.* S. 8, T.P. Act; S. 95, Succ. Act.

(7) S. 8, T.P. Act, S. 95, Succ. Act.

(8) *Tagore* v. *Tagore*, 9 B.L.R. 377 (395) P.C.

1919. Analogous Law.—Clause (1) of this section states a general rule of universal application, and one which underlies S. 8 of the Transfer of Property Act and S. 95 of the Succession Act, and is in accordance with the English rule that every grant must be construed most strongly against the grantor as conveying all that he has not reserved by words or necessary implication.[1] The explanation is added to distinguish the present law, resulting from the extension of the provisions of section 8 of the Transfer of Property Act[2] and those of section 95 of the Succession Act to Hindu transfers and wills respectively, overruling the contrary held in a large number of cases in which the courts had settled down to the view that a gift or a bequest to a female relation *prima facie* conveyed only a life-estate, since that was the limit imposed upon an estate that females took by inheritance.[3] The rule here enunciated, of course, applies only where the deed is ambiguous and is not sufficiently explicit as to the *quantum* of interest conveyed to a female donee, since it is now enacted that the words which are sufficient to convey an absolute estate in favour of a male relation are equally sufficient to convey the same interest where the donee or devisee is a female.

1920. In one case, the father, the holder of an impartible Raj, made a gift of a village to his daughter on the occasion of her marriage, providing that the daughter should hold possession of it without the power of transfer, and that on her death, it should descend to her children, but that if she died childless, the village should revert to the grantor. The daughter having died childless, the grantor's successor sued for resumption, and the Privy Council held that the resumption was justified under the terms of the grant which conferred an absolute estate defeasible on failure of issue.[4] So, where the testator, after creating an endowment for religious worship in a pagoda, directed that the shebaitship should be held by his wife, and after his death by his son, and after his death "by my daughter and her husband Nundoo Lal Bose and their male children successively," the Privy Council held the word "successively" to control the whole gift to the daughter, her husband and the male children, the intention being to give life-estates in the shebaitship to the sons of his daughter in succession.[5] In another case, the testator, who had no male issue, bequeathed certain real property to his eldest daughter and her sons from generation to generation. The legatee, who had daughters, predeceased the testator who also then died, leaving a widow and other daughters surviving him. The daughters of the deceased legatee claimed the property as the lineal descendants of the testator, contending that although S. 109 of the Indian Succession Act did not apply to the case, it should be held to govern it by analogy, as affording a guide to justice, equity and good conscience. It was held that the English rule embodied in the Succession Act, providing that, on a gift to the testator's child, the legacy did not lapse on the legatee dying before the testator leaving lineal descendants, could not be extended by analogy to Hindu Law, and that on the legatee predeceasing the testator, the gift failed altogether.[6]

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(1) *Damodar Das* v. *Dayabhai*, 22 B. 833 (841).

(2) *See* Ss. 2 (*d*) and 129 as amended by Act XX of 1929.

(3) For earlier cases on this point, *see* Hindu Code (3rd Ed.), §§ 2262, 2263, pp. 1118, 1119.

(4) *Sham Shivendra* v. *Janki Kuar*, 36 C. 311 P.C.

(5) *Gopal Chunder* v. *Kartikchunder*, 29 C. 716 P.C.

(6) *Ramamirtham* v. *Ranganathan*, 24 M. 299; *Nanhi* v. *Nathu*, 1 C.P.L.R. 45; *Krishna Das* v. *Dwarkadass*, (1937) B. 679.

Gift to coparceners.

1921. The question whether a gift, made to two or more coparceners jointly, conveys to them a joint or separate interest—a joint tenancy or a tenancy-in-common—has been considered in some cases.[1] But the question seems to be one of intention,[2] in the absence of which, the donees would take as tenants-in-common and not as joint tenants with a right of survivorship *inter se*.[3] But a gift to two or more persons, without indicating an intention that they were to take as tenants-in-common, constitutes a joint tenancy. But this is, as pointed out by the Privy Council,[4] an extremely technical rule of conveyancing,[5] which cannot be extended to Hindu Law, as it has been (it is submitted, erroneously,) in some cases.[6]

1922. The donor's intention must be gathered primarily from the deed of gift, construed with reference to the rule of construction adapted to the personal law to which the parties may be subject. Where, for instance, the testator (a Parsi) bequeathed his property to his widow and daughters, directing "that the donees were to agree together and to manage the affairs with unanimity, after whom his daughter's two sons were the owners of whatever property and estate there may be belonging to me," Fulton, J., held it to constitute a tenancy-in-common, but on appeal, this view was overruled, the court applying the English rule of construction applicable to the Parsis and holding that the gift was a joint gift to the two sons, Farran, C.J., observing: "Speaking as a grammarian I apprehend that a simple gift to *A* and *B* is a joint gift, that is to say, for the purpose of the gift, the two are treated as *one* person. The idea is more clear when a gift to a class, as for example, to the inhabitants of a parish is assumed. If a gift is made in that form, no one would, I imagine, suggest that it was a gift to each of the inhabitants of a proportionate share in the bequest. They are all considered as a unit for the purpose of accepting the gift. The Roman jurists adopted the same view."[7] This case was, of course, expressly decided with reference to the English Law. But if, in the same case, the donor were a Hindu, the sons would have taken as tenants-in-common.[8] It has been held that a maintenance grant to two widows makes the grantees tenants-in-common and not joint tenants.[9]

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(1) *Jageswar* v. *Ramchandra*, 23 C. 670 (678, 679) P.C.; *Ram Piari* v. *Krishna*, 43 A. 600; *Kishori* v. *Mundra*, 33 A. 665; *Gopi* v. *Jaldhara*, 33 A. 41; *Ethirajulu* v. *Mukumthu*, 28 M. 363 (370).

(2) *Jogeswar* v. *Ramchandra*, 23 C. 670 (678) P.C.; *Bahu Rani* v. *Rajendra*, (1933) P.C. 72.

(3) *Jogeshwar* v. *Ramchand*, 23 C. 670 P.C., *Bahu Rani* v. *Rajendra Baksh*, 8 Luck. 121 P.C.: (1933) P.C. 72; *Fani Bhusan* v. *Ful Kumari*, (1937) C. 1 (2); *Diwali* v. *Patel*, 26 B. 445; *Kishori* v. *Mundra*, 33 A. 665; *Ram Piari* v. *Krishna*, 43 A. 600, *contra* in *Mankamma* v. *Balkishan*, 28 A. 38, dissented from in *Jogeswar* v. *Ramchandra*, 23 C. 670.

(4) *Jogeswar* v. *Ramchandra*, 23 C. 670 (679) P.C.

(5) *Navroji* v. *Perojbat*, 23 B. 80 (87) (a case of Parsi will governed by the English Law).

(6) *Gobind* v. *Inayat*, 27 A. 310 (312); *Mankamma* v. *Balkishan*, 28 A. 38, dissented from in *Ram Piari* v. *Krishna*, 43 A. 600.

(7) *Navroji* v. *Perozbai*, 23 B. 80 (98); *Jogeshwar* v. *Ramchandra*, 23 C. 670 (676, 679) P.C.

(8) *Diwali* v. *Bechardas*, 26 B. 445 (448); *Hemanta* v. *Sudhanon*, 25 C.W. N. 262.

(9) *Jogeswar* v. *Ramchandra*, 23 C. 670 (678, 679) P.C.; *Lakshmi* v. *Hira*, 11 B. 75; *Diwali* v. *Bechardas*, 26 B. 445 (448); *Sasibala* v. *Chandra*, 56 I.C. 937.

1923. A *donatio mortis causa* is an example of a conditional gift dependent upon the death of the donor (**S. 234**). Hindu Law makes no distinction between this and any other condition.[1] Where, for instance, the donor delivered certain Government promissory notes to the plaintiff in contemplation of death, a few months after which he died, whereupon the plaintiff sued his heirs for completion of his title by endorsement, the court decreed the claim, holding that the donee's title was complete on delivery, whereas in the same case, the decree's title under English Law would not have been complete until his death.[2] The difference between the English Law and the Hindu Law is then this that, while under the one property in the *donatio mortis causa* does not pass until death of the donor, property under the other passes with delivery, subject to the conditional right of resumption. The fact that the donor did not make the endorsement was held not to affect the validity of the gift. The same view was taken by Peacock, C.J., in another case in which he said: "A transfer by deed and delivery, in my opinion, in the case of Europeans, constitutes the relationship of trustee and *cestui que trust* even in favour of a volunteer. In this case, the delivery without a transfer by deed was as valid between Hindus as if there had been a conveyance by deed and a delivery. The notes, therefore, in my opinion passed to the donee."[3]

Donatio mortis causa.

246. A gift or devise creating an estate of inheritance inconsistent with the general law of inheritance is void to that extent.[4]

Void gift and devise.

Illustrations.

(*a*) *A* devises his estate to *B* and his eldest nephew and the eldest nephew of such eldest nephew and so forth for ever. *B* takes the life-estate but the rest of the devise is invalid for it creates a line of succession inconsistent with the general law.[5]

(*b*) *A* bequeaths his partible estate to *B* and on his death to his eldest son, and thence forward to the eldest son of each holder. The bequest is invalid for it alters the course of ordinary succession to one by primogeniture, a new form of estate which cannot be created by will.

1924. Analogous Law.—"The power of parting with property once acquired, so as to confer the same property upon another, must take effect, either by inheritance or transfer, each according to law. Inheritance does one depend upon the will of the individual owner, transfer does. Inheritance is a rule laid down (or, in the case of custom, recognized) by the State, not merely for the benefit of the individuals, but for reasons of public policy.[6] It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than as the law directs, is assuming to legislate, and that the gift must fail and the inheritance take place as the law directs."[7] As Turner, L.J., put it: "A

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(1) 1 Str. H.L. 169; *ib.*, p. 426; *Krishna Deb* v. *Krishna Deb*, 12 W.R. (O.C.) 4; *Visalatchumi* v. *Subbu Pillai*, 6 M.H.C.R. 270.

(2) *Visalatchumi* v. *Subbu Pillai*, 6 M.H.C.R. 270; *cf.* S. 191, Succession Act, not applied to Hindus.

(3) *Krishna Deb* v. *Krishna Deb*, 12 W.R. (O.C.) 4.

(4) *Tagore* v. *Tagore*, 9 B.L.R. 377 (394) P.C. *Ambalal* v. *Ambalal*, (1933) B. 34.

(5) *Tagore* v. *Tagore*, 9 B.L.R. 377 (395, 396) P.C.

(6) Domat, 2413.

(7) *Per* Willes, J., in *Tagore* v. *Tagore*, 9 B.L.R. 377 (394) P.C.

man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."[1] Quoting this passage in another case, Willes, J., added: "If the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs to the exclusion of other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift, to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempted to confer, and that state of inheritance which it confers is void."

"It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu Law no person can succeed thereunder as heir to an estate described in the terms which English Law would designate an estate in tail."[2]

The *Tagore case* was an attempt to create an estate in tail male, but the Privy Council held the tail void, upholding only the life-estate to the immediate grantee.

Gift or devise to a persona designata.

247. Where a benefit, by way of a gift or devise is conveyed by a person to another, described as his adopted son, the wife, or any other relation; the question whether the benefit is intended to pass to the donee or devisee personally as a *persona designata*, or to him only, if the relationship alleged exists is one of construction of the dominant motive of the donor or testator as the case may be.

For commentary *see* S. 59, § 693.

Gift to joint donees devisees.

247-A. (1) The quantum and character of interest conveyed by a gift to two or more donees or devisees depends upon the dominant intention of the donor and the devisee[3] as the case may be.

(2) In the absence of indication of any such intention the quantum and character of their interest may be ascertained by the following rules, namely:—

(3) Where the donees or devisees are persons, other than the members of the Mitakshara joint family, they would be presumed to take their respective interests as tenants in common.[4]

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(1) *Soorjeemoney* v. *Denobundhu*, 6 M.I.A. 526, cited *per* Willes, J., in *Tagore* v. *Tagore*, 9 B.L.R. 377 (394, 395) P.C.

(2) *Tagore* v. *Tagore*, 9 B.L.R. 377 (395, 396) P.C.

(3) *Kamakhya* v. *Khushalchand*, (1934) P.C. 72.

(4) *Jogeswar* v. *Ramchandra*, 23 C. 670 P.C.; *Babu Rani* v. *Rajendra*, 8 Luck. 121: (1933) P.C. 72; *Navroji* v. *Perozbai*, 23 B. 80 (98); *Mahalakshmi* v. *Nagappaya*, 62 I.C. (M.) 814; *Fani Bhusan* v. *Fulkumari*, (1937) C. 1.

(4) Where they are members of a joint Mitakshara family they will be presumed to take as joint tenants. [1]

Illustrations.

(*a*) The testator bequeaths a legacy to two brothers *A* and *B*. *A* and *B* will take as tenants in common, unless they are members of a Mitakshara coparcenary in which case they would take as joint tenants.[2]

(*b*) The testator bequeaths a legacy to two brothers *A* and *B* their heirs successors and assigns: *A* and *B* are coparceners, but an interest to them and their heirs and assigns cannot extend unless they take as tenants in common. They will so take.[3]

(*c*) The testator bequeaths a legacy to the mother and her son *A* and *B*. The two take as tenants in common even though they belong to a Mitakshara joint family, because they are not and can never be coparceners.[4]

(*d*) But in the last case the testator can bequeath a legacy to *A* and *B* as joint tenants with survivorship since such bequest cannot be avoided as altering the law of inheritance and therefore opposed to the principle settled in the Tagore case.[5]

248. Gift to a class. **Where an interest is gifted or devised to a class some of whom are incapable of taking by reason of any rule of law or otherwise, the gift or devise will take effect as to the rest.**

1925. **Analogous Law.**—With the amendment of S. 115 of the Succession Act, by Act XXI of 1929,[6] the original section founded on the English case of *Leake* v. *Robinson*[7] has been amended so as to bring it into line with the Indian Law. On the subject of gift to a class two views are possible: one benignant and another literal. The English precedent took the literal view and was enacted as S. 115 of the Succession Act. But the Indian cases have always taken the benignant view and with the amendment of the section, this view has now received legislative sanction. The difference between the two views may be thus stated. Suppose a fund is bequeathed to *A* for life and after his death to all his children who shall attain the age of 25. *A* survives the testator and has some children, say, *B*, *C*, and *D*, living at the testator's death. Now, *B*, *C*, and *D*, living at the testator's death must attain the age of 25 (if at all) within the limits allowed for the bequest, which is 18 years after the death of the testator.[8] But since *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*, it follows that if the bequest is to be construed literally as benefiting *all A's children* on attaining the age of 25, and as all cannot take, it follows that *B*, *C*, and *D* cannot take also, that is to say, as the bequest is given to all *A's* children as a class, it is not good to any division of that class, but is wholly void.[9]

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(1) *See* ft.-note (3) at p. 780.
(2) *Navroji* v. *Perozbai*, 23 B. 80 (98).
(3) *Babu Ravi* v. *Rajendra*, 8 Luck 12; (1933) P.C. 721: *Diwali* v. *Patel Bechardas*, 26 B. 445; *Mahalakshmi* v. *Nagappaya*, 62 I.C. (M.) 814.
(4) *Ib.*
(5) *Ib.*
(6) S. 14.
(7) 2 Mer. 363, which is discussed in 1 Gour's Law of Transfer (6th Ed.), §§ 486, 489.
(8) S. 14, Transfer of Property Act, and S. 101, Succession Act.
(9) S. 115, Ill. (*ii*), Succession Act.

1926. But there is another view. The bequest might be construed benignantly, giving effect to it as far as possible. In that case, *B*, *C*, and *D* will take, though *all A's children* may not be able to profit by the testator's bounty. This is the Indian rule and adopted as a canon of construction applicable to Hindu gifts and bequests.[1]

1927. But, where the intention is to benefit a class as a whole, and not any of its individuals, then the latter cannot take apart from the class.[2] So, a gift or devise to "sons of sons" and "daughters of sons" or "widows of sons" is a gift to a class and not to any of its members. Consequently, if any member falling into that class was not found within 18 years after the testator's death, the bequest would be void altogether.[3] It appears to be now settled that there is no general presumption in India that, when property is bequeathed to two or more persons under a will, they take jointly.[4] The question depends on the intention of the testator, as gathered from the terms of the will and the surrounding circumstances, and the fact that the donees constitute an undivided family.[5] Where, therefore, the testator bequeathed certain property to two minor coparceners, upon the question arising whether the bequest was joint, the court held it to be so, because the testator had not left the management of the bequest during the legatees' minority to their mother, who was their natural guardian, but had appointed a third person to manage it until both the boys had attained majority. This provision was held to explain the testator's intention to make a joint bequest, since he considered it unnecessary to appoint a guardian if one of the minors had attained majority before his death, as in that case, he would be entitled to manage the whole property bequeathed.[6]

249. Construction of Wills. **Since the amendment of Section 57 of the Succession Act by Act XVIII of 1929, a will is subject to the provisions of that section and the sections enumerated in Schedule III of that Act as therein provided.**

1928. Analogous Law. —The four stages of the law bearing on the subject of Hindu wills, already been set out (§ **1872**). All wills, wherever executed, are now subject to the selected rules of construction collected in schedule III of the Succession Act and supersede all rules of Hindu Law, many of which were narrower.

Only the substance of these rules will be indicated here.

1929. Of these, S. 75 states that it is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intention of the testator can be known therefrom. This is entirely in accord with the Hindu Law, under which a will, if reduced to

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(1) *Bhagabati* v. *Kalicharan*, 32 C. 992 F.B., affirmed O.A. 38 C. 468 P.C.; *Tarakeshwar* v. *Shashi*, 9 C. 952 (960) P.C.; *Bishen Chand* v. *Asmaida*, 6 A. 560 (573, 574); *Krishna Das* v. *Dwarka Das*, I.L.R. (1937) B. 679; *Kandarpa* v. *Akshaychandra*, 61 C. 106 (117).

(2) *Gordhandas* v. *Ramcoover*, 26 B. 449.

(3) *Khiwji* v. *Morarji*, 22 B. 533 (538).

(4) *Jageswar* v. *Ramachandra*, 23 C. 670 P.C.

(5) *Mahalakshmi* v. *Nagappaya*, 62 I.C. (M.) 814.

(6) *Ib.*

writing, might be made in any language, form or order, the only pre-requisite being a sufficient expression of intention since the intention is to be judged by the expressions used and their general tenor and effect. For this purpose, oral evidence is admissible for the purpose and within the limits prescribed in Ss. 77-81.

1930. A will is presumed to speak from the moment of the testator's death. Consequently, the description contained in a will of property, which is the subject of a gift shall, unless a contrary intention appears in the will, be deemed to refer to and comprise property answering that description at the death of the testator.[1]

1931. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be used in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such a wider sense.[2] Where a clause is susceptible of two meanings, according to one of which it has some effect and according to the other it can have none, the former is to be preferred.[3] If the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.[4] But no part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.[5] The meaning of any clause in a will is to be collected from the entire instrument and all its parts are to be construed with reference to each other, and for that purpose, a codicile is to be considered as a part of the will.[6]

1932. Where a will is contained in two or more documents, they must be read together as a single deed, and it is legitimate to look at a contemporaneous document referred to in the will, which the testator caused to be written with the express intent to render clear his wishes with regard to his succession.[7] In construing a will, a court must consider the surrounding circumstances, the position of the testator, the family relationship, the particular sense and many other things, including the race and religious opinions of the testator and influence, and aims arising therefrom—but all this is an aid solely to ascertaining the meaning of the language used by the probability that he would use words in a particular sense in a particular will. Once the construction is settled, the duty of the court is loyally to carry out the intentions as expressed and none other. This duty is universal and is true alike of wills of every nationality and every religion or rank of life. The court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions, they must be disregarded. If any eventuality arises, which the will leaves unprovided for, there will be intestacy.[8] For the purpose of determining questions as to what person or what property is denoted by any words, used in a will, a court must inquire into

Extrinsic Evidence.

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(1) S. 90, Succession Act.
(2) *Ib.*, S. 83.
(3) *Ib.*, S. 84.
(4) *Ib.*, S. 86.
(5) *Ib.*, S. 85.
(6) *Ib.*, S. 82.
(7) *Narasimha* v. *Parthasarathy*, 37 M. 199 P.C.
(8) S. 75, Succession Act.

every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and his family, and into every fact, a knowledge of which may conduce to the right application of the words which the testator has used.[1]

1933. Where the words used in a will, to designate or describe a legatee or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect. A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.[2] Where any word, material to the full expression of the meaning has been omitted, it may be supplied by the context.[3] Where the words of the will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.[4] But where there is no ambiguity or deficiency on the facts of the will, no extrinsic evidence as to the intention of the testator shall be admitted.[5]

1934. Where two caluses or gifts in a will are irreconcilable so that they cannot possibly stand together, the last shall prevail.[6] In this respect a will differs from a deed, in which, of two repugnant clauses, the first prevails.[7] This rule is, of course, not to be resorted to in case of inconsistency in the same provision,[8] nor where different subjects are referred to[9] and in all cases only when reconciliation is impossible.[10]

When will or bequest fails.

1935. A will or bequest, not expressive of any de lnfinite intention, is void for uncertainty.[11] This rule is incorporated in a separate section in the Code where its scope will be found discussed. (**S. 261.**)

1936. Where a will purports to make two bequests to the same person and a question arises whether the testator intended to make the second bequest instead of or in addition to the first, if there is nothing in the will to show what he intended, the following rules shall prevail in determining the construction to be put upon the will:—

First.—If the same specific thing is bequeathed twice to the same legatee in the same will, or in the will and again in the codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same will, or one and the same codicil, purports to make, in two places, the bequest, to the same person, of the same quantity or amount of anything, he shall be entitled to one such legacy only.

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(1) S. 75, Succession Act.
(2) *Ib.*, S. 76.
(3) *Ib.*, S. 77.
(4) *Ib.*, S. 80.
(5) *Ib.*, S. 81.
(6) *Ib.*, S. 88.
(7) *Forbes* v. *Git*, (1922) 1 A.C. 256.
(8) *Advocate-General* v. *Hormasji*, 29 B. 375.
(9) *Damodar Das* v. *Dayabhai*, 22 B. 833 (841) P.C.
(10) *Amrithayyan* v. *Kalka*, 14 M. 65 (69, 70).
(11) S. 89, Succession Act.

Third.—Where two legacies of unequal amount are given to the same person in the same will or in the same codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In the last four rules the word "will" does not include a codicil.[1]

Fifth.—A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.[2] Under a residuary bequest, the legatee is entitled to all property, belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.[3]

Sixth.—If a legacy be given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representative.[4] If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

Seventh.—In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.[5] If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.[6] But where a legacy is given to legatees, in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.[7] Where the share that lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of.[8] Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the lifetime of the testator, but any lineal descendant of his shall survive the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear in the will.[9] Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the persons to whom the bequest is made.[10] Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but the possession of it is, by reason of a prior bequest or otherwise, deferred until a time later than the death of the testator, the property shall, at that

(1) S. 101, Succession Act.
(2) *Ib.*, S. 102.
(3) *Ib.*, S. 103.
(4) *Ib.*, S. 104.
(5) *Ib.*, S. 105.
(6) *Ib.*, S. 111.
(7) *Ib.*, S. 107.
(8) *Ib.*, S. 108.
(9) *Ib.*, S. 109.
(10) *Ib.*, S. 110.

time, go to such of them as shall be then alive and to the representative of any of them who have died since the death of the testator.[1]

250. Extrinsic evidence is inadmissible to alter, detract from, or add to, the terms of a will, though it may remove a latent ambiguity arising from words equally descriptive of two or more subjects or objects of gift.[2]

Extrinsic evidence when in admissible.

1937. **Analogous Law.**—It is a sovereign rule of construction that, in interpreting the intention of the testator, the primary and paramount object one should keep in view is to ascertain the testator's real intention. He must take his seat in the testator's easy-chair and, with the unfolded will upon his lap, think his thoughts for the moment. But in doing so, he must not take leave of the actual words used by the departed occupant of that chair. For it is his duty to interpret, not in the light of intention, nor by a flight of imagination, but by the stern realities of the written will.[3] As Turner, L.J., said: "In determining that construction, what we must look to, is the intention of the testator. The Hindu Law, no less than the English Law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption." "To put the matter another way, the question is not what the testator intended to do but what he did mean by the words which he actually used. The true enquiry is not what a testator meant to express, but what the words used do express; extrinsic evidence cannot be received as evidence of a testator's intention, outside and independent of the written words employed by him. In other words, where the meaning is fairly certain, it cannot be allowed to be modified by speculative inferences, drawn from his conduct, as to what he intended to do or thought he had done; extrinsic evidence, when admissible, is used as an aid to the correct interpretation of the language of the will, but it cannot be relied upon for misconstruing the will."[4]

Oral evidence.

1938. The admissibility of oral evidence affecting the terms of a will is subject to the provisions of chapter VI **(Ss. 91-100)** of the Evidence Act, S. 100 of which, however, provides that nothing in that chapter shall be taken to affect any of the provisions of the Indian Succession Act as to the construction of wills. Now, since these provisions have since been extended to the wills of all Hindus it follows that Hindu wills are subject to the rules of

(1) S. 111, Succession Act.
(2) *Soorjeemoney* v. *Denobundoo*, 6 M.I.A. 526, (550 551).
(3) *Ib.*
(4) *Srinibash* v. *Monhohini*, 3 C.L.J. 224 (254).

construction enacted in the Succession Act, and in chapter VI of the Evidence Act only so far as its provisions do not "affect" those of the Succession Act. The fact is that the provisions of the Evidence Act are far more rigid than those of the Succession Act which permits a far greater laxity in the construction of wills than what the Evidence Act permits in the construction of deeds.

When extraneous evidence admissible.

251. The surrounding circumstances under which the devisor made his will—as the state of his property, of his family and the like—is admissible.[1]

1939. Analogous Law.—It is, again, a general rule, applicable alike to English and Hindu Law, that a will must be benignantly construed, the testator's intention being carried out, if ascertainable, to the extent and in the form that the law allows.[2] Expressions in one will cannot be construed with reference to expressions of more or less doubtful import, to be found in other wills.[3] Such a method of interpretation has gone out of fashion in England.[4] "To extend it to India would hardly be desirable. To search and sift the heaps of cases on wills which cumber our English Law Reports, in order to understand and interpret the wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd. In the subordinate courts of India, such a practice, if permitted, would encourage litigation and lead to idle and endless argument."[5] In another case, their Lordships of the Privy Council pointed out that owing to the fact that Indian deeds are not uniformly drawn up by practised conveyancers, it would be misleading to apply the rules of conveyancing to their interpretation. The Indian scribe at times makes no distinction between a deed and a will, between a gift and a testatament,[6] or between a testament and a power to adopt.[7]

Reference to other Wills.

1940. There is no radical contrariety between the two sets of rules. And generally speaking, the rule stated in the section applies equally to all wills, whether those made by a Hindu or a non-Hindu, and whether or not subject to the Succession Act. Extrinsic evidence is admissible to prove the intention to make, alter or revoke, to ascertain the person named in the will, to ascertain the thing bequeathed—that is, to ascertain the subject and the object—to ascertain whether a codicil is cumulative or substituted, and other similar matters which do not contradict, add to or detract from its terms.[8]

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(1) *Narasimha* v. *Parthasarathi*, 37 M. 199 (221, 223) P. C.; *Emid Browne* v. *F. Y. Moody*, (1936) P. C. 285; *Sasanka Bhushan* v. *Gopi Ballav*, (1935) C. 716.

(2) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.; *Gordhan Das* v. *Ram Cooverbai*, 26 B. 449; *Elkins* v. *Cullan*, 13 N.L.R. 51.

(3) *Narendranath* v. *Kamalbasini*, 23 C. 563 P.C.; *Ganesh Chunder* v. *Lal Behary*, (1936) P.C. 318.

(4) *Ib.*

(5) *Per* Lord Macnaghten in *Narendra* v. *Kamalbasini*, 23 C. 563 (572) P. C. followed in *Bhagbati* v. *Kali Charan*, 38 C. 468 P.C.; *Dinbai* v. *Nusserwanji*, 49 C. 1005 (1012, 1013) P.C.

(6) *Mhd. Abdul Ghani* v. *Fakhar Sohan*, 44 A. 301 P.C.

(7) *Jagannath* v. *Kunja Bihari*, 26 C. W.N. 374: 64 I.C. 458: (1922) P. C. 162.

(8) *Narasingerji* v. *Raja Pangauti*, 47 M. 729 P.C.; *Venkatadri* v. *Parthasarathi*, 48 M. 312 (329) P. C.; *Vatsavava* v. *Venkatapathi*, 80 I.C. 807: (1924) P.C. 162; *Thaung* v. *Ma Than*, 51 C. 374 P.C.; *Secretary of State* v. *Jyoti Prasad*, 53 C. 533 P.C.

1941. The language of the will to be construed must be the best guide to its interpretation. It must be read as a whole and its paramount purpose ascertained. If all its clauses are interdependent but consistent, then effect must be given to them all; but if some of them are inconsistent, then the inconsistencies must, if possible, be reconciled and effect given to such of them as are reconcilable. It may be that the two clauses, though appearing to be antagonistic, are intended to provide for different circumstances. Such was the case in a will, of which the 8th, 13th, and the 18th clauses were seemingly antagonistic, in that they left uncertain whether the interest conveyed to the two sons of the testator was absolute or limited. The High Court held them to convey only a limited estate, since there was a gift over, which precluded the possibility of an absolute devise; but, on appeal, the Privy Council reversed their decree, holding that the limitation over was not intended to limit the son's estate but to provide for a contingency.[1] So, a gift under a will, to certain persons and their heirs for ever, of certain annuities, being fixed portions of the nett profits of an estate, was held to amount to a gift of proportionate shares in the *corpus* of the estate, in the absence of a conflict of such an interpretation with the general intention as gathered from the whole will.[2] So, where the testator had bequeathed his estate "to my adopted son Janardhan," the court upheld the bequest, though the adoption was found to be invalid. The deceased had made the adoption and considered it good, but did not make the bequest contingent upon its validity.[3]

Construction of words and Technical Terms.

252. (1) All words must be construed in their ordinary popular sense, unless there is a clear indication that they are used in another sense.[4]

(2) Technical terms must be presumed to bear their legal sense, unless the context clearly indicates the contrary;[5]

(3) Provided that, before so construing, due regard must be had to the infirmity of the scribe if a layman, and his unfamiliarity with the expressions used by him.

1942. Construction of Words.—The only safe rule applicable to the construction of wills is that there is really no rule at all. Indeed, there can scarcely be any fixed and general rule applicable to the construction of settlements and wills varying in terms and applying to estates varying in situation.[6] The only rule equally applicable to the construction of all documents, whether deeds or wills, is that ordinary words should be construed in their ordinary sense, and not in their technical sense, unless there is anything in the context to shew the contrary. As many of the wills of Hindus are written or spoken in the vernacular, English Judges are not in a position to construe them with the same advantage as Indian Judges. But this is no reason for the court, not conversant with the language, to consult and decide upon the opinion of an Indian Judge who had not heard the case. As their Lord-

(1) *Damodar Das* v. *Dayabhai*, 21 B. 1 (2, 3), where they are set out; reversed O.A. 22 B. 833 (841) P.C.

(2) *Hemangini* v. *Nobin Chand*, 8 C. 788.

(3) *Dhondu Bai* v. *Laxman Rao*, 22 Bom. L. R. 794.

(4) *Gurusami* v. *Sivakami*, 18 M. 347 (358).

(5) *Lalit Mohan* v. *Chukkan Lal*, 24 C. 834 P.C.

(6) *Har Narayan* v. *Surja Kunwari*, 43 A. 291 (296) P.C.

ships observed in a case: "The learned Judges say that in the construction of the clause, they have had the advantage of the opinion of Mr. Justice Gupta, who is fully conversant with the Bengali language, which is his mother tongue, and who agrees with them in the meaning to be attached to it. Their Lordships remark upon this that Judges, who have heard the arguments and who are responsible for the decision, can hardly with propriety rest it on the authority of one who has not heard the arguments and is not responsible for the decision, although he may be a Judge of the High Court. It is true that this case is a peculiar one, in which Judges have to interpret a language which seems to be imperfectly known to themselves and to be familiar to a colleague. But, then their Lordships are not informed how Mr. Justice Gupta translates the Bengali words. It is only said that he agrees with the meaning which the other learned Judges below attach to the clause in question. He does not appear to have thrown any new light on the rendering of the words into English. It must be taken that on this point, he agrees with his colleagues of the High Court and with their sworn interpreter and with the official translation in the record. If so, the agreement with the decision must be on account of that further reasoning, which has led the courts below to inferences from which their Lordships dissent."[1]

1943. The case from which this passage is cited, related to the construction of the crucial words in a will "*parjyapt haibek,*" translated by the English words "will become vested," as to which the High court said: "The technical meaning conveyed by the English expressions 'shall vest,' 'shall become vested' are not in our opinion conveyed by the Bengali words '*parjyapt haibek,*' which really mean 'shall devolve or go' and indicate the line of devolution."[2] Quoting this passage, the Privy Council said: "This appears to their Lordships to be a misconception of what words are necessary for the vesting of a bequest or legacy. A bequest in favour of a person simply (that is, without any intimation of a desire to suspend or postpone its operation) confers a vested interest. It must be remembered that it is within a comparatively recent period that Indian testators have adopted English modes of creating interests in their estates. There is no line of precedents attaching to Bengali terms meanings which make them understood as terms of art by Bengali lawyers. It is not suggested in this case that the meaning affixed by the courts to the testator's language is a sense required by a course of practice known to vakils. The only safe course is to give to his words the plain ordinary meaning."[3] In the end the Privy Council held the words to convey no more than a direct and simple gift to the eldest son. This case is then an instance of the danger to which the interpreter is exposed by ascribing to a non-technical expression a technical meaning. In another case, in which the question was whether the bequest to an idol conveyed the corpus of the estate or created only a charge thereon, the Privy Council said: "In such cases no fixed and absolute rule can be set up, derived alone from the use of particular terms in one portion of the will. The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is

(1) *Harris* v. *Brown*, 28 C. 621 (635) P.C. (2) *Ib.*, pp. 635, 636. (3) *Ib.*, 634 P.C.

a question which can only be settled by a conspectus of the entire provisions of the will."[1] The terms of absolute grant in a will may be qualified by its other clauses, and words expressed only to convey a limited interest may be enlarged by the purpose and effect of the bequest. The only safe rule to follow in the construction of a will is, then, to eschew all rules of technical construction, to read the will as a whole, and to see what was its manifest or underlying intention. This is the only safe guide which the courts are counselled to follow in the construction of wills and settlements[2]

1944. But though, this is the soverign rule, still certain words, such as "*malik,*" "*putrapoutradikrame,*" "*istemrari*" and the rest, have now acquired a definite sense in conveyancing, and when the context permits, they must be understood in that sense. (§ **1927.**)

So, it is held to be a well-established rule of construction that a gift of the rents and profits of property is equivalent to a gift of the property itself, and it has also been decided that a gift of the income of property will also carry the legal and beneficial interest in the property itself.[3] The testator bequeathed to his daughter-in-law his property "detailed below," which comprised "all cash, ornaments, utensils included and also two houses." After execution of the will, the testator had invested some money on the security of mortgage bonds, and the question was whether they could be held as comprised in the term "cash" bequeathed. It was held that they did. "The words in which the gift to her is made are very general and seem to us to be comprehensive enough to include all the property, which is described in the body of the will as ornaments, cash, utensils, *et cetera.* True it is that the words *et cetera* do not appear in the details of the property, but it was, we think, intended by the testator that all movable and immovable property, of which he was or should be possessed, should pass."[4] Where, however, the testator gave his wife a life-interest in the house in his possession, and in those which he might afterwards "purchase," and the testator acquired a house by inheritance in consequence of the death of his younger brother, the question arising whether this house equally passed under the will, it was held that the term "purchase" (*khareed*) was used in its normal sense and did not include the house acquired by inheritance. "It may be thought that, at the time of the execution of the will, he did not contemplate the contingency of his acquiring any immovable property otherwise than by purchase, and that, had he contemplated such a contingency, he would have provided for it, and would have left to his widow all his real property, however acquired by him subsequently to the date of his will. This is a surmise not destitute of plausibility, although, if it be true, the circumstance that he did not add a codicil to the will, after he had inherited the house in question from his brother, for the purpose of supplying the defect in the terms of the clause, which is the subject of consideration, and securing the devolution to his widow of the aforesaid house, is not easily explained."[5]

(1) *Har Narayan* v. *Surja Kunwari,* 43 A. 291 (293) P.C., affirming O.A. *Surja Kunwari* v. *Har Narayan,* 39 A. 311, following *Sonatun* v. *Juggutsoondaree,* 8 M.I.A. 66; *Ashutosh* v. *Doorga,* 5 C. 438 P.C., distinguishing *Jadu Nath* v. *Sita Ramji,* 39 A. 553 P.C.

(2) *Har Narayan* v. *Surja Kunwari,* 43 A. 291 (296, 297) P.C.

(3) *Durga* v. *Dunichand,* 2 A. L. J. 568 (572), following *Shookmoy* v. *Manoharri,* 11 C. 692; *Mannox* v. *Greener,* L. R. 14 Eq. 456.

(4) *Parsanni* v. *Ghareeb Das,* 5 A.L. J. 708 (712).

(5) *George* v. *George,* 6 N. W. P. H. C.R. 219 (221, 222).

1945. In another case, the testator had died in 1857, leaving a will, dated January 1857, clause II of which provided that all his residuary estate "shall descend in equal shares to the eldest son to be born to each of the daughters of my late brother who are now alive." By clause 15 of the will the testator declared that "until the majority of whoever may be the eldest at the time amongst the sons of my brother's daughters, the estate shall remain in the hands of the executor absolutely and for all purposes." At the time of the testator's death, two daughters of his brother were living, of whom *C* was married and *F* unmarried. *C* had a son born in 1858 who lived to be 21 years of age, and to whom, on his attaining that age, a moiety of the estate was made over by the executor. *F* married *W* in 1878, the only issue of the marriage being a son born in 1883, who lived only a few hours. It was held that a moiety of the estate vested in the sons of *C* and *F* on their birth, and that the vesting was not suspended by the direction that the estate should remain in the hands of the executor, who should "make over the share" of each on his attaining 21 years; those words merely pointed to the possession and enjoyment of the shares, which had already been vested. The words "the sons of those daughters," following the bequest, referred to the sons to whom it was made, namely, the eldest son of each daughter. On the birth of *F's* son, therefore, moiety of the estate vested in him, and on his death, passed to his father as his heir.[1]

1946. So, where the testator bequeathed his estate to his wife as its "*malik*," but added: "Such shall during her lifetime apply and spend the same in a good way," it was held that these words had the effect of reducing an absolute estate to a life-estate with uncontrolled powers of disposition by acts *inter vivos*.[2] In another case, the testator bequeathed an estate, stating that it "shall be considered to be the property" of a certain idol, and that "whatever may be saved after defraying the expenses of the temple and the pay of the servants, shall be used by our legal heirs to meet their own expenses," it appeared that the expenses of the temple absorbed only a small portion of the income, from which facts it was inferred that the testator could not have intended to bequeath the *corpus* to the idol, in whose favour the estate was merely charged with the expenses of its upkeep.[3]

1947. Technical Terms.—There are no technical terms; strictly so-called. By consensus of opinion, the courts ascribed to certain words a definite meaning. In this sense, these words may be taken to have become terms of art, as connoting a certain sense when used in deeds and wills. Such are the words *malik* and *putrapautradikrame*,[4] or *putrapoutradi*,[5] which are understood as words of general inheritance and generally as conveying an absolute interest, but this sense may be limited by the context. As observed by Lord Davey: "There are two cardinal principles in the construction of wills, deeds and other documents, which their Lordships think are applicable to the decision of this case. The first is that clear and unambiguous words are not to be controlled or

(1) *Harris* v. *Brown*, 28 C. 621 P.C.
(2) *Mithi Bai* v. *Maher Bai*, 23 Bom. L.R. 858.
(3) *Har Narayan* v. *Surja Kunwari*, 43 A. 291 P.C.
(4) *Chukkun Lal* v. *Lalit Mohan*, 20 C. 906, reversed O.A. *Lalit Mohan* v. *Chukkun Lal*, 24 C. 834 P.C.; *Sasiman* v. *Shib Narain*, 1 Pat. 305 P.C.; *Ramlal* v. *Secretary of State*, 7 C. 304 P.C.; *Hari* v. *Secretary of State*, 5 C. 228; *Motilal* v. *Advocate-General*, 13 Bom.L.R. 471; *Ramanuj* v. *Manraj Kuar*, (1935) O. 198.
(5) *Padam Lal* v. *Teksingh*, 29 A. 217; *Gooroo Das* v. *Sarat Chunder*, 29 C. 699.

qualified by any general expression of intention. The second is, to use Lord Denman's language, "that technical words or words of known import must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense."[1] In another case, Lord Buckmaster observed that the word "*malik* could be appropriately used to constitute the wife an absolute owner. It is not that the word is a 'term of art,' it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be."[2] In this view, the use of the term *malik* is significant but not conclusive of the quantum of interest intended to be conveyed. But taken along with the context, it might be conclusive.

1948. A will contained the following in favour of the testator's sister's son, Lalit, *viz.*, that he "becoming my substitute and becoming *malik* of all my estate and properties, shall. . . . enjoy, with son, grandson, and so on, in succession (*putrapoutradikrame*) the proceeds of my estate." Provisions followed for the maintenance of his nephew's widow and of his daughter, should he die; and a gift over that "in the absence of the said nephew's son, grandson, great-grandson, and so on, then of the sons born of my sisters . . . . . the eldest with son, grandson, and so on, in succession, shall" receive the ownership. On a claim by the nearest *gotraja sapinda* of the testator, against the nephew, for the construction of the will, it was held by the High Court that there being expressions excluding the succession of females and conferring the succession to male heirs and the gift over referring to the failure of male issue at any remote time, and not to the event of Lalit's death without having male issue, and there being also expressions indicating an intention not to grant an absolute alienable estate, the will should be construed as giving to Lalit only a life-estate. But this view was reversed by the Privy Council who said: "Their Lordships cannot find any sufficient reasons for importing into the gift to the appellant an implied prohibition against females succeeding as heirs, so as to limit the nature or extent of the estate taken by the appellant or confine it by construction to heirs male, although his estate may be defeasible if the gift over is valid and the event on which it takes effect should occur."[3]

1949. In Bombay, where before the enactments of 1929 a more favourable view prevailed regarding the rights of female heirs, it was held that a gift over to the daughters as "my *waris*" (heir) conveyed the same absolute estate which would have passed if the term used were *malik* (owner).[4] The same sense is conveyed by the phrase *santansrenikrame*,[5] or words which convey the sense that the estate is granted to the donee's "children and grand-children," which are words of enlargement and not of limitation. The testator granted a *taluq* to his sister *K* "with all rights appertaining thereto.....to you and the generations born of your womb, successively to enjoy the same. No other heir of yours shall have right or interest." On the question arising as to the nature of the estate thus conveyed, the Privy Council held that the words "you and the generations born of your womb" were intended to convey an

(1) *Lalit Mohan* v. *Chukkun Lal*, 24 C. 834 (846) P.C.
(2) *Bhaidas* v. *Gulab*, 45 B. 718 P. C.
(3) *Lalit Mohan* v. *Chukkun Lal*, 24 C. 834 (851) P.C.
(4) *Chunilal* v. *Mulid*, 24 B. 420.
(5) *Bhoobun* v. *Hurrish Chunder*, 4 C. 23 (25) P.C.

absolute estate, the effect of which was not, to cut down by the negative words which were capable of being read as referring to the time of *K's* death and "that their effect is to make the absolute estate, before given, defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs."[1]

1950. It has already been seen that the term "*putra*" means in Sanskrit and in Bengali not only a son, but also a son's son and a son's son's son, the three being regarded as one person in Hindu Law. (§ 112.) Consequently, when the testator spoke of a person as dying without leaving sons, the condition is satisfied only if he dies leaving no son, grandson or great-grandson in the male line.[2] And the term "issue" not only includes children but also a son adopted by the widow under authority from her husband.[3] Unless the term is qualified by the word "*auras*" or self-begotten, it does not exclude an issue by adoption.[4] Again, the terms "*aulad*" or "*santan*" import issue, both male and female.[5] Unless a different intention appears from the context, limiting it only to male issue, that term is, however, ordinarily confined only to legitimate issue, though if the gift is made by will of the *corpus* of a fund, or of a life-interest in a fund to the children of the testator or of another as a class, it would probably include also the illegitimate issue.[6] The word "*bans*" is of doubtful import and may mean either agnatic kinsmen or descendants. The last term, again, is confined only to children and grand-children and not to the testator's brother or widow.[7] So, where the testator gave his widow the power to adopt from amongst "my father's *bans*," it was held to refer to his paternal agnatic kinsmen and not to the descendants of his father.[8]

1951. The word "family" is an elastic term and may mean "a person and his wife and children" or the larger group of "a person and his descendants and their wives." So, where the testator created a trust for the support of the testator's "family," the question arose what that word included, and it was held by White, J., to mean the relatives of the testator, whether connected by marriage or blood, who were living at the time of the testator's death and then formed part of his household and were maintained by him. But on appeal, this construction was held to be too wide, the court restricting it to include only the testator's descendants and their wives living at the time of his death.[9]

1952. The words "*hamesha*," "always" or "for ever" though implying perpetuity, may be limited in their import by the context. And taken by themselves, they do not *per se* extend the interest beyond the person who is named. They are not inconsistent with limiting the interest given, but the circumstances under which the instrument is made or subsequent conduct of the parties may show the intention with sufficient certainty, to enable the court to presume that the grant was perpetual. So, where a decree provided that *A* should always pay *B* Rs. 70

(1) *Bhoobun* v. *Hurrish Chunder*, 4 C. 23 (28) P.C.

(2) *Bissonath* v. *Bamsoondery*, 12 M.I.A. 41 (47).

(3) *Beemchurn* v. *Heeralal*, 2 I.J. (N.S.) 225.

(4) *Suriya Rau* v. *Raja of Pittapur*, 9 M. 499 (595) P.C.

(5) *Kumud* v. *Jogendra*, 21 C.W.N. 854 (858): 41 I.C. 11; *Dhan Devi* v. *Mahan*, (1900) P.R. 114; *Krishna Rao* v. *Bena Bai*, 20 B. 571 (Children cannot mean only sons).

(6) *Sher Bahadur* v. *Ganga*, 36 A. 101 (121, 122) P.C.

(7) *Arumugam* v. *Ammi*, 1 M.H.C. R. 400.

(8) *Dayabai* v. *Chunilal*, 10 Bom.L. R. 97.

(9) *Khetter* v. *Ganga*, 4 C.W.N. 671 *f.n.*

per month, and the question arose whether the charge was to cease with *B's* death or was heritable, the court held that there was nothing to show that the payment was to continue after *B's* death.[1]

1953. Meaning of "Malik".—In several cases the courts had to construe the meaning of the term "*malik*" as used in describing the female donee's estate. Referring to it the Privy Council observed: "It is not that the word is a term of art, it does not necessarily define the quality of the estate taken, but the ownership of whatever that estate may be"[2] that is to say, the use of the word "*malik*" by itself has not necessarily the effect of conferring a heritable estate on the donee, though it certainly implies that the female donee is clothed with absolute right. But the question whether such donee has necessarily an absolute estate, must largely depend upon the context, and in every case it is one of intention. As their Lordships observed later on in the same case: "If words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership were not intended."[3] This case then reiterates once more their Lordships' view, so often expressed by them in previous cases,[4] and now superseded by the legislature that the rule which regulates the construction of a gift applicable to a male donee, cannot be extended to a female; and the use of a single word must not be construed as wrested from the context. "I am the '*malik*,' says the female donee. "Yes," says the court, "but let me see of what you are in the *malik* of your widow's estate, or of the entire estate. For this purpose I must read the whole deed and take into account all the circumstances. It may be that the donor has conferred upon you an exceptional estate. But I cannot assume it, as I would have done, if you were not a female."

1954. The several cases, otherwise seemingly irreconcilable, may probably be so reconciled. So, where, of two brothers *B* and *G*, *B* died childless, leaving a will giving his widow the power to adopt and bequeathed his estate in two moieties to his widow and adopted son, if one was adopted, but otherwise his widow was to succeed to the entire estate as *malik* with power of sale and gift, but that if she sold any property, the testator's heirs and co-sharers should have the right if pre-emption for an adequate consideration. The widow died dedicating the property to a deity, whereupon *G's* son sued for its recovery, contending that the widow had only a life-estate; but his claim was thrown out, the court holding that the word *malik*, if taken with the context sufficed to convey an absolute estate and that the fact that her right of sale was subject to pre-emption did not qualify her power of alienation any more than it would in any other case of sale otherwise subject to pre-emption.[5]

(1) *Azizunnissa* v. *Tasadduq*, 23 A. 324 P.C.

(2) *Bhaidas* v. *Gulab*, 26 C.W.N. 129 (131) P.C.

(3) *Ib.*

(4) *Padam Lal* v. *Tek Singh*, 29 A. 217; *Surjamoni* v. *Rabinath*, 30 A. 84 P. C.; *Bhaidas* v. *Gulab*, 46 B. 153 P.C.; *Bishnath* v. *Chandrika*, 55 A. 61 P.C.; *Sarju Bala* v. *Jyotirmayee*, 59 C. 142 (148) P.C.; *Jagmohan Singh* v. *Sri Nath*, 57 I.A. 291: (1930) P.C. 253: *Punchoomoney* v. *Trailokya*, 10 C. 342; *Shib Lakshan* v. *Tarangini*, 8 C.L.J. 20; *Sures Chandra* v. *Lalit Mohan*, 20 C.W. N. 463, and cases cited therein; *Mangalji* v. *Rambhaoo*, 64 I.C. (N.) 752.

(5) *Sudhamoni* v. *Surat Lal*, 25 C.W. N. 527.

253. The construction must be uniform, the same words being construed in the same sense, unless a contrary intention appears from the context, or unless the words refer to a different subject.[1]

Construction must be uniform.

1955. Analogous Law.—This rule, though equally general, does not coincide with the English rule, which does not favour the same construction of words, though appearing in one clause, if they apply to realty and personalty respectively.[2] So, where there is a gift of realty and personalty together to children "or their heirs," the word "heirs" is read in a dual sense, as denoting *heir-at-law* as regards the realty and *next of kin* as regards the personalty.[3] But this is an artificial rule due to the statute of distribution, for which there is no parallel in this country, and no such distinction is, therefore, authorized by the law of construction. The context may, of course, indicate that the same word was intended to be used in a dual sense. So, while the term "*aulad*" or "*issue*" is normally used to mean only a legitimate issue, where the context shows that the testator intended to benefit all his issue, whether legitimate or illegitimate, it will be so construed.[4]

1956. The rule on the subject is thus formulated in the Succession Act:—

Interpretation of words repeated in different parts of will.

"86. If the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary."

This is a general rule, and applies to all Hindu wills.[5] "The will is the dictionary from which you are to find the meaning of the terms which the testator has used."[6] "The principle is, that if words acquire a special meaning by reason of their context, that meaning cannot be safely given to them, when used in a different context."[7] Considerations, which only show that a testator has made a disposition in his will which the court is surprised to find there, though they might have determined the sense in which the testator had used an ambiguous expression, cannot of themselves lead the court to refuse to give effect to the plain language he has employed. Where, for instance, the testator makes a bequest to his children, it cannot be read as one limited only to the sons, to the exclusion of the daughters.[8] So, where the testator made a will whereby he appointed his wife as his executrix and heir, and provided that if a son be born to him, that son should be the owner of the residue, and if no son be born, then his wife should be the owner, the court held that, on the failure of the contingency contemplated, the wife took an absolute estate.[9] Where the words of contingency form part of the description of the class of persons to take,

(1) S. 86, Succession Act.
(2) *Forth* v. *Chapman*, 1 P. Wms. 667; 2 Williams on Executors (9th Ed.), 933 (967), foot-note (*h*).
(3) Williams on Executors, (9th (Ed.), 996, foot-note.
(4) *Sher* v. *Ganga*, 36 A. 101 (121, 122) P.C.
(5) *Krishna Rao* v. *Bena Bai*, 20 B. 571 (592).
(6) *Per* Lord Cairns in *Hill* v. *Crook*, 6 H. L. 283 (285); *Birks*, In re, (1900) 1 Ch. 417 (418).
(7) *Per* Wilson, J., in *Ballin* v. *Ballin*, 7 C. 218.
(8) *Krishna Rao* v. *Bena Bai*, 20 B. 571 (591, 592).
(9) *Jairam* v. *Kessowjee*, 4 Bom.L.R. 555 (557).

as in the case of a gift to those "who shall attain the age of 21," the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. In such a case, there must be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a court in adopting any but the literal construction. In the words of contingency occurring in the description of the class of persons to take, a mere gift over is not sufficient to alter their meaning.[1]

1957. So, where the testator appointed four trustees to his will and provided that "upon your death, these properties shall similarly devolve on your heirs," and it was contended that while the words "your" referred to the four trustees, "your death" was intended not to refer to the death of *all* the trustees, the court rejected the construction, holding that there was nothing in the context to justify a departure from the normal rule.[2]

All words must be considered.

254. (1) Of two modes, preference must be given to the construction which gives effect to every expression.[3]

(2) But where two or more clauses are repugnant in a deed or will, the first in the deed and the last in the will shall prevail.[4]

1958. Analogous Law.—Both the clauses of the section are abstracted from sections 82, 84, 85 and 88 of the Succession Act, and are supported by the undernoted cases.[5]

Clause (1).

1959. The general rule is that all words used in a will must receive their due importance. This is emphasized by Jaimini who quotes the terse aphorism—"more words, more meaning".

The rule is taken from the English Law and may be thus illustrated.[6] If one devises land to *A* in fee, and later on in the same will devises it to *C* for life, both parts of the will stand. *C* will take first, and *A* on determination of *C's* interest.[7]

1960. Although the cardinal rule in the construction of wills is to give effect to the intention of the testator, the duty of the court is to discover not what the testator meant but what is the meaning of his words.[8]

1961. The primary rule applicable to the construction of a deed or a will is that stated in clause (1). It is but natural that where the executant has used expressions, he is presumed to have intended that they should control his meaning. But this is not always possible. And if two or more expressions are found to be irreconcilably contradictory, how are they to be construed? In that case, the rule of English Law governing wills, enacted also in the Succession Act now applicable to Hindu

(1) *Ballin* v. *Ballin*, 7 C. 218 (224).
(2) *Aghore Nath* v. *Kamini*, 11 C. L.J. 461 (473).
(3) *Amirthayyan* v. *Katheramayyan*, 14 M. 65 (69).
(4) *A.-G.* v. *Hormusji*, 29 B. 375; *Somasundra* v. *Ganga*, 28 M. 386.
(5) *See* f.-ns. (3) and (4).
(6) 2 Jarman on Wills (5th Ed.), 1656; 1 Williams on Executors, (10th Ed.), 837, citing *Grey* v. *Minnethorpe*, 3 Ves. 105; *Constantine* v. *Constantine*, 6 Ves. 102; *Hall* v. *Warren*, 9 H.L.C. 420.
(7) *Anonym., Elliz.*, 9; *Doe* v. *Daires*, 4 M. & W. 599.
(8) *Aghore Nath* v. *Kamini*, 11 C.L. J. 461 (474): 6 I. C. 554, following *Abbot* v. *Middleton*, 7 H.L.C. 68; 11 E.R. 28; *Scarle* v. *Rawlins*, (1892) A.C. 342 (344).

wills is that the later clause overrules the earlier clause,[1] though the converse rule is held to govern deeds[2] (§ 1962). The reason for this distinction appears to lie in the fact that since a will takes effect upon the death of the testator, his last wishes are alone material, whereas a deed, which takes effect upon execution, must follow the conveyancing rule that the words which purport to convey *in praesenti*, have that effect *instanter*, and cannot be qualified by later words of limitation. But the rule that if there be a repugnancy, the first in a deed and the last in a will shall prevail, has no application where the supposed inconsistencies are found in one and the same provision,[3] or where they provide for different circumstances.[4]

1962. Construction of Repugnant Clauses.—The rule here formulated is a rule of English Law,[5] enacted in S. 88 of the Succession Act but it is a rule which is in consonance with natural equity and has been recognised in several cases in this country. But it is a rule to which recourse must be had only in the last resort and only after all other rules fail.[6] And before it is applied, it must be clear that two or more clauses of a deed or will are really repugnant. In many cases they may be supplementary and by no means irreconcilable, if due regard be had to circumstances and to context. Such a case arose in a case decided by the Privy Council, in which their Lordships had to construe the effect of two seemingly contradictory clauses. The recital in a debtor's letter referred to a standing debt, and the lien he created charged all the balances due from him. The debtor contended that the charge was limited to the debt then due, while the creditor claimed lien for all balances, whereupon the Privy Council observed: "The construction of an ambiguous stipulation in a deed may undoubtedly be governed or qualified by a recital; but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital."[7] In this case the recitals stated that since the executant owed to the creditor a considerable amount of money, he delivered a lien for the current outstandings "and upon my payment of all balances, you will at once return to me all documents now deposited with you and cancel this letter." The debtor contended that the lien was limited by the recitals, but the Privy Council held the later clause, which constituted the contract, to extend to all unpaid balances. In another case, the Bombay High Court had to consider the effect of repugnancy in the same clause, in which case they held the rule here formulated inapplicable. In that case, a deed of indenture contained, among other things, a provision conveying to trustees "upon trust and for the use of the said trustees absolutely, to be expended and used by them for such charitable purposes as they might think fit." There was clearly inconsistency between conveying "absolutely" and a further direction creat-

Clause (2).

(1) S. 88, Succession Act; *Chiman Rao* v. *Rambhau*, 4 Bom.L.R. 509.

(2) *Doe* v. *Biggs*, 2 Taunt. 109 (113); *Forbes* v. *Git*, [1922] 1 A.C. 256.

(3) *A.-G* v. *Hormusji*, 29 B. 375.

(4) *Damodar Das* v. *Dayabhai*, 22 B. 833 (841) P.C.

(5) *Deo* v. *Licester*, 2 Taun. 109 (113).

(6) *Advocate-General* v. *Hormusji*, 29 B. 375 (381); *Anirthayyan* v. *Kotheramayyan*, 14 M. 65 (70).

(7) *Marcar* v. *Sigo*, 2 M. 239 (257) P.C., following *Walsh* v. *Trevanion*, 15 Q.B. 750.

ing a trust in favour of charity. It was held that, read as a whole, the testator intended to create a trust and that the word "absolutely" was not inconsistent with the creation of a trust.[1] But in another case, where the husband had bequeathed his estate to his widow as "*malik*" but had added that "during her lifetime she shall apply the same and spend it in a good way," the court held the words to be words of limitation, reducing the estate to a life-estate.[2]

Construction must be testacy.

255. That construction must be preferred which will prevent a total intestacy.[3]

1963. **Analogous Law.**—This rule is a natural corollary to that which favours the benignant construction of wills, giving effect to its bequests as far as possible and after straining every nerve to make a sense out of the most uncouth declaration of the deceased. Consequently, of two modes of construction, law favours that which will prevent a total intestacy.[4] So, in one case the testator bequeathed his estate to his two wives *A* and *B* and his nephew *C* in equal shares, providing that so long as his "wives *A* and *B* will remain alive, all the three shall enjoy in equal shares, and on the death of *A*, her share will be enjoyed by *B* and *C* in equal shares, and on the death of both *A* and *B*, *C* shall obtain the estate absolutely." *C* survived *A* but predeceased *B*, a contingency not provided for in the will, whereupon it was contended that on the death of *C*, the estate would descend as upon an intestacy, and that, therefore, *B* became entitled to the estate as the heiress of her husband. But the court held that that was not the testator's intention, and that the court could not adopt a construction which would lead to intestacy, and that the testator's intention being to vest the estate in *C* on the determination of the lives of *A* and *B*, *C's* representative became entitled to possession of *C's* interest.[5]

Construction against Intestacy.

1964. Where a person made two wills, by the latter of which the dispositions made by the earlier one were cancelled, but where the dispositions made by the latter will turned out to be invalid in law, it was held that as the testator had wanted to make a will and had had no intention of dying intestate, his *animus revocandi* had only a conditional existence and that his real intention was to revoke the first, only if the second would successfully effect the dispositions set out therein, and that, on these failing, the first will became operative.[6] (§ 1917.)

Subsequent events ignored.

256. The construction is not to be varied by events subsequent to the execution.[7]

1965. **Analogous Law.**—A will speaks and takes effect as from the date of the testator's death.[8] But this does not mean that we are to construe whatever a man says in his will, as if it were said on the day of his death. All it means is that where the testator uses expressions such as "my land" or the like, it would not include all after-acquired

(1) *Advocate-General* v. *Hormusji*, 29 B. 375 (385).
(2) *Mithi Bai* v. *Mehar Bai*, 46 B. 162.
(3) *Mandakini* v. *Arunbala*, 3 C.L.J. 515, following *Turner* v. *Hallard*, 30 Ch. D. 390 (395).
(4) *Ib.*
(5) *Mandakini* v. *Arunbala*, 3 C.L.J. 515 (520, 521).
(6) *Govinda* v. *Ramcharan*, 52 C. 748.
(7) *Portal and Lamb*, In re, 30 Ch. 50 (55).
(8) S. 90, Succession Act, framed in accordance with S. 24 of the English Wills Act, 1837 (1 Vict., C. 26).

property which he possessed at the date of his death. In one case, at the date of his will, the testator possessed a cottage and a little land in a place where he subsequently purchased a large house and gardens. By his will he had given "my cottage" and "all my land" in the place to a specific devisee, and the question was whether the devise sufficed to convey the house and gardens which he had purchased since the date of his will. It was contended that since the description of the property must be deemed to refer to the property answering that description at the death of the testator, "all my land" in the will had the effect of conveying both the subsequently acquired house and the gardens. But Lindley, L.J., overruled this contention, holding that in order to construe a will, you must look at the facts as they were at the date of the will.[1]

1966. In another case, Thurlow, L.C., laid down as a sound rule that the language of a will must be construed with reference to the circumstances existing at the time it was executed, and not by any subsequent event. Where, for instance, the testator had bequeathed a fund to *A*, desiring him to dispose of it to such charities as he thought fit, recommending poor clergymen with large families and good character. *A* died 9 years before the testratrix had notice of it, whereupon the next-of-kin contested the devise to charity on the ground that *A's* death had revoked it, or at least made it so imperfect that it could not be rendered perfect. The next-of-kin argued as follows: "The testratrix had given nothing to any charitable purpose, but personally to the trustee to appoint. She must have contemplated either that he was to outlive her or not. By his death 9 years before her, the gift lapsed, and she was for 9 years together in the situation of a testatrix giving to such uses as she should herself appoint; for she did not mean the confidence to go to his representatives as she meant the legal interest to go." But Thurlow, L.C., overruled this contention, holding that the will could not be construed in the light of subsequent events or of what the testatrix might have done or thought afterwards. "The court cannot resort to circumstances of that kind, nor judge of her intention at the time of making the will by what she thought afterwards."[2]

1967. So, where the testator gave £ 1,000 to *M* and the issue of her body, and in default of such issue, he gave the said £ 1,000 to be equally divided between the daughters, *then* living, of *J* and *E* his wife, it was held that the devise could not benefit the daughters of *J* and *E* born after the testator's death.[3] On the same principle, where the number of children mentioned by the testator agrees with the number existing at the date of the will, the gift will not be extended to an after-born child, although *en ventre sa mère* at the date of the will.[4]

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(1) *Portal and Lam*, In re, 30 Ch. 50 (55), explained in *Gullins*, In re, (1909) 1 Ch. 345 (351, 352).

(2) *Moggridge* v. *Thackwell*, 1 Ves. J. 464 (475) s.c.: 7 Ves. 36: 13 Ves. 416; 30 E.R. 440 (445); S. 110, Succession Act.

(3) *Jee* v. *Audley*, 1 Cox 324: 29 E. R. 1186.

(4) *Shere* v. *Bishop*, 4 B.C. C. 55; *Emery's Estate*, In re, 3 Ch. D. 300.

Effect of operative part.

257. Where a testator's intention cannot operate to its full extent, it shall take effect as far as possible.[1]

1968. Analogous Law.—This is S. 87 of the Succession Act and is in accordance with the English Law,[2] according to which, if a testator devised two parts of his property, showing an anxious intention that they should both go together, but on its appearing that he had no power of disposition over one part, the devisee would take the other part, though the testator did not intend him to take the one without the other.[3] So where the testator bequeaths an estate contrary to Hindu Law, what is contrary to law will alone be inoperative, but the rest given effect to. "If the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and so forth for ever, to take as his heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift, to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void.[4]

If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable of taking shall take the whole.[5] If the legacy be given to two persons jointly and one of them die before the testator, and other legatee takes the whole.[6] But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.[7]

Probate.

258. (1) Probate of a will may be obtained by an executor appointed by the will.

(2) The grant of probate is subject to the provisions of Ss. 211-369 of the Succession Act.

(3) The probate of a will only establishes its factum but not its validity which must be otherwise established.

1969. Analogous Law.—The object of obtaining probate[8] of a will is to prove it and obtain a conclusive order as to its contents and the appointment of executors, if any, named therein, but not the validity of its provisions.[9] The object of the proceedings is merely to determine the

(1) S. 87, Succession Act.

(2) *Fisk* v. *A.B.*, 4 Eq. 521; *Hunter* v. *Bullock*, 14 Eq. 45; *Dawson* v. *Small*, 18 Eq. 114; *Williams*, In re, 5 Ch.D. 735; *Birkete*, In re, 9 Ch.D. 575.

(3) *Southey* v. *Somerville*, 13 Ves. 486.

(4) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.; *Tarokessur* v. *Soshi*, 9 C. 922 (957, 958) P.C.; *Kristoronimoni* v. *Norendho*, 16 C. 383 P.C.

(5) S. 106, Succession Act; *Nandi Singh* v. *Sita Ram*, 16 C. 677 P.C.

(6) S. 106, Succession Act.

(7) S. 107, *Ib.*

(8) From Lat. *Probo*, to prove; hence, the proceeding in which a person's will is proved as such and registered.

(9) S. 227, Succession Act.

question of representation of the deceased for the purpose of administering the estate and not for the purpose of determining any question of inheritance or the title.[1] Though the judgment of the Probate Court is a judgment *in rem*, binding upon all persons, it is not conclusive in the sense that the Civil Court is precluded from trying the same issues.[2] The court in granting probate must follow the language of the Succession Act, without digressing into English Law on the subject.[3] It has not to try the applicant's title to the property or to decide on the property disposed of or on the validity of such disposition.[4] Obtaining probate means nothing more than that the will was executed by the testator, and does not decide his power to make the will or its validity.[5] The court canno go into the title of the testator.[6] It is bound to grant probate on proof of execution of the will, unless it finds that it was not executed by the testator, or that he was not in a state of mind competent to exercise his testamentary powers, or that the will was not the testator's own voluntary act. The court has no concern with the question whether the will, if proved, will be effectual or valid, or whether it can affect certain parts of the property with which it purports to deal. The mere fact that a will is proved, might, in view of a previous decree of a Civil Court prove ineffectual, is no ground for refusing to grant probate.[7] Though the probate proceedings are miscellaneous,[8] and question of title cannot be raised or decided, still no matter can subsequently be contested in a regular suit after it is once decided in the probate proceedings. So where a will contained a clause "that the testator had no son and had not given and will not give the widow authority to adopt," it was held that the question that there had been no adoption was *res judicata*, and could not be re-agitated in a regular suit.[9]

1970. The object of proceeding under part IX of the Succession Act is to determine the question of representation of the deceased for the purpose of administering the estate, and not to determine the question of inheritance. The court should not enter into questions of adoption in such proceeding.[10]

In every case in which probate of a Hindu will is asked, a special citation ought to be served upon those persons whose interests are direct-

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(1) *Jagannath* v. *Ranjit*, 25 C. 354; *Arunmayi* v. *Mahendra*, 20 C. 888; *Ganesh* v. *Ramchandra*, 21 B. 563.

(2) *Bailey* v. *Harris*, 12 Q.B. 905.

(3) *Kurratulain* v. *Nuzleat*, 33 C. 110 P.C.

(4) *Thrope* v. *Macdonald*, 3 P.D. 76; *Behary* v. *Juggo*, 4 C. 1; *Arunmayi* v. *Mahendra*, 20 C. 888; *Lalit Chandra* v. *Baikantha*, 14 C.W.N. 463 : 5 I.C. 395; *Nishi* v. *Ashutosh*, *ib.* 613; *Baisnav* v. *Kishore*, 15 C.W.N. 1014; *Hormusji* v. *Dhanbaiji*, 12 B. 164; *Barot* v. *Muli*, 18 B. 749; *Bal Gangadhar* v. *Sakwar Bai*, 26 B. 792 (797); *Ochavaram* v. *Dolatram*, 28 B. 644; *Birjnath* v. *Chander*, 19 A. 458; *Mahasundar* v. *Ratan Prasad*, 1 Pat.L.W. 370; *Behari* v. *Ganga*, 1 Pat. L.W. 744 : 41 I.C. 279; *Nga Pwe* v. *Michan*, (1910) U.B.R. 169 : 10 I.C. 993.

(5) *Bhabangana* v. *Horendra*, 17 C.W.N. 445 : 16 I.C. 48; *Chintaman* v. *Ramchandra*, 12 Bom.L.R. 694.

(6) *Bhabangana* v. *Horendra*, 17 C.W.N. 455: 16 I.C. 44.

(7) *Jagadindra* v. *Madhusudan*, 20 C.W.N. 307 : 27 I.C. 24.

(8) *Indra Narain* v. *Onkarlal*, (1912) P.R. No. 20 : 10 I.C. 130; *Cullen* v. *Elkins*, 9 N.L.R. 152; 21 I.C. 599.

(9) *Brendon* v. *Sundarbai*, 38 B. 272.

(10) *Manshana* v. *Ma Chin, Taw*, 10 Bur.L.T. 184 : 44 I.C. 138.

ly affected by the will. The practice of a mere general citation in all cases in one which may tend to encourage fraud.[1]

An application for probate cannot legally be disposed of by a compromise. The court is itself under a duty to determine whether the will is genuine or not.[2]

Except in a case subject to the Hindu Wills Act, there is nothing to oblige a person to apply for a probate before enforcing the terms of the will.[3] And since a will may in certain cases be still oral, a person may obtain probate even of an oral will.[4] The court naturally view with suspicion an oral will,[5] but the court cannot refuse probate if the will is proved without opposition, and in any case it cannot be refused merely because the will is officious.[6]

Before the extention of the several general provisions of the Succession Act, a question had engaged the attention of the courts whether a woman executor or administrator possessed the same unlimited power of disposal as a male executor or administrator, it being held that she did not;[7] but this distinction is no longer material, since the powers of an executor or administrator, whether male or female, are now subject to the general provisions of S. 307 of the Succession Act. The estate of the testator vests in the executor, but "it is the duty of an executor to administer the assets in a due course of administration. It is a breach of trust in him in effectuating that breach is a party to such fraud."[8] Though the estate vests in the executor, his conveyance may be avoided by a person interested in the will if it is for undervalue,[9] or is otherwise infected by fraud[10] or collusion with the purchaser, or is otherwise in breach of his duty.

An executor derives his title from the will and not from the grant of probate.[11]

His Title to Property.

1971. Since the executor or the administrator is in no better position as regards the title to the property devised, it follows that the disposal, by will, of her husband's property by a Hindu widow, confers no title on the legatee to eject even a trespasser.[12] A devise may be defeated by the subsequent transfer of property by the testator, and it may be otherwise postponed by the claims of his creditors and others who take precedence over a mere legatee.[13]

(1) *Kamona* v. *Hurro Lall*, 8 C. 570.

(2) *Jaggeshwar* v. *Jagatdhari*, 2 Pat. L.J. 535 : 40 I.C. 345.

(3) S. 213 (2) Succ. Act from which S. 57, cl. (*c*) is omitted; this section is also omitted from Sch. III; *Peribai* v. *Motumal*, (1937) S. 84; *Bhagwan Sang* v. *Bechavdas*, 6 B. 73 (75).

(4) *Gokulchand* v. *Mangal Sen*, 35 A. 313; *Haji Mahomed*, In re, 24 B. 8; *Mangtu* v. *Jowala*, (1908) P.W.R. 8.

(5) *Haji Mahomed*, In re, 24 B. 8.

(6) *Rammal* v. *Kakal*, 22 C. W. N. 315 : 43 I.C. 208.

(7) *Kamikhya Nath* v. *Hari Charan*, 26 C. 607, followed in *Chunni Lal* v. *Makshada*, 52 I.C. (C.) 309 (310); *Mithi Bai* v. *Mehar Bai*, 46 B. 162 (170); *Mahomed Yusuf* v. *Hargovandas*, 47 B. 231; *Katreddi* v. *Kadiyala*, 49 M. 261 F.B.

(8) *Doe* v. *Follows*, (1832) 1 L.J.R. 177 (178).

(9) *Umamoyi Dasi* v. *Raja Janki*, 1 I. C. (C.) 248 (250); *Rice* v. *Gordon*, 11 Beav. 265 (270): 50 E.R. 818 (820): 83 R.R. 153 (157).

(10) *Whale* v. *Booth*, 4 T. R. 625-*n*; *Rice* v. *Gordon*, 11 Beav. 265; *Scott* v. *Tyler*, 2 Dick. 725; *Doe* v. *Fallows*, 2 Cr. & Jerv. 481: 1 Wms. Ex. 697-698.

(11) *Soona Mayna* v. *Soona Navena*, 35 I.C. 323 P.C.; *Ganapathi Aiyar* v. *Sivamalai Goundan*, 36 M. 575.

(12) *Jagdeo* v. *Raja Kuar*, 103 I.C. (P.) 482: (1927) P. 262.

(13) *Krishna Kumari* v. *Rajendra Bahadur*, 2 Luck. 43: (1927) O. 240.

CHAPTER XX.

RELIGIOUS AND CHARITABLE ENDOWMENTS.

1972. Topical Introduction.—The present law relating to religious and charitable endowments has grown mainly out of the numerous inculcations, commending and enjoining the making of gifts to such objects. The rest is statute law and case-law. The sacred texts contain no rules for the management of charities, in which the pious founders have invested their fortunes. Probably, no other country in the world can boast of such munificent bequests, made in the name of religion and charity. But like all other countries, these endowments have, to a large extent, been diverted from their original purpose and are now held in *quasi*-proprietary rights. In 1810,[1] in the Bengal Presidency, and in 1817,[2] in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Mahomedan, and placed them under the charge of the respective Boards of Revenue. On the close of the Mutiny, which was ascribed to undue religious intervention by Government, it decided to relinquish its control of these institutions and to place them under the management of their own respective creeds. With this object, the Religious Endowments Act of 1863[3] was enacted, which devised a system of committees, to which were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents;" other endowments remained unprovided for, with the result that grave abuses crept into their management, and the splendid funds, which the bounty of the public had consecrated to religious and charitable uses, were dissipated in other ways. Unavailing efforts have since been made to control their administration, but the Government, pledged to religious neutrality, is slow to move, and until the enactment of the Charitable and Religious Trusts Act,[4] the only provisions to be found in the statute book were those contained in the Religious Endowments Act[5] and S. 92 of the Code of Civil Procedure. The Trusts Act did not touch them, and the Religious Endowments Act is a misnomer, since it merely transfers to Government the powers previously possessed by the Board of Revenue, and merely deals with public religious foundations.

1973. The provisions of the Charitable and Religious Trusts Act are wider, but, as will be presently seen, it merely arms the court with power to afford advice and guidance to the trustee and call upon him to furnish particulars of the trust to a person interested therein. Its proceedings are summary, and the only relief it can grant to a petitioner against a recalcitrant trustee is by a suit, which the former may institute under S. 92 of the Civil Procedure Code. Apart, however, from the statute law, the common law has laid in terms, which admit of no equivocation, that religious and charitable endowments, whatever their nature and character, are essentially trusts, of which the manager, for the time being

(1) Beng. Reg., XIX of 1910.
(2) Mad. Reg., VII of 1817.
(3) Act XX of 1863.
(4) Act XIV of 1920.
(5) Act XX of 1863.

—by whatever name he may be called whether *mahant, shebait* or *dharmadhikari,*—is a trustee, in the wider sense of that term, and that, as such, he has now power of alienation of the *corpus,* which he is bound to maintain for the purpose for which it was created. Even the *mahant* of a *muth,* who was at one time held to be in the nature of a proprietor, has now been accorded a place alongside of other trustees and in no way distinguishable as regards his power of administration and alienation.

1974. Hindu endowments are divided into religious and charitable. The former may be further sub-divided into public and private. The vast majority of the endowments are those designated public. The only instance of a private religious endowment is that furnished by a family endowment for the benefit of a private idol, over which neither the public nor the court has any control.

The sacred texts do not distinguish between religion and charity according to which the one includes the other. The Sanskrit term *"dharm"* is wide enough to include both religious and charitable objects In England and in the Indian law as enacted in S. 17 of the Transfer of Property Act, religious trusts are classed as charitable trusts. So Lord Langdale M.R., said, "All the cases with one exception, go to support the proposition that a religious purpose is a charitable purpose."[1] But though the two purposes are allied they are distinguishable and will be found distinguished in the sequel. (**S. 262.**)

1975. The Hindu Law of gifts being applicable to wills, it follows that, while the Smritis encourage unfettered gift to religion and charity, the only check that the clerigical inculcations receive, is from the inclination of the testator and the calls of other claimants upon his affection and liberality. But where no such claimants exist, or the testator is susceptible to the influences of religion, he is known to make wholesale bequests of his estate to religious charity.[2] And such bequests have been held to be even free from the rule against perpetuities. "It being assumed to be a principle of Hindu Law that a gift can be made to an idol, which is a *caput mortuum* and incapable of alienating, you cannot break in upon that principle by engrafting upon it the English Law of perpetuities."[3]

The encouragement, which charitable bequests have thus received, both from the sacred and the secular laws, has naturally prompted persons to make illusory bequests, where, while the form is religious, the intention is to benefit the devisee. Such illusory devises are, however, subject to the ordinary law.

Definitions.

259. In this chapter unless there is anything repugnant in the subject or context.

(*a*) "Beneficiary" is a person for whose spiritual or temporal advancement an edowment is created. It includes an idol to whom, or any other object for which, the property is dedicated.[4]

(*b*) "*Debutter* property" is property dedicated to a god or gods or a religious object as distinguished from a charitable object.[5]

(1) *Baker* v. *Sutton,* 1 Keen 225 (233) followed in *Jouresend* v. *Carne,* 3 Hare 257.

(2) F. Macn. H.L. 320, 323, 331, 335, 336, 347, 349, 350, 371, App. 58.

(3) *Per* Markby, J., in *Aseme* v. *Krishna,* 2 B.L.R. (O. C.) (47); *Jamshedji* v. *Soonabai,* 33 B. 122; now *see* S. 17, Transfer of Property Act.

(4) *Har Narayan* v. *Surja Kunwari,* 43 A. 293 P.C.; *Eshwari Bhuwaneswari* v. *Brojo Nath,* (1937) P.C. 185 (188); *Manohar* v. *Bhupendra Nath,* 60 C. 452 (476, 479) F.B.

(5) *Manohar* v. *Bhupendra Nath,* 60 C. 452 (475) F.B.

(*c*) "**Dedication**" is the formal renunciation of one's right in property in favour of a religious or charitable object.[1]

(*d*) "**Endowment**" is the dedication of property by a grant, gift or devise to religious or charitable uses.[2]

(*e*) "*Pujari*" is a person appointed to be in charge of the worship of an ideal or deity.[3]

(*f*) "**Manager**" is a person, charged with the management of *debutter* property, possessing some proprietary rights therein[4] which rights and his duties are regulated by custom or usage of the institution to which he is attached. He is variously called a trustee, *shebait*, *sarbarakar*, *dharmakarta* or *mahant*. And though he is sometimes called a trustee, he is not a trustee in the English sense or in the sense in which that term is used in the several Acts of the Indian legislature.[5]

(*g*) "**Worshipper**" is a person who has the right of worship or to otherwise offer his reverence to an idol or shrine.

1976. Analogous Law.—The following are but a few out of the numerous texts to be found on the subject of endowments:—

Manu.—"323. Should the king be near his end through some incurable disease, he must bestow on the priests all his riches, accumulated from legal fines; and having duly committed his kingdom to his son, let him seek death in battle, or if there be no war, by abstaining from food."[6]

Vishnu.—"81. Let him (the king) bestow landed property upon Brahmans.

"82. To those upon whom he has bestowed (land) he must give a document, destined for the information of a future ruler, which must be written upon a piece of (cotton) cloth, or a copper-plate and must contain the names of his three immediate ancestors, a declaration of the extent of the land and an imprecation against him who should appropriate the donation to himself, and should be signed with his own seal."

"83. Let him not appropriate to himself landed property bestowed (upon Brahmans) by other (rulers)."

"84. Let him present the Brahmans with gifts of every kind."[7]

Mitakshara.—"Both he who accepts land and he who gives it, are performers of a holy deed, and shall go to a region of bliss".[8]

Ib. (*citing the last*).—"Since donation is praised, if a sale may be made, it should be conducted for the transfer of immovable property, in the form of a gift, delivering it with gold and water (to ratify the donation)."

Sankh.—"Wealth was conferred for the sake of defraying sacrifices."

"Though, in the case of secular gifts, delivery of possession is necessary to complete a gift, it is dispensed with when the gift is in favour of religion or charity. And though other gifts are void if made by a man who is afflicted with disease and the like, a gift to religion is irrevocable and may, on death of the promisor, be enforced against his son."[9]

Katyayan.—"What a man has promised in health or in sickness for a religious purpose, must be given, and if he die without giving it, his son shall doubtless be compelled to deliver it."[10]

1977. Definition of Terms.—Hindu Law makes no distinction between religious as distinct from charitable objects. The "beneficiary" of a religious en-

(a) **Beneficiary.**

(1) *Manohar* v. *Bhupendra Nath*, 60 C. 476 (481).

(2) *Watson & Co.* v. *Ramchand*, 18 C. 10 (18) P.C.

(3) *Indurj* v. *Chundemun*, 16 W.R. 99.

(4) *Ram Parkash* v. *Anand Das*, 43 C. 707 (713) P.C.; *Arunachellam* v. *Venkatachalapathi*, 43 M. 253 (286) P.C.

(5) *Vidyavaruthi* v. *Balusami*, 44 M. 831 P.C.; *Naina Pillai* v. *Ramanathan*, 47 M. 337 (352) P.C.; *Manohar* v. *Bhupendra Nath*, 60 C. 452 (467, 494, 495) F.B.; *Keshav Das* (*Mahant*) v. *Amardas*, 14 Pat. 379.

(6) Manu, IX-323.

(7) *Vishnu*, III-81-84; 7 S.B.E. 21, 22, 32.

(8) Brahm Vaivart, cited in Mit., I-I-32.

(9) 3 Dig., 484.

(10) 2 Dig., 96.

dowment may be any object, real or imaginary, an idol, a *muth* or other juristic person or a body of men. In either case, they are the direct beneficiaries. But in a wider sense, worshippers and devotees are equally regarded as beneficiaries, if they have the right of offering their devotion and worship to the deity.[1]

(b) Debutter property.

1978. The term "*debutter*" is a popular corruption of the Sanskrit word "*devottar*" which means "dedicated or given to God". As such, *debutter* property is property dedicated to a god or gods.[2] An idol[3] a *muth*[4] or a temple is a juridical person and can hold property. But it is, like the Church, a person in perpetual minority and requires some one to manage its estate. The destruction of an idol does not destroy the endowment[5] since the endowment is not to the idol but to the god of which it is a visible symbol.

(c) What is Dedication.

1979. The term "Dedication" implies an intentional renunciation by the owner of his right in the property that he offers to an idol or any sacred object. A dedication is not a transfer within the meaning of law, though, upon dedication, the property ceases to belong to the owner and its ownership passes to the object concerned. The two cardinal essentials of such dedication are the *sankalp*, and *samarpan* or *utsarga*[6] by spoken words accompanied by libations of water in the presence of a priest or other witness to proclaim the act of voluntary renunciation.

A dedication must relate to a sacred or charitable object. The sacred object may be public or private, existent or brought or to be brought into existence by the founder for which his dedication is made.[7] Hindu law recognizes no distinction between a religious and a charitable object. Consequently, where a dedication relates to a charitable object or purpose, its character, as such, is not to be judged by the limitations of the English statute, which gives to the term "charity" a technical meaning.[8] Any object that is treated as charitable, *e.g.*, the construction of a well, a tank, a reservoir, a *dharmasala*, or a *serai* for the accommodation of the public or any section of it, the opening of *sadarvart*, or a fund, created for the distribution of food and money to all comers, or for the feeding of animals fish or birds and the like, is a charitable object.

1980. Nevertheless, the usual human motives prompt these endowments, and in judging of the character of an endowment, the following questions naturally arise: (1) what is the total value of the estate of the deceased disposed of by his will? (2) what proportion of it was bequeathed to the family god and how much to its members? (3) If the estate be large, and the bequest to the god small, it might be an effort to create a perpetuity and make the estate both impartible and inalienable. (4) If that was not

(1) *Mohiuddin* v. *Soyududdin*, 20 C. 810 (816); *Kazi Hassan* v. *Sagun*, 24 B. 170 (181).

(2) *Shyma Charan* v. *Sagun*, 24 B. 511; *Sripathi* v. *Khudiram*, 41 C.L.J. 22: 82 I.C. 840: (1925) C. 442.

(3) *Pramatha Nath* v. *Pradyumna*, 52 C. 809 P.C.; *Shibessouree* v. *Mothooranath*, 13 M.I.A. 270 (273); *Jagadindra* v. *Hemanta*, 32 C. 129; *Jodhi* v. *Basdeo*, 8 A.L.J. 817: 11 I.C. 47, F.B.; *contra* in *Raghunathji* v. *Shah Lal*, 19 A. 336.

(4) *Babaji* v. *Laxman Das*, 28 B. 215 (223). A *Muth* is known as *Marhi* in Sindh; *Goverdhangir* v. *Vishingir*, 15 S. L.R. 38: 63 I.C. 370.

(5) *Purna* v. *Gopal*, 8 C.L.J. 369.

(6) *Manohar* v. *Bhoopendra Nath*, 60 C. 452 (477) F.B.; *Bhekdhari* v. *Sri Ramchanderji*, 10 Pat. 388 (400); *Chandulal* v. *Rampatmal*, (1933) L. 189 *contra* such ceremonies not necessary, *Prem Nath* v. *Hari Ram*, 16 L. 85.

(7) *Lakshmi Narayan* v. *Gostha Raman*, (1937) C. 327 following, *Bhupati Nath* v. *Ram Lal*, 37 C. 128.

(8) Statute of Elizabeth (43 Eliz., C. 4); *Morris* v. *Bishop of Durham*, 9 Ves. 495.

the object, why was not specific property made over to the god for his maintenance and worship? (5) If the estate was indebted was it an attempt to screen the property from the creditors, was there any reason for making the bequest *benami*. (6) If the endowment was small and all the surplus was left to the legatee, it would be treated as a gift to the legatee with a burthen for the worship of the idol. (7) If the testator was an orthodox idolator, it would account for his bequest to his guardian deity, otherwise it would arouse suspicion. (8) Charitable bequests call for similar scrutiny. (9) In all gifts and bequests made since 1929, the rules of construction of deeds and wills is subject to the statutory control. (10) But in cases decided since, Hindu Law, applicable to religious and charitable grants and bequests still holds good, since an idol is a juridical person in perpetual minority, and any dedication made to it will still be judged by Hindu Law. (11) Consequently, an endowment made in favour of a public religious or charitable object will carry with it the incidents formulated by that law. (12) For instance; where the bequest is to a *math*, its *mahant* takes the estate upon the terms that custom and usage have vested him. (13) If he appoints a *shebait*, law vests in him some degree of proprietary interest, though for the purpose of limitation, that interest must be treated as non-existent. (14) The question whether an endowment creates a public or a private trust is again a question that may call for decision. (15) The Hindu Law of religious and charitable endowments is at present neither wholly statutory nor purely personal. How much of the other applies to a given case depends upon its nature and the circumstances attending it.

(d) **Endowment.**

1981. An endowment is a loose term, and sometimes used in a dual sense as distinguishing the property dedicated to an object as also the object itself. Strictly speaking, it means the one and not the other.

(e) **Pujari.**

1982. As defined under the head "trustee," the manager of a religious object is variously described; but whatever description might be given to him, he is distinct and must be distinguished from a *pujari* who is the officiating priest in charge of the worship, and where the object is charitable *e.g.*, a *dharmashala*, or a hospital, he does not exist, because he is not required. A person may serve both as a *shebait* as well as a *pujari;* but his two functions remain separate.

1983. In the first place, a manager must be distinguished from a superintendent[1] or other officer, in which the trust does not vest, but who is merely to supervise the work of the manager.[2] Such officer performs his prescribed duties, but has neither the rights nor is liable to perform the duties of manager. Then, again, the manager of the trust properties, as such, must be distinguished from the manager of the temple-service and ceremonies which he performs according to the customary ritual. As manager of the properties, he is trustee of the endowment, and his general rights and duties are those of a trustee,[3] which he cannot delegate for performance to another.[4]

Religious Trustee.

1984. The term "trustee" has become engrafted into Hindu Law, in a sense different to what it bears under English Law, a sense in which that term has been

(1) *Ramcharan* v. *Rakbal*, 41 C. 19.
(2) *Ramanathan* v. *Murugappa*, 29 M. 283 (289) P.C.
(3) *Srinivasa* v. *Esalappa*, 46 M. 565 (582) P.C.
(4) *Bannerjee* v. *Sita Nath*, 26 C.W.N. 236 (241) P.C.; *Kotasseri* v. *Kanholi*, (1922) M.W.N. 428.

used in several Acts of the Legislature.[1] The difference between a *shebait* and a trustee in the English sense is this. A *shebait* takes the estate dedicated to an idol upon customary terms, which include some interest in the dedicated property whereas a trustee has, and can have, no such interest. Such is a *dharmadhikari*, who has no right beyond that for personal support.[2] But a *mahant* of a *muth* has larger powers than a *shebait* and is sometimes described as an owner in trust for the *muth*[3] and "the only law of these *mahants* and their offices, functions and duties is to be found in custom and practices which is proved by testimony."[4]

The Position of a Mahant.

1985. The position of the *mahant* must then be now settled to be as follows: "The whole assets (of the *muth*) are vested in him as the owner thereof in trust for the institution itself."[5] "The nature of the ownership is . . . . an ownership in trust for the *muth* or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning *mahant*, the trust does exist and must be respected."[6] "The *mahant*, in their Lordships' opinion, is not only a spiritual preceptor, but also a trustee in respect of the *muth* over which he presides."[7] Adverting to this case, a Madras Bench held it to be a "considered pronouncement as to the position of the head of a *muth*, as to his functions and his legal position with regard to the endowments."[8] In the absence of custom, a *mahant* of a *muth* cannot transfer the right of management vested in him, though coupled with obligation to manage in conformity with the trust annexed thereto.[9]

There is no fixed rule which regulates the relation between a superior and a subordinate *muth*; even if a *muth* is subordinate to another, it must be governed by its own rules of management.[10]

But though a *mahant* does not, as a matter of common law and apart from special usage, possess the power of appointment, he is entitled to appoint a deputy, who may, in due course, succeed to him.[11] It has already been stated (§ **1978**) that a *muth*, like an idol, is a juridical person, capable of acquiring, holding and vindicating legal rights, though, of necessity, it can only act in relation to those rights through the medium of some human agency. In connection with the property of a *muth*, there are two distinct classes of suits, those in which the manager seeks to enforce his private and personal rights, and those in which he seeks to vindicate the rights of the *muth*. The rights of the *muth* cannot ordinarily be prejudiced by the

(1) *Vidyavaruthi* v. *Balusami*, 44 M. 831 (839, 842) P.C. *e.g.*, The Religious Endowment Act (XX of 1863); Charitable Endowments Act (XXVII of 1890); Indian Trustees Act (XXVII of 1866); Trusts Act (II of 1882); The Trustees and Mortgagees Powers Act; (XXVIII of 1866).

(2) *Vidyapurna* v. *Vidyanithi*, 27 M. 435; approved in, *Srinivasa* v. *Evalappa*, 45 M. 565 (581, 582) P.C.

(3) *Arunachellam* v. *Venkatachalapathi*, 42 M. 253 (286) P.C.

(4) *Greedhari* v. *Nund Kissore*, 11 M. I.A. 405 (428); quoted in, *Ram Parkash* v. *Anand Das*, 43 C. 707 (716) P.C.; *Kesho Das* v. *Amardasji*, 14 Pat. 319.

(5) *Ram Parkash* v. *Anand Das*, 43 C. 707 (713) P.C. distinguished in; *Vidyavaruthi* v. *Balusami*, 44 M. 831 (838) P.C. But in *Srinivasa* v. *Evalappa*, 45 M. 565 (582), a *Mahant* was held to possess larger powers than a mere *Dharmkarta*.

(6) *Ib.*, p. 714.

(7) *Ib.*, p. 732.

(8) *Baluswamy* v. *Venkataswamy*, 40 M. 745 (749).

(9) *Rajah Vurmah* v. *Revi Vurmah*, 1 M. 235 P.C.; *Gnanasambanda* v. *Velu*, 23 M. 271 P.C., explained in *Prayad* v. *Kriparam*, 8 C.L.J. 499 (504).

(10) *Prayad* v. *Kriparam*, 8 C.L.J. 499 (505), following *Kashi* v. *Chidumbarnath*, 20 W.R. 217; *Giyana* v. *Kandasami*, 10 M. 375.

(11) *Tiruvambala* v. *Pandaram*, 40 M. 177 (197).

result of a suit of the former class.[1] The head of a *muth* may contract debts for the purpose of the *muth*, and debts so contracted may be recovered from the *muth* property, and will devolve as a liability on his successor to the extent of the assets received by him. But the head of a *muth* cannot pledge its credit for debt contracted for its purposes without necessity and without reference to the question whether they should have been met from current income. In this respect, the head of a *muth* does not possess larger powers than the heads of other religious institutions, whose powers are, analogous to those of the manager of an infant heir.[2]

Dedication—Partial or complete.

260. (1) A dedication of property to an endowment may be partial or complete.

(2) It is partial when there is merely a charge or trust created.[3]

(3) It is complete when the property is dedicated absolutely, and no person has reserved any beneficial interest therein.[4]

Explanation 1.—**The question whether the dedication in a given case is absolute or partial is a question of intention deducible from the construction, execution[5] and effect of its terms.[6]**

Explanation 2.—**The question whether a bequest amounts to a dedication to an object, subject to a charge in favour of another, or is an alienation in favour of the latter, subject to a charge in favour of the object,[7] is a question of intention deducible from the construction and effect of the bequest.[8]**

1986. Partial Dedication.—A dedication may be partial or complete, since a disposition may create a charge or trust in favour of the idol or in favour of the heirs, or any other person, such as the *shebait* or the *mahant*. In such cases, the dedication is complete or partial according as the religious object is the sole beneficiary or merely a beneficiary to the extent of a charge created in its favour. In the one case, ownership of the property vests in the religious object, while in the other case, it vests in the donees or the heirs who take it, subject to a trust, but it descends (and descends beneficially to heirs) subject only to a trust or charge for the purpose of religion.[9] "In such cases, no fixed and absolute rule can be set up, derived alone from the use of particular terms in one portion of the will. The question whether the idol itself shall be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives of the testator for their upkeep, or that, on the other hand, these heirs shall be considered the true beneficiaries of the property, subject to a charge for the upkeep, worship and expenses of the idol, is a question

(1) *Babai Rao* v. *Luxman Das*, 28 B. 215.

(2) *Nataraja* v. *Karutha*, 9 I.C. (M.) 150.

(3) *Jagadindra* v. *Hemanta*, 32 C. 129 P.C.

(4) *Ib.*

(5) *Ganesh Gir* v. *Fatechand*, 31 N.L.R. 282 (288).

(6) *Har Narayan* v. *Surja Kunwari*, 43 A. 291 (293, 295) P.C.; *Surendra Krishna* v. *Ishwar Bhubaneswari*, 60 C. 54 (81, 84).

(7) *Bhekhari* v. *Sri Ramchand*, 10 Pat. 338 (396, 400); *Janardan* v. *Khilishchandra*, (1932) C. 419.

(8) *Manohar* v. *Bhupendra Nath*, 60 C. 452 (490, 491) F.B.; *Surendra Krishna* v. *Ishwar*, 60 C. 54.

(9) *Sonatun* v. *Juggulsoondree*, 8 M. I.A. 66; *Ashutosh* v. *Doorga*, 5 C. 438 P.C.; *Jagadindra* v. *Hemanta*, 32 C. 129 (141) P.C.; *Gopal Lal* v. *Purna Chandra*, 49 C. 459 (465) P.C.; *Janardan* v. *Khitish Chandra*, (1932) C. 419; *Mahimchandra* v. *Hara Kumari*, 42 C. 561; *Bhuggobutty* v. *Gooroo*, 25 C. 112; *Rajender* v. *Shamchand*, 6 C. 106; *Ram Kumar* v. *Jogender*, 4 C. 56; *Sathianama* v. *Savanathanabagi*, 18 M. 266; *Sri Ganesh* v. *Keshav Rao*, 15 B. 625.

which can only be settled by a conspectus of the entire provisions of the will."[1]

1987. So where the testator by will devised all his movable and immovable property to his family idol, and after stating that he had four sons or grandsons in succession, but that they should enjoy "the surplus proceeds only," and the will, after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol and maintain the family, further directed that whatever might be the surplus after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and the family, the testator directed that, after the expenses of the family, whatever net proceeds and surplus there might be should be divided annually in certain proportions among the members of the family, it was held that the bequest to the idol was not an absolute gift but was to be construed as a gift to the testator's four sons and their offspring in the male line, as a joint family, so long as the family remained joint, and that the four sons were entitled to the surplus of the property, after providing for the performance of the ceremonies and festivals of the idol and the provisions in the will for maintenance.[2] In other words, this was a secular bequest in the guise of a religious endowment, but in it the religious motive was not illusory. As Turner, L.J., said: "According to the true construction of the will, the property granted to the idol is effectually granted for the benefit of the testator's four sons and their offspring in the male line as a joint family, subject to the performance of acts, business, ceremonies and festivals and to the provision for maintenance in the will contained, and that the surplus income, after answering the performance of such provisions, is in like manner well and effectually given for the benefit of the four sons and their offspring in the male line in the joint family."[3] This case was followed in another case, in which the court had to decide upon the following facts: The plaintiff sued for partition, alleging the property was joint, but that, out of the profits, certain expenses for the worship of God and performance and celebration of certain religious festivals and ceremonies were incurred, all of which were alleged to be patrimonial, the balance being divided amongst the co-sharers. The defence was that the whole of the Ijmalee land was the property of the idol. It was held that since there was no dedication of the property to the idol by its transfer from the family in its favour, the land was partible, but subject to a trust in favour of the idol.[4]

1988. The converse case was that of the testatrix who left, by will, to her sons lands belonging to her, to support the daily worship of an idol, and defray the expenses of certain other religious ceremonies, with a provision that, in the event of there being a surplus after these uses had been satisfied, out of the revenue of the said lands, such surplus should be applied to the support of the family. It was held that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property, which, after satisfying the religious and cere-

(1) *Harnarayan* v. *Surja Kunwari*, 43 A. 291 (293) P.C.; *Jadu Nath* v. *Thakur Sitaramji*, 39 A. 553 P.C.; *Ishwari Bhubaneshwari* v. *Brojo Nath*, (1937) P.C. 185.

(2) *Sonatun* v. *Juggutsoondree*, 8 M.I. A. 66 (87, 88); *Har Narayan* v. *Surja Kunwari*, 43 A. 291 P.C.

(3) *Sonatun* v. *Juggutsoondree*, 8 M.I. A. 66 (87, 88).

(4) *Ram Coomar* v. *Jogender*, 4 C. 56, following *Sonatun* v. *Juggutsoondree*, 8 M.I.A. 66.

monial trusts, might be considerable and could not be presumed to be valueless. In so holding, Sir Barnes Peakcock said: "It cannot be said that the property was wholly *debutter*. They consider that it created a charge upon the property for the expenses of the daily worship of the idol as it was performed at the death of the testatrix."[1] Referring to these cases, the Privy Council said: "There is no doubt that an idol may be regarded as a juridical person capable, as such, of holding property, though it is only in an ideal sense that property is so held. And probably, this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character. The cases of *Sonatun Bysack* v. *Juggutsoondree Dossee*[2] and *Asutosh Dutt* v. *Doorga Churn Chatterjee*[3] are instances of less complete dedications, in which, notwithstanding a religious dedication, property descends (and descends beneficially) to heirs, subject to a trust or charge for the purposes of religion. Their Lordships desire to speak with caution, but it seems possible that there may be another class of cases of partial or qualified dedication not quite so simple as those to which reference has been made."[4] Then their Lordships confessed that if they had to determine the nature of the dedication in the case before them, they would have felt great difficulty in doing so. This question their Lordships had not to consider for the purpose of the case. But the question raised was whether the land in suit was *debutter*, so granted by Government to the plaintiff's predecessor and so described in the settlement *pattas* of 1868 and 1877, referring to which their Lordships observed: "On the one hand the use of the term 'Shebait' in the settlement *pattas* of 1868 and 1877 and in the plaint in this suit, points rather to a dedication of the completest character. On the other hand, the provisions in those *pattas* which impose liability upon the grantees to the whole extent of their own property, and not merely to the extent of what they might hold as *Shebaits*, suggest a different conclusion. And so does the clause in the *patta* of 1868, empowering Government to determine the term on death."[5] Their Lordships then assumed, for the purpose of their argument, the religious dedication to have been of the strictest character. In another case, the testator had bequeathed his two houses to his two nephews for the worship of a deity installed in one of them and provided for its worship out of the joint income of the houses and the pilgrim's offerings, leaving the surplus to be appropriated by the nephews. The trial judge held the bequest to the temple merely illusory, but the High Court upheld it as a valid endowment without reference to the quantum of income from each source and the expense of worship, and the net surplus that the nephews were to appropriate.[6]

1989. These cases show that there is no fixed rule governing the construction of gifts to idols, which must be construed in accordance with the general rules applicable to the construction of other gifts. Thus, although a will provides that the property of the testator "shall be considered to be the property" of a certain idol, the further provisions such as that "whatever may be saved, after defraying the expenses of the temple

(1) *Ashutosh* v. *Doorga*, 5 C. 438 (443) P.C., following *Sonatun* v. *Juggutsoondree*, 8 M.I.A. 66, followed in *Har Narayan* v. *Surja Kunwari*, 43 A. 291 P.C.; distinguishing *Jadu Nath* v. *Thakur*, 39 A. 553 P.C.; *Surendrakrishna* v. *Ishwar*, 60 C. 54.

(2) 8 M.I.A. 66.

(3) 5 C. 438 P.C.

(4) *Jagadindra* v. *Hemanta*, 32 C. 129 (140, 141) P.C.

(5) *Ib.*, p. 141.

(6) *Murlidhar* v. *Diwanchand*, 38 A. 214.

and the pay of the servants, shall be used by our legal heirs to meet their own expenses," and the circumstances such as that the expenditure upon the idol was fixed and would require only small proportions of the income, may indicate that the intention was that the heirs shall take the property subject to a charge for the performance of the religious purposes named.[1]

Absolute dedication.

1990. On the other side of the line fall cases such as the following: The family dwelling house belonged to a lady who executed a deed of gift purporting to give it to an idol. By this deed, she appointed her sons managers of the trust, and provided that they should live in the house, that they should not be able to partition or sell any part of the endowed property, and that the surplus profits, after providing for the Government revenue, expenses of establishment and worship and salary of the manager, for the time being, should be expended in the purchase of adjacent lands, in the name of the idol, for the accommodation of the families of the managers, and in the erection of a new building thereon. Wilson, J., held this to constitute an absolute gift to the idol, "but that subject to a trust for worship, there was a gift for the benefit of the members of her family mentioned in the deed. . . . The deed in terms gives the house to the idol and appoints the four surviving sons managers. The house is to be the perpetual habitation of the idol.[2]

1991. Under Hindu Law, an idol, as symbolical of certain religious purposes, is capable of being endowed or vested with property. But it is not an essential condition of a valid endowment that it should take the form of an express gift to an idol. All that is necessary is that the religious purposes or objects of the testator should be clearly specified, and that the property intended for the endowment should be set apart for or dedicated to these purposes.[3] In 1544, a village was granted to the head of a Gosavi *muth*, to be enjoyed from generation to generation, and the deed of grant provided that the grantee was "to improve the *muth*, maintain the charity and be happy." The office of the head of *muth* was hereditary in the grantee's family. In 1866, an *inam* title-deed was issued to the then head of the *muth*, whereby the village was conferred on him and his successors, tax-free, to be held without interference so long as the conditions of the grant were duly fulfilled. It was found, regard being had to usage, that the trusts of the institution were the upkeep of the *muth*, the feeding of pilgrims, the performance of worship, the maintenance of water-shed and the support of the descendants of the grantee. From before 1840, it had been usual for the head of the *muth*, for the time being, to make grants to his brothers or younger sons for their maintenance. In 1842, the father of the present plaintiff, being the head of the *muth*, granted certain lands of the village, above referred to, to his younger brother, the deed of grant being in terms absolute. The grantee died about 30 years before the suit, and the lands in question came into possession of the widow and a mortgagee from her respectively. In 1863, the plaintiff's father placed certain other lands in possession of defendant No. 3, who paid rent therefor, and received *pattas* for some years from the plaintiff, who sued for possession, when defendant No. 3 pleaded a

(1) *Har Narayan* v. *Surja Kunwari*, 43 A. 291 P.C.; distinguishing *Jadu Nath* v. *Thakur*, 39 A. 553 P.C., following *Sonatun* v. *Juggutsoondree*, 8 M.I.A. 66; *Ashutosh* v. *Doorga*, 5 C. 438 P.C.; *Surendra Krishna* v. *Ishwar*, 60 C. 54.

(2) *Rajunder* v. *Shamchand*, 6 C. 106 (117, 118).

(3) *Per* Sale, J., in *Bhuggobutty* v. *Gooroo*, 25 C. 112 (127), overruled, on a different point, in *Bhupati* v. *Ramlal*, 37 C. 128 F.B.

right of permanent occupancy. The court, however, ejected him, holding that the village was granted as an endowment for the *muth* and charities connected with it, and that what might remain after due execution of those trusts, was intended to be applied to the maintenance of the grantee or his descendants. An absolute grant could not be made, and the grant was good to that extent only.[1]

1992. There is nothing in law to prevent the creation of an absolute estate in trusteeship, and the fact that trust property is inalienable, would not make the estate in the trusteeship the less an absolute estate, and would not affect the descent of the trust property to the heirs of the donee according to the ordinary law.[2]

Certainty of subject and object: Doctrine of cypres.

261. (1) An endowment must be certain both as to the subject and the object.[3]

(2) Provided that where a specific bequest fails for uncertainty in the object, and there is no direction upon its failure that the bequest should go to the residue, the court will apply the gift *cy pres*, that is to say, to other objects, as nearly as may be, of a similar character.

Illustrations.

(*a*) If a testator says "I bequeath goods to *A*", or "I bequeath to *A*" or "I leave to *A* all the goods mentioned in the schedule, and no schedule is found", or "I bequeath 'money', wheat, 'oil' or the like," without saying how much, this is void.[4]

(*b*) A bequest to such benevolent institutions round about Auckland as my trustee may select is void because of the want of precision inherent in the word "benevolent."[5]

(*c*) The testator bequeaths a sum of money to "*dharm.*" The bequest is void for uncertainty and cannot be applied *cy pres.*[6]

(*d*) The testator bequeathed a sum of money for the erection and maintenance of a hospital to be erected on a portion of his garden house at *E*, to be demarcated by his executors. By the partition of the garden house, the land is not available for the dispensary. The executors are all dead; still the court will frame a scheme for giving effect to the testator's intention as far as possible.[7]

(*e*) The testator bequeathed his estate to trustees for *dharmarth*, a *dharamshala* and for Sanskrit education, the trustees being free to apply the fund on any or all of the three objects, of which the first being void for vagueness, the whole bequest is void on account of the correlation of the void object with the two valid objects.

1993. **Analogous Law.**—The first clause is based upon the broad principle that the court cannot administer a trust unless it is certain of its subject and object. This is now statutorily enacted in S. 89 of the Succession Act, the illustration to which shows the uncertainty in the subject. that is the property intended to be didicated to charity. The second clause is equally supported by S. 87 of the same Act.

1994. **Subject Certain and Uncertain.**—The subject of a charitable bequest must be reasonably certain, that is, it must be ascertainable with a reasonable degree of certainty as to what property the founder has dedicated or set apart for charity. There is this difference between a secular and a charitable bequest that in the latter case, if the testator has supplied a measure of the bequest, the court will ascertain how much should be applied and will settle a scheme.

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(1) *Sathinama* v. *Saravantabagi*, 18 M. 266 (276).

(2) *Guruvajammah* v. *Rungaswamy*, 62 I.C. (M.) 745.

(3) *Chhotabhai* v. *Juanchandra*, (1935) P.C. 97; *Bhuggobutty* v. *Gooroo*, 25 C. 112 (127).

(4) S. 89 Ill., Suc. Act.

(5) *A.-G.* v. *New Zealand Insurance Co.*, (1937) P.C. 8.

(6) *Ranchordas* v. *Parvatibai*, 23 B. 725 P.C.

(7) *A.-G.* v. *Belchambers*, 36 C. 261.

The subject is, however, not uncertain where the testator devises the remainder over, after a succession of life-estate, to charity.[1] So, he may devise the income of a certain field or fund, the rent of certain properties,[2] half his income[3] or a sum of money[4] specified or unspecified provided its amount can be estimated. Such was the bequest to "get a *Shiva* temple erected at a reasonable cost in a suitable place," which the court fixed at Rs. 2,843-10-6, being 3 per cent. of the value of the movable property left by him.[5]

1995. The dactrine of *cy pres*, as applied to charities, rests on the view that charity in the abstract is the susbtance of the gift and the particular disposition merely the mode, so that, in the eye of the court, the gift, notwithstanding the fact that the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse. It cannot be laid down as a general principle that the *cy pres* doctrine is displaced where the residuary bequest is to a charity, or that among charities, there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the scope of the charitable object is such, or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it.

1996. On the failure of a specific charitable bequest, jurisdiction arises to act on the *cy pres* doctrine, whether the residue be given in charity or not, unless, upon the construction of the will, a direction can be implied that the bequest, if it fails, should go to the residue.

In applying the *cy pres* doctrine, regard may be had to the other objects of testator's bounty, but primary consideration is to be given to the gift which had failed, and to a search for objects akin to it. The relief of misery in a particular locality may guide the court in framing a *cy pres* scheme to benefit that locality. Unless the *cy pres* scheme framed by the lower court be plainly wrong, a court of appeal should not interfere with it.[6]

1997. In the first place, the *cy pres* doctrine only applies to religious and charitable bequests. It has no application to bequests generally.[7] In the second place, the doctrine has no application even as regards charitable bequests, where there is a direction that, on failure of the bequest, the property shall fall into residue, or where the objects of the original trusts are capable of being carried into effect but remain unsatisfied, or where the original trusts are still subsisting. As the Privy Council observed: "The jurisdiction of the court, to act on the *cy pres* doctrine, upon failure of a specific charitable bequest, arises whether the residue be given to charity or not, unless upon the construction of the will, a direction can be implied that the bequest, if it fails, should go to the residue."[8] This passage occurs in a case in which the

(1) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.; *Gobind* v. *Gomti*, 30 A. 288.

(2) *Moraji* v. *Nenbai*, 17 B. 351; *Jamnabai* v. *Khimji*, 14 B. 1.

(3) *Jadunath* v. *Sitaramji*, 39 A. 533 P.C.

(4) *Gordhan* v. *Chunnilal*, 30 A. 111; *Rajendra* v. *Raj Coomari*, 34 C. 5 (Money includes investments); *Callicart* v. *Eyskene*, (1918) 1 Ch. 33.

(5) *Gokool* v. *Issur*, 14 C. 222 (230).

(6) *Mayor of Lyons* v. *A.G.*, 1 C. 303 P.C.

(7) *A.-G.* v. *Haberdashers Co.*, 1 My. & K. 420; *Thomson* v. *Shakespeare*, 1 De G. F. & J. 399; *Carve* v. *Long*, 2 De G.F. & J. 75; *Re Clark*, 1 Ch. D. 497; *Pearse* v. *Pattinson*, 32 Ch. D. 154, cited in 4 Hals. L. E. § 346, p. 197.

(8) *Mayor of Lyons* v. *Advocate-General*, 26 W.R. 1 (7) P.C.

testator had made a bequest for the discharge and relief of poor debtors detained in prison in Calcutta, which failed by reason of the abolition of imprisonment for debt, but the privy Council held that the gift was capable of being applied *cy pres*, notwithstanding that the residuary bequest was to charity; that upon the construction of the will, there was not such a necessary inference of intention to be found in the terms and provisions of the will as to raise the implication of a bequest over by the testator of these legacies upon the failure of the particular charities, and that the appellant was not competent under his present petition, which was confined to a claim of the share of the residue as residuary legatee, to reopen the scheme, which had been settled and confirmed by the High Court, for the *cy pres* application of the fund in dispute, on the ground that the appellant was excluded from participation therein.[1]

1998. Charitable Bequest.—The essential characteristic of a charitable bequest is that it must be for the benefit of the public or mankind. A bequest to a poor relation or friend by name, howmuchsoever charitable in intention and in fact, is not a charitable bequest in law. In this respect there is no distinction between the English and the Indian view of the subject. So, in an old English case, charity is defined as a "gift to a general public use, which extends to the poor as well as to the rich."[2] The difficulty of attempting an exhaustive enumeration of objects which constitute charity is obvious and admitted.[3] But it is not difficult to understand what charity means. The difficulty arises when it is diverted from its public purpose and becomes what is sometimes called "a private charity," which, however, is only a charity in the legal sense when it is at least a charity restricted to a special class or administered by individuals without the intervention of any corporate organization.[4] "Each particular object may be private, but it is the extensiveness which will constitute it a public charity."[5]

1999. Both the English and the Indian rules of construction permit a latitude of construction in giving effect to the testator's religious or charitable bequests which, if made to an individual, would be unquestionably void. Charitable bequests are no exception to the rule that a benignant construction must be placed upon wills and charitable bequests.[6] In ascertaining whether or not a general intention to make a bequest to a public charity is expressed with definiteness, the test to be applied is, whether a man of ordinary common-sense, wishing to follow the directions of the testator with a willing mind, will have any practical difficulty in giving effect to the bequest. So, where the testator directed his brothers to start a *"sadavart"* for the needy in his name, and the bequest was opposed as void for uncertainty, though it was admitted that *"sadavart"* meant charity which took the form of a periodical distribution, at regular intervals, of money and goods, the court held the bequest good, on the ground that the testator had expressed his general intention to give a legacy to charitable purpose, and only left uncertain the particular mode by which his intention was to be carried into effect.

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(1) *Mayor of Lyons* v. *A.-G.*, 1 C. 303 P.C.

(2) *Jones* v. *Williams*, (1767) Amb. 651.

(3) *Attorney-General* v. *Pearce*, (1740) 2 Atk. 87; *Hall* v. *Darby Sanitary Authority*, 16 Q.B.D. 163.

(4) *Sinclair*, In re, (1884) 13 L.R. Ir. 150 (154).

(5) *Nash* v. *Morley*, 5 Beav. 177 (183).

(6) *Per* Lord Loreburn, L.C., in *Weir* v. *Crum Brown*, (1908) A.C. 162 (167).

In such a case, the trustees or, failing them, the court could draw up a scheme giving effect to the testator's general intention.[1]

2000. The courts have accordingly upheld bequests for performing the testator's funeral ceremonies and for feeding Brahmins according to the custom of the caste,[2] or for feeding and paying Brahmins on the day following the *Shivaratri* festival,[3] or for feeding indigent men at the outer gate of his house.[4] So, where a gift was made to the inmates of a hospital, it was held that the gift was in reality for the proper management and use of the hospital. Gifts to charitable institutions are valid and upheld, even though the institution be not a corporate body, provided there is some responsible authority charged with the general administration of the funds of the institution.[5]

2001. As compared to this, the following are more certain, *e.g.*, settlement of Rs. 500 a month for continuance of the charity at the testator's *dharamsala* at Benares,[6] or for the construction of a temple to *Shiv* within the compound of a specified house.[7] On the same ground the bequest of the income derived by the testator's securities "to the oldest respectable inhabitant of Gunville" was upheld as a charitable bequest, intended to bring comfort and relief to some old people in straintened circumstances.[8]

2002. The principle of Hindu Law, which invalidates a gift other than to a sentient being capable of accepting it[9] does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, and does not make such a bequest void.[10] So, a direction to establish a *Thakur* at a place to be selected by the executors has been upheld,[11] as was the direction that the executors should get a *Shiva's* temple erected at a reasonable cost in a suitable place within the compound of the brick-built *baithakkhana* house inclusive of the building and garden thereof.[12] So are bequests to build a well and *avada* or cistern for animals to drink out of[13] or for the performance of *shradh* and the giving feasts to brahmins.[14] So was a bequest for the worship of *Shiv Thakur*[15] and *dharm sabha*

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(1) *Jamunabai* v. *Khimji*, 14 B. 1; *Advocate-General* v. *Strangman*, 6 Bom. L.R. 56 (*Sadavart* and *Anna Chatra* the same); *Krsihna Bai* v. *Notan Das*, 3 S.L.R. 185: 4 I.C. 1158.

(2) *Lakshmi* v. *Baijnath*, 6 B. 24.

(3) *Kedar* v. *Atul*, 12 C.W.N. 1083.

(4) *Rajendra* v. *Rajcoomari*, 34 C. 5.

(5) *Fanindra* v. *A.-G.*, 6 C.W.N. 321.

(6) *Gordhan* v. *Chunnilal*, 30 A. 111 (112).

(7) *Gookool* v. *Issur*, 14 C. 222.

(8) *Lucas*, In re, (1922) 2 Ch. 52.

(9) *Moti Vahoo* v. *Mamoobai*, 21 B. 709 P.C.

(10) *Bhupati* v. *Ramlal*, 31 C. 128 F. B., overruling *Upendra* v. *Hemchandra*, 25 C. 405; *Rajomoyee* v. *Troylukho*, 29 C. 260 (273, 274); *Nogendra* v. *Benoy*, 30 C. 521. To the same effect, *Moharsingh* v. *Het Singh*, 32 A. 337; *Chatur Bhuj* v. *Chaterjit*, 8 A.L.J. 34; *contra* in *Phundan* v. *Srimatarya*, 3 A. 793.

Per MacDonell and Tottenham, JJ.: "We believe that, according to Hindu notions, when an idol has once been, so to say, consecrated by the appropriate ceremony performed and *mantra* pronounced, the deity of which the idol is the visible image, resides in it, and not in any substituted image, and the idol as spiritualized, becomes what has been termed a juridical person. It does not by any means follow that, because the idol now in question has passed into the possession of the defendant, together with the property dedicated to it, it has thereby fallen into the condition of a last or broken idol, which by Hindu Law may be replaced."—*Doorga* v. *Sheo Prashad*, 7 C.L.J. 278 (280, 281).

(11) *Rajamoyee* v. *Troylukho*, 6 C.W.N. 267.

(12) *Gokool* v. *Issur*, 14 C. 222.

(13) *Jamnabai* v. *Khimji*, 14 B. 1.

(14) *Lakshmi* v. *Baijnath*, 6 B. 24 (25).

(15) *Kedar* v. *Atul*, 12 C.W.N. 1083, following *Dwarkanath* v. *Burroda*, 4 C. 443, followed in *Lakshmi* v. *Vaijnath*, 6 B. 24 (25).

with a power to the executor to receive the surplus income after defraying expenses but with no power to alienate the property.[1] So, again, was a direction to executors and trustees to "pay to my sons or their heirs and representatives such sums for the *seva* or service of my family idols and the usual *pujas* that are celebrated in my house and the periodical *shradh* of my ancestors, of my late wife and of myself, when dead, as to the executors and trustees may seem fit and proper."[2] A bequest to a charitable object to be selected by the executor is, of course, a valid charitable bequest, since its object is certain, in that it is capable of being made certain by the executor,[3] though on this point contrary is also maintained.[4]

Bequests void for uncertainty.

2003. But the case was held to be different where the executor was to apply a bequest for "such charitable uses or for such emigration uses,"[5] or "to charitable or other indefinite uses."[6] Such will be a bequest for *sarakam"* or good works,[7] or "for purposes of popular usefulness or for purposes of charity," as the executors, may, in their plenary discretion, select,[8] or any similar vague purposes which the executor might select to spend the same, "in proper and just acts for the testator's benefit".[9]

Such is a bequest to "dharm," a vague expression connoting "virtue," legal or moral duty and law. A bequest to "dharam" *simpliciter,* or when coupled with equally vague explanations such as "dharam or doing all good acts of a permanent nature and acting in such a manner as to give me a good name,"[10] and similar bequests are void, both because of vagueness and because their object can only be attained by the creation of a trust which cannot be administered effectively.[11]

Since a charitable bequest is mixed up with "popular" or useful" purposes, it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them, such as "charitable or benevolent,"[12] or "charitable or philanthropic" or "charitable or pious" purposes, or where the description includes purposes which may or may not be charitable, such as undertakings of public utility, and a discretion is vested in the trustees, the whole gift fails for uncertainty.[13]

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(1) *Benodi* v. *Sita Ram,* 6 A.L.J. 144: 1 I.C. 666.

(2) *Ananda* v. *Rajendra,* 4 B.L.R. (O.C.) 231; *Profulla* v. *Jogendra,* 9 C.W. N. 522.

(3) *Parbuti* v. *Rambharun,* 31 C. 89.

(4) *Surbomingola* v. *Mohendranath,* 4 C. 506; *Jamunabai* v. *Dharsey,* 4 Bom.L. R. 893.

(5) *Hingeston* v. *Sidney,* 1908 1 Ch. 488.

(6) *Hunter* v. *A.-G.,* 1899 A.C. 309.

(7) *Baji* v. *Jamna Das,* 22 B. 774.

(8) *Trikum* v. *Haridas,* 31 B. 583, following *Runchor Das* v. *Parvati Bai,* 23 B. 725.

(9) *Gokool* v. *Issur,* 14 C. 222.

(10) *Motiwahoo* v. *Mamoobai,* 21 B. 709 P.C.: 1 B. H. C. R. 71; *Cursandas* v. *Vundravandas,* 14 B. 482; *Morarji* v. *Nenbai,* 17 B. 351; *Devashankar* v. *Motiram,* 18 B. 136; *Vundravandas* v. *Cursandas,* 21 B. 646; *Runchordas* v. *Parvatibai,* 23 B. 725; *Parthasarathi* v. *Thiruvengadam,* 30 M. 340 (*per* Subramanya Iyer, J., *dissentient*); *Upendra Lal* v. *Hem Chandra,* 25 C. 405; *Gurdit Singh* v. *Sher Singh,* 14 I.C. 247.

(11) *See* the subject discussed in 3 Gour's Law of Transfer (6th Ed.), §§ 3657-3660.

(12) *A.-G.* v. *Brown,* (1917) A.C. 393 (395, 396).

(13) *Per* Lord Davey in *Hunter* v. *A.-G.,* (1899) A.C. 309 (323), followed in *Trikumdas* v. *Haridas,* 31 B. 583 (585).

Such would be an endowment for the worship of God without specifying the deity.[1] Such is a bequest to "the *Thakurji* in his *thakurdwara*,"[2] though in this case there was evidence that the testator was building a "*thakurdwara*" or temple for installation of the image of "*Thakurji*" or Ramchand. In this view, it is submitted that the case was wrongly decided as both the subject and the object were ascertainable with reasonable certainty, and in any case, the application of *cy pres* should have been considered.

But there can be no doubt that a bequest to spend the residue of a fund "in proper and just acts for the testator's benefit" is wholly void for the reason given by Lord Davey in the case before cited.[3] Such would also be a devise to "religious purposes," since, in a Hindu mind, the phrase might denote something more than and different from charitable purposes.[4] But a bequest that the income of certain property was "to be devoted to religious and charitable purposes under the direction of my executor" was declared to be valid charitable bequest.[5] And the same view was taken of another bequest of "the residue of my estate in charity and in such manner and to such religious and charitable purposes as he (the executor) may in his discretion think proper."[6] These cases shew that a bequest for the "religious purpose may fail for uncertainty, but one for a "charitable and religious" purpose may succeed, because the courts construe charitable bequest *cy pres* which they cannot in the case of a purely religious bequest.[7]

2004. A bequest to the testator's agnates or to Brahmins is void for ambiguity as to the object, in that it is uncertain as to which of them the testator intended to take.[8]

Kinds of Endowment: Religious, Charitable, Public, Private.

262. An endowment may be wholly or partially religious or charitable, public or private.

(1) A religious endowment is one which has for its object the establishment, maintenance or worship of an idol, deity or any other object or purpose subservient to religion.

(2) A charitable endowment is one which has for its object the benefit of the public or of mankind.[9]

(3) An endowment is public if the dedication is for the use or benefit of the public.

(4) An endowment is private if the dedication is limited to a family god, a family or families or small and certain body of individuals, to which the public have no access.

2005. Analogous Law.—Hindu law makes no distinction between charitable and religious endowments, but such distinction now exists and is statutorily recognized.[10] An endowment of either kind may be public

(1) *Chandi* v. *Haribala*, 46 C. 951.
(2) *Phundun* v. *Arya*, 33 A. 793.
(3) *Gokool* v. *Issur*, 14 C. 222.
(4) *Parbati* v. *Ram Barun*, 31 C. 895 (898).
(5) *Advocate-General* v. *Damothar*, 1 B.H.C.R. 76-*n*; *Ram Gopal* v. *Sib Kissen*, 1 B. H. C. R. 76-*n*; *Parbati* v. *Ram Barun*, 31 C. 895 (899).
(6) *Parbati* v. *Ram Barun*, 31 C. 895 (898, 899).
(7) *Muthukrishna* v. *Ramchandra*, 37 M. L. J. 489; *Sundar Lal* v. *Kullu Ram*, 65 I.C. (L.) 820.
(8) *Shyama* v. *Naba*, 17 C.W.N. 39: 14 I.C. 708.
(9) Charitable Endowments Act (VI of 1890).
(10) *Ibid.*

or private. The former has been the subject of legal protection, though it is not defined. The following definition of charitable purpose occurs in the Charitable Endowments Act.[1]

Definition.

"S. 2. In this Act, 'charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worsip."

2006. S. 17 of the Transfer of Property Act also alludes to religious and charitable endowments as being for "the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind." There is a clear distinction between religious and charitable endowments: the one proceeds from a motive of piety, the other from benevolence. But in practice, the two are, at times, combined, as where an endowment is made for the establishment of a temple and distribution of alms to the poor. But an endowment may be charitable without being religious. Such is an endowment to found a professorship,[2] a university,[3] or to support a *sarai, dharmasala* of a hospital.[4]

History of English Endowments.

2007. Gifts for religious and charitable uses have been the first to be favoured in all countries overridden by priestly influences. In mediaeval Europe, practically everything a man possessed was left to the Church. And similar abuses had crept into England, till they brought into existence the Statute,[5] passed in 1547, restraining bequests to superstitious uses, which ordained that if any real or personal property whatever shall have been, or shall be, since assigned, limited, or appointed to have continuance for ever, or for a time only, towards or for the finding or maintenance of a stipendiary priest, or for the maintenance of an anniversary or obit, or chapel, or other like intent, these, and such like gifts and dispositions as these, are to be accounted within the superstitious uses intended to be suppressed by the Act. Establishments or foundations for securing prayers for the souls of the dead were to be deemed superstitious within the Statute.[6] Other bequests to superstitious uses, not mentioned by the Act, are deemed void by the general policy of the law, *e.g.*, a devise for the good of the soul of the devisor.[7] The Statute provides that bequest made void by it shall vest in the Crown beneficially, though if it is for charitable purposes, the Crown may order to what charitable purpose it shall be disposed.[8] This Statute was amended and re-enacted from time to time,[9] and it was consolidated and re-enacted as the Mortmain and Charitable Uses Act, 1888.[10]

2008. In India, the statute prohibiting the gift or devise of property to superstitious uses was never in force, and there is no other law to restrain the priestly inculcations to make pious and charitable bequests in the name of religion.

2009. Endowments: Public and Private.—The distinction between religious and charitable, and public and private is of later

(1) Act VI of 1890.
(2) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.
(3) *Manorama* v. *Kalicharan*, 31 C. 166.
(4) *Fanindra* v. *Administrator-General*, 6 C.W.N. 321.
(5) 1 Edw. VI, C. 14.
(6) *Attorney-General* v. *Fishmongers' Co.*, 2 Beav. 151.
(7) *R.* v. *Lady Portington*, 1 Solk, 162.
(8) *Ib.*
(9) (1735) Mortmain Act (9, Geo. II, C.-36).
(10) 53 & 54 Vict., C. 16 (1890).

growth, since Hindu law, which dealt with coparcenary property, as a rule, and self-acquired property as a mere exception, afforded no ground for such bequests. The distinction between them is not even yet clearly defined, or in fact, defined at all. For while several Acts of the Indian Legislature provide for the protection of religious and charitable endowments, they treat the two as identical, and while some of these Acts prescribe a remedy for abuse in the case of public trusts, they do not attempt to define them nor is a clear definition possible, since trusts are often a blend of a religious charitable nature and they may be partially public and partially private. In the latter case, the question is often one of degree. Apart from it, one distinction between a public and a private trust appears to be that the one deals with the public generally or with a defined section thereof, which is, nevertheless, an uncertain and a fluctuating body of men who participate in its benefit;[1] while a private endowment is one limited to a defined body of men, such as the members of one's family or the like. Where the endowment relates to an idol or a temple, the same distinction marks its public or private character. If the idol is a family *Thakur*, installed for worship of the members of the family, it is a private endowment, though the *Thakur* may be widely worshipped by the entire Hindu Community. Even a place may be open to the public and yet not be a public endowment within the meaning of law. For instance, the founder may construct a *serai* or a *dharamshala*, for the accommodation of travellers, but if he keeps the key and can exclude any of them from entering it, it would not be a public endowment but a private property of the founder.[2] But if in this case, the founder had dedicated the property to the public, he could not exclude the public for whose benefit he had made the dedication.[3] Such dedication cannot be inferred from the mere execution of a deed of gift, though it is an evidence of it,[4] though it is not the same as dedication in Hindu law which requires the dual rite of *sankalp* (resolve) and *samarpan* (renunciation) whereby the property is completely given away and the owner completely divests himself of the ownership of the property.[5] Of course, such dedication may be inferred from the course of conduct of the founder, his heirs and of the committee of management or in fact, from any fact or circumstance showing that the public used the institution as a public trust and that it was so used and treated.[6]

2010. Public Endowments.—Where the nature of the trust cannot be ascertained from the deed of endowment, its character has to be ascertained from extrinsic evidence as to the founder's intention and how it was regarded by the founder or his family and the public, if any, interested in it. Two facts are in this case material: (*i*) How was it regarded by the founder and his heirs, and (*ii*) how was it regarded by the public? If, for instance, there is anything to show that the founder intended to

(1) *Debrus* v. *Abdoor Rahman*, 23 W.R. 453 (454).

(2) *Chandu Lal* v. *Rampat Mal*, (1933) L. 189.

(3) *Deoratan* v. *Deoki*, 3 Pat. 842; *Bhekdhari* v. *Sri Ramchand*, 10 Pat. 388 (397, 398); *Chandu Lal* v. *Rampat Mal*, (1933) L. 189; *Bansilal* v. *Govindlal*, (1932) B. 439.

(4) *Bhekdhari* v. *Sri Ramchand*, 10 Pat. 388 (399, 400) following *Deosaran* v. *Deoki Bharthi*, (1924) Pat. 657.

(5) *Manohar* v. *Bhupendra*, 60 C. 452 (476) F.B.; *Deosaran* v. *Deoki Bharthi*, (1924) Pat. 657 (661); *Bhekdhari* v. *Sri Ramchand*, 10 Pat. 388 (389).

(6) *Lakshman* v. *Subramania*, (1924) P.C. 44; *Prakash Chandra* v. *Subode Chandra*, (1937) C. 67 (79); *Chintaman* v. *Dhondo*, 15 B. 612; *Jugal Kishore* v. *Lakshman*, 23 B. 659 (664).

benefit the public as that it was open to them, and that the customary religious festivals had been celebrated there in a public manner, the court may treat the trust as public.[1] The fact that a temple is open for public worship, that the rites and ceremonies are such as are observed in public temples, and that numerous *inam* lands have been granted to the temple, constitute strong evidence of its public character.[2] To be public, it is not necessary that the institution should be open to the public at large. All that is necessary is that it should benefit a caste, a section of a caste, a class or a body of men sufficiently general to be called public.[3]

2011. Private Endowments.—Turning next to private endowments, it has been held that the distinction between this and a public endowment depends upon its extensiveness.[4] One form of such endowments takes the form of a family trust, in which the estate is tied up in the name of the family *Thakur*, for the benefit of the family, which brings to view the distinction between the real and an illusory dedication. But this amounts to a *benami* transaction.[5] That apart, there are certain private dedications in which the trust is intended to benefit, wholly or partially, the family deity, in which case, the further question arises whether the beneficiary is the *Thakur*, or the family. The distinction is material, since if the beneficiary is the *Thakur*, charged with the trust of maintenance of the family, the latter cannot deal with the property as their own. If, on the other hand, the family is the beneficiary, charged with the maintenance of the *Thakur*, they have the ordinary rights of owners only burdened with the trust, which they are liable to discharge. (**S. 260.**) Cases have occurred where the dedication to an idol is not absolute but merely partial.[6] The question is one of construction, intention,[7] and effect, which is a question of fact, and not one of law, depending upon the terms and conditions of the deed, and the conclusion to be drawn therefrom.

Proof of Private Endowments.

2012. The question whether an endowment is public or private is one intention[8] which may be gathered from the deed of dedication (**S. 259**) contemporaneous acts[9] and usage.[10] The ordinary instance of a private endowment is a family trust for the worship of a family idol.[11] In such a case, the only worshippers, as of right, entitled to worship it are the members of a family. But between such private idol and a public one, there are numerous degrees of ownership and rights. The true test of a place, whether it is private or a public one, is whether

(1) *Lakshmi* v. *Murasi*, 5 O.L.J. 97: 45 I.C. 231.

(2) *Jafar* v. *Ibrahim*, 24 M. 243; *Muthia* v. *Periannan*, 4 M.L.W. 228: 34 I.C. 551; *Puravia* v. *Poonachi*, 40 M.L.J. 289: 62 I.C. 655; *Pujari* v. *Goundan*, 29 C.W.N. 112: 81 I.C. 518: (1924) P.C. 44; *Mandacheri* v. *Thachangat*, (1934) P.C. 230.

(3) *Sathapayar* v. *Periasami*, 8 C. 32; *Baswa* v. *Bhagwan Kaur*, 17 I.C. (L.) 270.

(4) *Shaw* v. *Halifax Corporation*, (1915) 2 K.B. 170 (181); *Verge* v. *Somerville*, (1924) A.C. 496; *Prakash Chandra* v. *Subodh Chandra*, (1937) C. 67 (79).

(5) *Mahatab Chand* v. *Tej Chundra*, 5 B.S.R. 314: 7 I.D. (O.S.) 571; *Braja Sundari* v. *Lachmi*, 2 B.L.R. 155, affirmed O.A. 15 B.L.R. 176 (foot-note) P.C.

(6) *Iswar* v. *Khitish Chandra*, (1932) C. 419.

(7) *Surrendrakrishna* v. *Ishwar Bhubaneshwari*, 60 C. 54 (71).

(8) *A.-G.* v. *Mayor of Bristol*, 37 E.R. 640 (649).

(9) *A.-G.* v. *Corporation of Rochester*, 43 E. R. 1079 (1089); *A.-G.* v. *Skinner's Co.*, 58 E.R. 470 followed in *Kumaraswamy* v. *Lakshmana*, 53 M. 608; *Puran Das* v. *Shiromani*, 15 L. 732.

(10) *Kumaraswamy* v. *Lakshmana*, 53 M. 608; *Puran Das* v. *Shiromani*, 15 L. 732.

(11) *Gopal Lal* v. *Purna Chandra*, 49 C. 459 (468) P.C.

the public have acquired a right to go to it[1] for certain purposes, it may be, for worship merely. In such a case, the fact that the temple was erected by some one who opened it and installed therein an idol at his own cost would be evidence of its origin, but it is well-known that such temples are dedicated by pious founders to the use of the public, which includes, as already stated, a section or sub-section of the people, caste or community. When a temple was erected upon land, one half of which had been given to the priest, and the other half was purchased for the purpose of building the temple, and the temple constructed out of funds raised by public subscription it could not be described otherwise than as a public temple.[2] The fact that the admission of the public is subject to rules,[3] or the payment of an admission fee, or that the public go there because of the sanctity of the priest does not suffice to make it private.[4]

2013. Hindu foundations are, as a rule, intended to be for the benefit of the public, and private ownership is an exception, and not the rule.[5] But such exceptions do exist, where, for instance, the donor dedicated certain houses for the maintenance or an idol, installed by him in one of them, appointed himself as its *shebait*, and provided for his successors from his own family, the mere fact that the whole of the income from the endowed property was to be appropriated for the service of the temple and charities connected therewith, including the feeding of students and the poor, would not make it a public endowment, as such charities are incidental to private trusts.[6] So where a temple is constructed within one's compound or on a site contiguous to it, it would indicate an intention to treat it as a private temple and the fact that the idol is fixed (*achal*) does not make it a public temple.[7] The question in such cases is whether the charities are optional or compulsory, only morally or legally obligatory.[8] Here again, the question is reduced to one of intention and usage.[9] So where properties, both religious and non-religious, are granted at various times by one person to another, and the latter treats them as his private properties, subject to partition, the court held the non-religious grants as personal to the grantee, a holyman, and the religious lands as impartible and as made not to the person but to the office.[10] A grant of land or any other property by a disciple to his spiritual preceptor is *prima facie* a personal grant, both heritable and transferable, if it appears that it was intended to perpetuate the spiritual family of the preceptor by providing for succession in the line of his disciples.[11] So if the dedication was to a private deity, temple or shrine, the fact that the public were admitted to it would not make it a public trust.[12] The fact that a large number of persons are interested in an endowment may be some evidence of its public character, but it is of itself inconclusive, since a family idol may be the subject of ownership of a numerically large number of members

(1) *Premo* v. *Sheo Nath*, (1933) O. 22.
(2) *Oseri* v. *Bawa Balmukandass*, 24 I.C. (S). 712.
(3) *Basawa Singh* v. *Bhagwan Kuar*, 17 I.C. (L.) 270.
(4) *Puraviya* v. *Poonachi*, 62 I.C. (M.) 655.
(5) *Subramania* v. *Lakshmana*, 54 I.C. (M). 177.
(6) *Sathappayyar* v. *Periasami*, 14 M. 1; followed in *Prasad Das* v. *Jagannath*, 60 C. 538 (543); *Cf. Krishnaswami* v. *Avayambal*, (1933) M. 204.
(7) *Premo* v. *Sheo Nath*, (1933) O. 22.
(8) *Ram Prasad* v. *Ram Kishan*, 11 Pat. 594; *Bhekdhari* v. *Sri Ramchand*, 10 Pat. 388.
(9) *Mahomed Khazim* v. *Ali Saghir*, 11 Pat. 288.
(10) *Sethuramaswamiar* v. *Meruswamiar*. 41 M. 296 (304, 305) P.C.
(11) *Sathapayyar* v. *Periaswami*, 14 M. 1 (6,7).
(12) *Chinna Venkata* v. *Hindu R. E. Bd.*, (1938) M. 214.

of the family than an idol set up by an obscure sect. Again, suppose a hundred persons combine to erect a shrine, they do not by that very fact make it any more a public trust, than if they had constructed a house for their residence. But the case would be different where from the nature of the building, *e.g., a dharamshala*[1] or *a serai*, a dedication to the public would be presumed; *a fortiori* where there is evidence of dedication,[2] which may be rebutted by the evidence that the owner kept the key and his permission was necessary to occupy it.[3] The question in such cases is not whether the public go but rather whether they have a right to do so and the *shebait* has no power to exclude them.[4] Apart from dedication its user would, as already observed, determine its character. As such, the court took judicial notice of the fact that the Nair temples and their lands in Malabar are as a rule privately owned by the *tarwads* or large family corporations and that the very contrary is the case in the rest of Madras Presidency.[5]

2014. A public endowment may be reduced to private ownership by adverse possession,[6] which, in the case of a permanent alienation made by a *mahant* who could only alienate it for legal necessity, would comment on his ceasing to be *mahant* by death, or otherwise.[7]

Mixed Endowments.

2015. In not a few cases, an endowment is partially public and partially private. Such is the case where the donor sets apart a portion of his bounty to pious user and the rest is given for the maintenance of a certain person and his decendants, or disciples.

Sums set apart for this purpose may not even be defined, *e.g.*, where the surplus income from the worship and certain charities is left to be appropriated by the priest. It is clear that in such case the trust cannot be deemed to be wholly public or wholly private. The difference is important both as regards the question of accountability as also the necessity of sanctity of sanction for a suit thereon. **(S. 283.)**

Form of an Endowment.

263. (1) An endowment may be made directly or indirectly, by a grant, gift or bequest, trust or otherwise, orally or in writing.[8]

(2) When it is in writing and the alienation amounts to a gift or will, or a trust, and relates to immovable property of the value of Rs. 100 or upwards, it must be registered in accordance with the provisions of the statute law.[9]

(3) Where, however, it is made in any other form, it will be complete when it amounts to a dedication under Hindu Law.[10]

(4) As such, such dedication, whether it relates to movable or immovable property of any value, may be direct or indirect; if direct it

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(1) *Jugalkishore* v. *Lakshman Das*, 23 B. 659.
(2) *M. Sirajut Haq* v. *Imamuddin*, 19 A. 104 (108).
(3) *Chandulal* v. *Rampat Mal*, (1933) L. 189.
(4) *Premo* v. *Sheo Nath*, (1933) O. 22.
(5) *Mundacheri* v. *Achuthan*, (1934) P.C. 230 (231, 232).
(6) *Kumaraswamy* v. *Lakshmana*, 53 M. 608 (619).
(7) *Ramcharan* v. *Naurangi Lal*, 12 Pat. 251 P.C.; *Sri Chidambara* v. *Manickam*, (1933) M. 481.
(8) *Gangi* v. *Tammi*, 50 M. 421 (425) P.C.
(9) S. 17 Registration Act, S. 63, Succession Act.
(10) S. 259, *see* "Dedication".

must be made in the form of a formal dedication by *sankalp* and *samarpan* or *utsarga* as hereinbefore defined in section 259.[1]

2016. How Endowment may be created.—A religious and charitable endowment may be created by gift or devise. Where it is created by gift, it is not subject to the provisions of S. 123 of the Transfer of Property Act. And as neither the Trusts Act nor the English Law of trusts[2] applies to such endowments,[3] it need not be in writing registered as therein provided.[4] Even the creation of a trust is not necessary. As West, J., said: "A Hindu who wishes to benefit a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the charity, or at least protect it so far, at any rate, as it is consistent with his own *dharm* or conceptions of morality. A trust is not required for this purpose; the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English Law. In early times, a gift placed, as it was expressed, "on the altar of God," sufficed to convey to the church the lands thus dedicated. Under the Roman Law of pre-Christian ages, such dedications were allowed only to specified national deities. After Christianity had become the religion of the empire, dedications to particular churches or for the foundation of churches and of religious and charitable institutions were much encouraged."[5] They have been also encouraged by the Hindu Smritikars.

There being no legal prohibition against the creation of an oral endowment, an endowment may be created by word of mouth[6] or in writing at the discretion of the founder.[7]

2017. Registration When Necessary.—This section only deals with the *creation* of an endowment, but not with the endowment of an existing foundation. If, for instance a person wishes to endow a temple, *muth* or an idol, his endowment must take the form of a gift, either to the trustees or to the idol. In the first case, the gift would, it is said, be subject to S. 123 of the Transfer of Property Act, though not if the gift is made directly to the idol.[8] For although all Hindu gifts are now subject to the provisions of chapter VII (Ss. 122-129) of the Transfer of Property Act, that chapter by operation of S. 5 is limited to a transfer "to one or more living persons" and thereby excludes a gift to juridical person, such as a deity temple or shrine, an endowment to which is free from the necessity of registration as provided in S. 123. Similarly, S. 1 of the Trusts Act exempts Hindu trusts from the provisions of S. 5 of the Indian Trust Act requiring registration and as a will is not compulsorily registrable, it follows that a Hindu endowment whether made by grant, gift, will or the medium of a trust and relating to immovable property of over Rs. 100 in value is not compul-

Clause (2).

(1) *Deosaran* v. *Deoki*, 3 Part. 842; *Bhekdhari* v. *Sri Ramchand*, 10 Pat. 388; *Prem Nath* v. *Hari Ram*, 16 L. 85 (97, 98).

(2) *Vidya Varuthi* v.*Baluswami*, 44 M. 831 P.C.

(3) S. 1, Trusts Act (II of 1882).

(4) *Ib.*, S. 5.

(5) *Manohar* v. *Lakhmiram*, 12 B. 247 (263, 264); *Bhuggobutty* v. *Gooroo*, 25 C. 112 (127); *Profulla* v. *Jogendranath*, 9 C. W.N. 528 (534).

(6) *Gangi* v. *Tammi*, 50 M. 421 (425) P.C.; *Muddun Lal* v. *Konnel*, 8 W.R. 42; *Pallaya* v. *Ramadhanalalu*, 13 M.L.J. 364; *Ramalinga* v. *Sivachidambara*, 42 M. 440; *Sri Gopal* v. *Radha Benode*, 41 C.L.J. 396: 88 I.C. 616: (1925) C. 996.

(7) *Narasimha* v. *Venkatalingam*, 50 M. 687 F.B.

(8) *Pallayya* v. *Ramavadhanulu*, 13 M. L.J. 364; *Ramalinga* v. *Shivachidambara*, 42 M. 440; *Tammireddy* v. *Gangireddy*, 45 M. 281; *Narasimha* v. *Venkatalingum*, 50 M. 687 F.B.

sorily registrable.[1] Further, since such an endowment takes the form of a dedication which means renunciation, requiring no acceptor or acceptance, it follows a line of its own as indicated elsewhere. **(S. 259.)** As regards writing there is no statutory necessity except where such bequest is part of a will, which must be in writing and executed in accordance with the provisions of S. 63 of the Succession Act incorporated in S. 237 of this Code.

2018. Express Words Unnecessary.—Since law prescribes no form of dedication, it follows that no words are necessary to constitute a dedication. "All that is necessary is that the religious purposes or objects of the testator should be clearly specified, and that the property intended for the endowment should be set apart for or dedicated to those purposes."[2] In another case, the testator bequeathed his house to his daughter for her life, and after sundry bequests, empowered his executors to sell the residue of the landed property and make over the proceeds to the university of Calcutta. No express words were to be found in the will as to what would become of the house on determination of the daughter's life-estate; but the court held it to fall into the residue which was bequeathed to the university, and, as such, directed the executors to sell it and make over the proceeds, with that of the residue of the other estate, to the university.[3]

Clauses (3), (4).

There can be no endowment without dedication.[4] Where, therefore, in a document there was nothing to show that there was such a dedication except the use of the word *"debutter,"* and the grant was made apparently for the personal enjoyment of the grantee, though the grantor may have contemplated that the profits of the property, after satisfying the personal wants of the grantee, would be devoted to the service of the God whom he attended, it was held that such an expectation may explain the use of the word *"debutter,"* but it does not suffice to constitute a valid dedication to the God.[5] The mere fact of the proceeds of a piece of land, having appropriated for the worship of an idol, does not constitute it an endowed property, but the fact of the assignment to the idol must be specifically proved.[6] The mere fact of its being released by Government, on the ground of its being appropriated to the service of an idol, does not impose on it the character of a religious endowment.[7]

2019. It is, at times, a question of some difficulty whether what has been done amounts to a dedication or not. The fact that the income from some properties had been generally, though not invariably, applied to the maintenance of a *Thakur*, is evidence of its dedication; but the fact that, in some cases, it had not been so applied, may be evidence either against the dedication or of the breaches of trust which do not disprove the dedication. The question is how it was treated as a rule and on the whole.[8]

2020. Trust Unnecessary.—Under English Law, no endowment is possible without the creation of a trust, but it is held unnecessary for the

(1) *Narasimham* v. *Venkatalingam*, 50 M. 687 F.B.

(2) *Per* Sale, J., in *Bhuggobutty* v. *Jogendra*, 9 C.W.N. 528; *Sarab Sukh* v. *Gooroo*, 25 C. 112 (127); *Profulla* v. *Ram Prasad*, 46 A. 130.

(3) *Manorama* v. *Kali Charan*, 31 C. 166 (169).

(4) *Watson & Co.* v. *Ramchand*, 18 C. 10 (18) P.C.

(5) *Shamcharan* v. *Abhiram*, 8 C.L.J. 306, following *Ram Kanai* v. *Narayan*, 2 C.L.J. 546 (552).

(6) *Narain* v. *Roodur*, 2 Hay. 490; *Ram Pershad* v. *Sreehuree*, 18 W.R. 399.

(7) *Nimaye* v. *Jogendro*, 21 W.R. 365.

(8) *Sri Gopal* v. *Radha Binode*, 41 C. L.J. 396: 88 I.C. 616: (1925) C. 996.

creation of a Hindu endowment. But though this is the law, it is seldom that an endowment is created without the creation of a trust. Suppose, for instance, a person were to declare: "I dedicate my village *B* to the god *C*." How is the purpose of his dedication to be fulfilled? The god *C* is a *juridical* person and cannot take *B*, and unless there is somebody to accept and administer the gift on behalf of *C*, how are the founder's wishes to be fulfilled? It may be that *A* administers the fund himself, and there is nothing to prevent him from doing so. In that case, he becomes the trustee of the fund, and his subsequent acts and conduct will show whether he had really divested himself of his property *B* or had merely used it as a shield for some ulterior purpose. Where, therefore, his *bona fides* are challenged, say, by a creditor, who attaches *B*, the burden is heavy on *A* to show that he had dedicated it to *C*.[1] As the Privy Council observed: "Very strong and clear evidence of such an endowment ought to exist."[2] The mere fact that the rents and profits of the property have been, for some years, applied for the worship of the idol, may be inconclusive, unless separate accounts are shown to have been kept and the income of the endowed property treated as distinct from the family income, showing "that property has been inalienably conferred upon an idol to sustain its worship."[3]

2021. The fact that certain property was purchased in the name of his own idol, is equally inconclusive. As the Privy Council said: "The question is whether there is any evidence of an endowment properly so called. Now, what is the evidence of an endowment? This was clearly not an endowment for the benefit of the public. The idol was not set up for the benefit of public worship. There are no priests appointed, no Brahmans who have any legal interest whatever in the fund. It is not like a temple endowed for the support of performing religious service for the benefit of any Hindu who might please to go there. It is simply an idol set up by the Maharaja apparently in his own house, and for what purpose? Why, for his own worship. We constantly have suits claiming certain turns of worship; but here there is no turn or right of worship established. There is nothing stated in any way to show that the Maharaja intended that the idol should be kept up for the benefit of his heirs in perpetuity, and before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an endowment are stated. The Maharaja appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol, as if it were his own property. There is no evidence at all of any of the essentials of an endowment in favour of idol."[4] But while the founder of a private idol has an uphill task to establish his dedication, the task, though difficult, is not impossible. Where, for instance, the fact of the dedication was supported by an ancient document, added to which there was the evidence of appropriation of profits for the support of the idol, the Privy Council said: "The mere fact of the proceeds of any land being used for the support of an idol may not be

(1) *Doorganath* v. *Ramchunder*, 2 C. 341 P.C.; *Ramcoomar* v. *Jogender*, 4 C. 56; *Watson & Co.* v. *Ramchand*, 18 C. 10 P.C.

(2) *Doorganath* v. *Ramchunder*, 2 C. 341 (349) P.C.

(3) *Doorganath* v. *Ramchunder*, 2 C. 341 (349) P.C.; *Dharma Das* v. *Gosta*, 8 I.C. (C.) 894.

(4) *Brojosoondery* v. *Lachmee*, 20 W. R. 95 (96) P.C., affirming O.A. 11 W.R. 13.

proof that those lands formed an endowment for the purpose,[1] but it is a fact that may well be taken into consideration, when, as in this case, the intention of the founder has to be gathered from an ancient document, expressed, to say the least, in ambiguous language: *Contemporanea exposito est optima."*[2]

2022. When once an endowment is established, the mere fact that there had been sales and mortgages[3] of the property by some members and partition of it amongst the *shebaits,*[4] or that the conditions of the trust have not been performed,[5] does not alter its character, though properties dedicated to a family idol may be converted into secular property by the consensus of the family. As the Privy Council observed: "Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction."[6] Consequently, in the case of such endowment, the fact that a certain property was at one time *debutter,* raises no presumption of its continuance, which must be proved by the manner it has been held and enjoyed and its income appropriated.[7] There can be no question that where an idol is consecrated in a temple, the latter must also be presumed to have been dedicated to the idol.[8]

But the mere execution and registration of a deed of endowment, unaccompanied by delivery of possession by the transfer of the apparent evidence of ownership, was not sufficient to create an irrevocable endowment.[9]

No Dedication.

2023. A dedication implies complete divestment, by the owner, of his ownership of the property, and its transfer to or in trust for the donee. If it falls short of this, it is not a complete dedication, though it may amount to a precatory trust, or other provision made for the maintenance of the object of his bounty. Such was the case of the testatrix who addressed her will to her grandson and directed him to perform the worship of some family idols out of the income of specified properties. There was no gift of any property to the idol, nor any provision made for worship after his death; it was held that no heritable Shebaitship had been created, and that the properties were conferred on the grandson subject to the maintenance of the worship, and that it created only a private trust, to which S. 92 of the Civil Procedure Code was inapplicable.[10] While a dedication may be oral, the mere fact that the manager of a joint family had been paying the expenses of a choultry out of a part of the profits of a usufructuary mortgage does not establish a dedication thereof to charity.[11]

Subject of endowment.

264. Any property movable and immovable that a person can dispose of by gift or will may form the subject of an endowment.

(1) *Muddun Lal* v. *Komal,* 8 W.R. 42 (43), cited in *Abhiram* v. *Shyama Charan,* 36 C. 1003 (1012) P.C.

(2) "A contemporaneous exposition is the best in law." *Abhiram* v. *Shyama Charan,* 36 C. 1003 (1012) P.C.

(3) *Dharma* v. *Gosta,* 16 C.W.N. 29: 8 I.C. 894.

(4) *Bhabataran* v. *Behari,* 10 I.C. 399.

(5) *Kasheeshuree* v. *Krishnakaminee,* 2 Hay 557; *Madhab* v. *Sarat Kumari,* 6 I.C. (C.) 26.

(6) *Doorganath* v. *Ramchunder,* 2 C. 341 (347) P.C.; *Abhiram* v. *Shyama Charan,* 36 C. 1003 P.C.; *Dharma Das* v. *Gosta,* 16 C.W.N. 29: 8 I.C. 894; *Gobinda* v. *Debindra,* 12 C.W.N. 98.

(7) *Gobinda* v. *Debindra,* 12 C.W.N. 98.

(8) *Sri Gopal* v. *Radha Binode,* 41 C. L.J. 396: 88 I.C. 616: (1925) C. 996.

(9) *Ram Dhan* v. *Prayag,* 43 A. 503.

(10) *Gopal* v. *Purna Chandar,* 49 C. 459 P.C.

(11) *Gangi* v. *Tammi,* 50 M. 421 (429, 431) P.C.

2024. **Analogous Law.**—Since an endowment is the gift of one's property to the service of God, or of men, in whom resides the spirit of God, a property, which a person is competent to dispose of by gift or will, he is equally competent to dispose it of in charity.

A mere easement may, however, be dedicated, though it cannot be transferred. The deceased had built a *ghat* as the last resting place of persons on the point of death, where the rites of *antarjali* (or last rite of water) was performed. It was held that as the deceased had appointed no *shebait*, he did not intend to part with the ownership of the *ghat*, but that, nevertheless, there was the dedication of an easement in favour of the Hindu community.[1]

Endowment in favour of non-existing object.

265. An endowment may be created in favour of an idol, muth or other object, not in existence at the death of the testator.[2]

2025. **Analogous Law.**—This is an exception to the ordinary rule of Hindu Law which requires that a gift, to be valid, must be in favour of a sentient being in existence at the moment the gift takes effect. Hence, where a gift is made by a will which takes effect on the death of the testator, under Hindu Law, unaffected by the Hindu Disposition of Property Act, the donee must be then in existence. Otherwise the gift shall fail. But religious and charitable endowments, being favoured by the sacred law, are an exception to the rule.[3] The contrary was laid down in some cases, in which it was held that the principle of Hindu Law, which invalidates a gift other than to a sentient being, capable of accepting it, applied equally to a bequest to trustees for the establishment of an image and the worship of a Hindu deity, and made such bequest void.[4] But these cases have since been overruled and the law is as stated in this section.

Vesting of the endowments.

266. In the absence of anything appearing to the contrary, the beneficial interest in the dedicated property vests in the religious or charitable object, and its management in the manager, subject to the customary incidents of his office.[5]

2026. **Analogous Law.**—There is no uniform rule governing religious and charitable endowments. The endower may make a direct bequest to the object of his bounty without the intervention of trustees, or he may transfer the property in trust. But whatever the nature of the bequest, ownership in the property so bequeathed vests in the idol, *muth*, temple or other object of his bounty, while the manager possesses the right of possession and management.

The manager is variously called *sarbarakar*, *shebait*, or *mahant*, but his legal character is identical. He is not the trustee of the Fund or its receipts, and his rights and liabilities are regulated by usage.[6]

(1) *Jaggamoni* v. *Nilmoni*, 9 C. 75.
(2) *Bhupathi* v. *Ram Lall*, 37 C. 128 F.B.
(3) *Bhupathi* v. *Ram Lall*, 37 C. 128 F. B., overruling *Upendra* v. *Hemchandra*, 25 C. 405; *Brojomoyee* v. *Troylukho*, 29 C 260; *Nogendra* v. *Benoy*, 30 C. 521; *Mahar Singh* v. *Het Singh*, 32 A. 337; *Chatarbhuj* v. *Chatarjit*, 33 A. 253.
(4) *Upendra* v. *Hemchandra*, 25 C. 405; *Brojo Moyee* v. *Troylukho*, 29 C. 260; *Nogendra* v. *Benoy*, 30 C. 521.
(5) *Vidyavaruthi* v. *Balusami*, 44 M. 831; *Manohar* v. *Bhupendra Nath*, 60 C. 452 F.B.
(6) *Vidyavaruthi* v. *Balusami*, 44 M. 831 P.C.; *Manohar* v. *Bhupendra Nath*, 60 C. 452 F.B.

2027. The presumption stated in clause (1), however, applies "in the absence of anything appearing to the contrary." This must depend upon the terms and conditions of the dedication and where these cannot be ascertained, by usage.[1]

The founder of an idol has the right of appointing its manager. It is open to him to act as the manager, in which case, he becomes the *de facto* trustee, in common parlance called the *shebait*. As such, the *shebait* may have to appoint other persons to assist him; one such person so appointed is the *pujari*,[2] but he is only a servant, appointed for the performance of worship and the due observance of ceremonies, and cannot claim the right of a *shebait*.[3]

Operation of endowment.

267. An endowment may be conditional or unconditional, permanent or temporary, and takes effect from such time as the founder may intend.

2028. Analogous Law.—An endowment may be created to take effect from any time *in praesenti*, as from the execution of the deed of endowment, or *in futuro*, as on the death of the testator, or at any time on determination of one or more life-estates.[4] In each case, it is a question of intention. And since endowments are free even from the rule against perpetuity, there is practically no legal impediment to their creation. So, where the testator bequeathed his house to his daughter for her life, and the residue was to be sold by his executors and the proceeds made over to the university of Calcutta; but no express provision was to be found in the will as to what would happen to the house in question on determination of the daughter's life-estate, it was held that the reversion in the house, expectant on the determination of the daughter's life-interest, passed under the specific residuary devise in favour of the university of Calcutta.[5]

Illusory and void endowment.

268. An endowment is illusory and void if it is a device to preserve the estate to the family of the endower, or to defraud, defeat or delay his other claimants or creditors.[6]

Illustrations.

(*a*) *A*, being indebted, dedicates his property to his family god, retaining all control. The endowment is void.

(*b*) *A*, endows a god to spite his son. The endowment is void.

2029. Analogous Law.—From the fact that a religious endowment is not subject to the rule against accumulations and perpetuities, and that it is no longer, as it was (§ 1975) at one time, subject to the ordinary rule of Hindu Law that the donee must be in existence at the death of the testator, testators often resorted to this device for the purpose of evading those laws, added to which an endowment offered a tempting bait to deceive creditors. At one time, such pseudo-endowments were quite common, being really resorted to for the purpose of withdrawing property alike from the grasp of the oppressor or from the disintegrating action of the ordinary rules affecting it.[7] And the fact an endowment might

(1) *Kailasam* v. *Nataraja*, 33 M. 265 F.B.
(2) *Indurj* v. *Chundemun*, 16 W.R. 99.
(3) *Sripathi* v. *Khudiram*, 41 C.L.J. 22: 82 I.C. 840: (1925) C. 442.
(4) *Gobind* v. *Gomti*, 30 A. 288 (289).
(5) *Monorama* v. *Kali Charan*, 31 C. 166 (169).
(6) *Watson & Co.* v. *Ramchund*, 18 C. 10 P.C.; *Doorganath* v. *Ramchander*, 2 C. 341 P.C. and cases cited in comm.
(7) Phillips and Trevelyan's Hindu Wills, (2nd Ed.), pp. 36, 37.

be validly made in favour of one's private tutelary god, without the intervention of trustees or the requirement of an instrument or other mode of publicity, facilitated the use of the god as a *benamidar* to shuffle out of the creditor's reach property, which the debtor could not otherwise shield from their grasp. The crucial test in such cases is, of course, the intention, and the only evidence of intention afforded is the application of its income on the endowed object.[1]

2030. The fact that separate accounts were maintained of the rents and profits collected and applied for the worship of the idol, is material but not conclusive,[2] since such accounts might be maintained by any unscrupulous person; but where they were so maintained for a period going over half a century, it will be strong corroborative evidence of a dedication,[3] as the fact that the dedicator had been appropriating its income[4] or that the property had been the subject of a partition, would be evidence against it.[5] The mere fact that an idol has been maintained out of the income of a property, is no proof of dedication, since such contributions might be voluntary and liable to discontinuance at any time.[6] In order to prove an endowment, it must be established that an absolute grant was, in the first place, made with the intention that the profits should be applied for the service of an idol, that the profits have since been so applied, and that members of the family of the founder have not treated the property as one, the profits of which were mainly intended to be applied for their benefit.[7]

2031. There may be dedication and yet only a partial dedication, as where it is burdened with a charge in respect of a charity, in which case the beneficial interest is liable to seizure in execution of a decree.[8] Here again, a distinction must be made between the bequest of property subject to a certain charge and a bequest of property subject to certain duties.[9] To constitute a valid dedication, it is not necessary that any specific property should be set apart. A share of the income derivable from the family properties may be dedicated. The family properties will then become subject to a charge for that amount, and whoever takes the family properties by alienation or partition, will take them subject to that charge. Whether the amount has been set apart by the family is a question of fact, to be decided on the evidence adduced in each case.[10] Where the testator dedicated his house to god *Shiv* and directed that the income from certain promissory notes worth Rs. 10,000 should be appropriated for his worship, the fact that he had also empowered his executor to live in the house did not make the bequest colourable.[11]

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(1) *Ramchandra* v. *Ranjit*, 27 C. 242; *Bhekdhari* v. *Sri Ramchanderji*, 10 Pat. 388.

(2) *Doorganath* v. *Ram Chunder*, 2 C. 341 P.C.; *Abhiram* v. *Shyama Charan*, 36 C. 530 P.C.; *Ramchandra* v. *Ranjit*, 27 C. 242.

(3) *Mudden Lal* v. *Komul Bibee*, 8 W. R. 42; *Radha* v. *Judoomonee*, 23 W.R. 369 P.C.

(4) *Sookheemoney* v. *Mohendro*, 4 B. L.R. 16 P.C.; *Suppammal* v. *Collector*, 12 M. 387; *Azizuddin* v. *Legal Remembrancer*. 15 A. 321 (322).

(5) *Kuneez* v. *Saheba*, 8 W.R. 313.

(6) *Mudden Lal* v. *Komul*, 8 W.R. 42; *Ram Pershad* v. *Sreemutee*, 18 W.R. 399; *Shurfoounissa* v. *Koolsoom*, 25 W.R. 447; *Doorganath* v. *Ramchunder*, 2 C. 341 P. C.; *Abhiram* v. *Shyama Charan*, 36 C. 1003 P.C.

(7) *Madhab* v. *Sarat Kumari*, 15 C.W. N. 126: 6 I.C. 26; *Kulada* v. *Kali Das*, 42 C. 536.

(8) *Dassa* v. *Narasimha*, 35 B. 156; *Muthu* v. *Shunmoogatha*, 8 M.L.T. 224: 7 I.C. 79.

(9) *Lalchand* v. *Nandlal*, (1912) P.L. R. 171: 16 I.C. 838.

(10) *Nagar* v. *Ramappaya*, 25 I.C. 399.

(11) *Benode* v. *Sita Ram*, 6 A.L.J. 444: 1 I.C. 666.

2032. The question whether the endowment is real or illusory, depends upon whether it is a substantial bequest to charity or to the testator's family.[1] "To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor, the amount of the property, the nature and needs of the charity, their probable or possible expansion, the priority of their claim upon the settled fund and the like."[2] Where, therefore the grantor created a trust of his property for the performance of the customary *fateha* and the distribution of food and clothes to the poor in the month of *Ramzan* every year, the surplus being equally divided by his sons, grandson, and their heirs, from generation to generation, his estate yielding an annual income of Rs. 1,500, out of which Rs. 300 were spent on charity, and Rs. 300 paid to the trustee as his salary, leaving a balance of Rs. 900 per annum to feed the family and the descendants of the grantors in perpetuity, it was contended that the endowment was illusory in that only two-fifths went to charity while three-fifths went to the heirs; but the Privy Council overruled the contention, holding that the income might fluctuate or decrease permanently and needs of the charity might expand. It was contended that the trustee might spend little or nothing on charity, to which the Privy Council replied that if the trustee failed to perform his trust, the court could interfere. They then said: "The sum devoted to these charities is, according to any standard, not large, though, for the present, it is abundant for their needs. Having regard to the wealth of the grantors at the date of the deed, the provision made by it is a modest provision."

2033. "Their Lordships take the view that, having regard to all the circumstances of the case, the dominating purpose and intention of the grantors in executing this deed, evidently, was to provide adequately for these charities. That was their main and paramount object. The secondary and subsidiary objects were to secure for their families and descendants any surplus that might remain over, after the needs of the charities had been satisfied. As the gift for the charities was perpetual, it was necessary and right that the provision for capturing any possible residue should also be perpetual. The provisions of the deed carry out these objects, and that being so, it is, in their Lordships' view, only right to hold that the effect of the instrument is not to give the trust property in substance to the family of the grantors, but to give it in substance to the charitable purposes named in it. If this is so, as they think it is, the deed is within the authorities a good and valid deed of *wakf* and must be allowed to take effect according to its tenor."[3]

While the father is entitled to make "pious and reverential gifts to Brahmins," and also "gifts from affection towards Vishnu and other divinities."[4] Still, he is not entitled to do so out of spite towards his son. Such endowment is not *bona fide*, and, as such, it is void.[5]

Invalid endowment.

269 No endowment can be made, the purpose or object of which is illegal.[6]

Illustration.

A Hindu endows a mosque. The endowment is invalid.[7]

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(1) *Majibunnissa* v. *Abdul*, 23 A. 233 (243) P.C.

(2) *Ramanadan* v. *Vava*, 40 M. 116 (121, 122) P.C.

(3) *Ramanadan* v. *Vava*, 40 M. 116 (124) P.C.

(4) *Gopal* v. *Kunwar Singh*, (1843) S. D.A.B. 24.

(5) *Raghunath* v. *Gobind*, 8 A. 76.

(6) *Fazle* v. *Anath Bandhu*, 16 C.W.N. 114: 11 I.C. 436, cf. S. 23, Contract Act; S. 6 (*h*), Transfer of Property Act.

(7) *Fazle* v. *Anath Bandhu*, 16 C.W.N. 114: 11 I.C. 436.

2034. Analogous Law.—It is provided by the Contract Act that no contract is legal, the purpose or object of which is illegal.[1] A transfer in the same circumstances is prohibited by the Transfer of Property Act.[2]

A person cannot achieve by a bequest what he could not do by a transfer. So, an endowment made to start a suicide club would be invalid as opposed to public policy.

Again, and apart from the statute law, a person cannot endow an object not warranted by his personal law. So, a Hindu cannot endow a Mahomedan mosque. Such a dedication is doubly void, being prohibited both by the Hindu and by the Mahomedan Law.[3]

But though the Mahomedan Law interdicts a gift received from an infidel, there is nothing in that law to preclude a Mahomedan ruler from making a religious or charitable grant to a Hindu.[4]

Endowment when revocable.

270 (1) An endowment once completed is both irrevocable and unalterable.[5]

(2) Provided that an endowment in favour of a family idol may be altered or transferred by the consensus of the family.[6]

2035. An Endowment is both Irrevocable and Unalterable.—A gift, once completed, becomes irrevocable; *a fortiori*, an endowment which is a gift to sacred uses. It was in one case argued that an endowment should be regarded as merely revocable appropriation, of which the founder may vary the use, but the contention was dismissed by the Privy Council with these words: "No authority whatever was adduced in support of this position, which strikes at the root of most modern endowment of the like nature."[7] Of course, an endowment brought about by coercion, fraud or undue influence may be set aside to the same extent as a gift. But, otherwise, when it is a voluntary act of public benevolence, it cannot be recalled without detriment to the public, in whom a right has become vested. An endowment does not fail because the idol, which was the subject of endowment, is stolen or broken, since the idol is merely a visible form of the deity who is imperishable. If its visible form disappears, it is open to the founder or *shebait* to replace it with appropriate ceremonies.[8]

Clause 1.

2036. When Revocable.—The case of an endowment in favour of a private family god is, however, different. There can be no doubt that if the family council so decide, it may be altered or transfered but it is by no means clear whether the family have an equal right to revoke and convert it into secular property. In one case,[9] the Privy Council had no doubt observed "where the temple is a public temple, the dedication may be such that the family itself could not put an to it, but in the case of family idol, the consensus of the whole family might give the estate another direction." This statement has not been followed in several Indian cases, in which it is distinguished as

Clause 2.

(1) S. 23, Contract Act.
(2) S. 6 (*h*), Transfer of Property Act.
(3) *Fazle* v. *Anath Bandhu*, 16 C.W. N. 114: 11 I.C. 436.
(4) *Puran* v. *Darson*, 11 I.C. (A.) 166, (170).
(5) *Doorga Nath* v. *Ramchander*, 2 C. 341 (347) P.C.; but *see Surendrakrishna* v. *Ishwar Bhubaneswari*, 60 C. 54 (71).
(6) *Ib.*
(7) *Juggutt Mohini* v. *Sokheemoney*, 14 M.I.A. 289 (302); *Sripathi* v. *Khudiram*, 41 C.L.J. 22: 82 I.C. 840: (1925) C. 442.
(8) *Semble* in *Kali Kanta* v. *Surendra Nath*, 41 C.L.J. 128: (1925) C. 648.
(9) *Doorganath* v. *Ramchunder*, 2 C. 336 (347) P.C.

an *obiter dictum*,[1] though, of course, full effect has been given to it in other cases.[2] It is submitted that a dedication is not like any other alienation, and, once made, it cannot be revoked, though it may be altered or transferred in the case of a family idol, by the consensus of the family. Where, therefore, a private *debutter* has been partitioned between members of the family for the better enjoyment thereof, and there had been sales and mortgages of portions of the property by some members, but there was nothing to show that there was a consensus to give the property a different turn, it was held that these facts alone did not alter the *debutter* character of the property.[3]

2037. Where land has been given as *debutter* land, and the requisite services are not performed, all that the donor can do is to take steps to have the services performed. He cannot recover it in a suit for *khas* possession.[4] Where certain buildings were dedicated to the professors of the Jain religion, after which the religion became subdivided into two sects, the *Swetambar* and the *Digambar*, the former of whom rebuilt and greatly improved the buildings and, therefore, claimed them for the exclusive use of their sect, the Privy Council held that the dedication of the buildings being for the common use of both the sects, their improvement by one sect created in them no exclusive right to their user.[5]

Management of Endowment.

Who may be appointed Manager.

271. (1) No person is disqualified by reason of his caste or sex to be appointed a manager.

(2) A female is not disqualified, by reason of her sex, from holding a priestly office, though she might not be competent to perform its spiritual duties.

2038. Analogous Law.—The question of eligibility cannot be determined without reference to the nature of the endowment. If its purpose is secular charity, there is no limit as to the person that may be appointed its manager. Where the institution is religious, its nature must determine the eligibility of any person to be its manager. In a new foundation, the founder usually appoints some one to manage it. And as any Hindu may validly create a religious endowment, it follows that caste is no disqualification. Nor is sex. But since a gift to Brahmans is commended by the Brahman text writers, pious endowers generally appoint a Brahman to the shebaitship of an idol or temple. But Kshatriyas and even Shudras[6] are hereditary *shebaits* of many a temple, and the Jains appoint one of their own creed to that office, and in one case, it was found that certain Mahomedan Malis were hereditary pujaris of an ancient Hindu temple;[7] while in the case of *muths*, Gosavi Bairagis are invariably appointed their *mahants*. As these orders are open to all Hindus, caste plays but a secondary part in the election to mahantship. But it is, nevertheless, a qualification.

(1) *Sreepati* v. *Krishnachandra*, 41 C. L.J. 22 (26, 27); *Chandi Charan* v. *Dulal Chandra*, 54 C. 30 (37, 38); *Per* Rankin, C.J., in *Surendra Krishna* v. *Iswar Bhubaneshwari*, 60 C. 54 (71).

(2) *Gobind* v. *Debendra*, 12 C.W.N. 98; *Dharma* v. *Gosta*, 16 C.W.N. 29: 8 I.C. (C.) 894; *Lalit Mohan* v. *Brojendra Nath*, 53 C. 251.

(3) *Dharma* v. *Gosta*, 16 C.W.N. 29: 8 I.C. 894.

(4) *Gopinath* v. *Gooroo*, 18 W.R. 472; *Ram Narain* v. *Ramoon*, 23 W.R. 76.

(5) *Maharaj Bahadur* v. *Seth Hukum Chand*, 24 A.L.J. 100: 93 I.C. 219: (1926) P.C. 13.

(6) *Radha Mohun* v. *Jadoomonee*, 23 W.R. 369; *Sundarambal* v. *Yogovana Gurukkal*, 38 M. 850 (859); *Pujari* v. *Subramania*, 29 C.W.N. 112: 81 I.C. 518: (1924) P.C. 44.

(7) *Babu* v. *Sukka*, (1923) A. 165.

2039. A married man may be appointed a *shebait*, unless celibacy is made a condition of the office or is necessarily implied by the nature of the institution, *e.g.*, a *muth*, the *mahant* of which must of necessity be a celibate.[1] But there is no *shastric* prohibition against marriage.[2]

As regards females, it is competent to a founder to appoint a female shebait,[3] whose succession to that office may be, moreover, supported by usage.[4] In one case, it was contended, on the authority of Manu,[5] that as women are not instructed in the Vedas and are simple creatures, they are not fit for priestly duties, but the court held that, as in the case before them, the female *shebait* had been nominated by her husband and imparted *mantras*, which were accepted and not objected to, there was nothing to show that she was disqualified to be an *adhikaree*.[6]

2040. In another case a similar contention was raised but not decided.[7] But the fact that in no case has a female been declared disqualified by reason of her sex from filling the office, shows that sex no longer stands in the way of woman's eligibility to management of a religious trust, though whether she is equally competent to discharge the priestly duties, must depend upon the usage of the institution. In practice, the goddess Devi prefers priestess of her own sex, while the phallic god Shiv would never tolerate a woman high priest,[8] though, even here she may validly fill the office of the manager,[9] and even as regards her qualification to the priestship (*archak* or *purohit*), she has been permitted to hold the office, being held entitled to have the actual worship performed through a male substitute appointed for the purpose.[10] But, even here, it is open to the founder to appoint a female *shebait*,[11] and usage has recognized the right of a woman to act as *mahant* of a *Biragi muth*,[12] while there is no objection to her holding the office of a trustee of a charitable endowment.[13] Even in cases where her sex disqualifies her to officiate herself, she is entitled to appoint a substitute,[14] where, however, the *sanad* provided for the management by a priest and his family and its female members married into another family would become ineligible for appointment as manager,[15] though they would become eligible for such appointment in the family they have married into.

2041. **Qualification of Manager.**—No qualification is necessary for eligibility as manager, though it is obvious that the appointment of a person claiming adversely to the endowment, would place him in a posi-

(1) *Ram Prakas* v. *Anand Das*, 43 C. 707 P.C.

(2) *Hari Das* v. *Raja Ram*, (1935) L. 545.

(3) *Surendra* v. *Doorgasoondery*, 19 C. 513 (537) P.C.

(4) *Janokee* v. *Gopaul*, 2 C. 365, O.A. 9 C. 766 (770) P.C. ; *semble* in *Sitaram* v. *Sitaram*, 6 B.H.C.R. (A.C.) 250; *quaere in Keshava* v. *Bhagirathi*, 3 B.H.C.R. (A. C.) 75; *Joy Deb* v. *Huroputty*, 16 W.R. 282.

(5) IX-18.

(6) *Poorun* v. *Kasheeshurree*, 3 W.R. 179 (180); *Puranlalji* v. *Rao Behari Lal*, 44 A. 590.

(7) *Joy Deb* v. *Huroputty*, 16 W.R. 282.

(8) *Sundarambal* v. *Yogavana Gurukkal*, 38 M. 850 (860, 861), dissented from in *Rajeswari* v. *Subramania*, 40 M. 105.

(9) *Sundarambal* v. *Yogavana Gurukkal*, 38 M. 850 (859).

(10) *Annaya* v. *Ammakka*, 34 M.L.J. 196 (209) F.B.; *Seshammal* v. *Soondarajiengar*, (1853) M.S.D.A. 261, explained as *obiter* in *Sundarambal* v. *Yogavana Gurukkal*, 38 M. 850 (859), dissented from in *Rajeswari* v. *Subramania*, 40 M. 105, following *contra* in *Ramasundaram* v. *Savundrathammal*, 16 M.L.T. 423; *Tangirala* v. *Manikya*, 27 M. L.J. 179.

(11) *Surendra* v. *Doorgasoondery*, 19 C. 513 (531, 532) P.C.

(12) *Dhuncooverbai* v. *A.-G.*, 1 Bom. L. R. 743.

(13) *Malligarjun* v. *Sridevamma*, 20 M. 162 P.C.

(14) *Kunj Bihari* v. *Naraini*, 45 A. 437.

(15) *Ranchhod* v. *Jayanti*, 28 Bom. L. R. 463: 95 I.C. 85: (1926) B. 309.

tion where his interest will conflict with his duty.[1] A minor might be appointed as a manager, as he might be appointed an agent. But a person who is disqualified by reason of bodily deformity, or bodily disease such as leprosy, or disease of the mind, or of leading the life which is immoral or inconsistent with the religious vows of the office, such as that of a *mahant* of a *muth*, cannot be appointed to that office.[2] So, again, a married man cannot be appointed to be the head of a *muth*. If he is married and has children, he must renounce them before entering upon a life of enforced celibacy and asceticism.[3] But the Madras High Court has upheld the right of a married woman to inherit the service and emoluments of an *archaka* office in a temple.[4] In one case, the Privy Council held a *beldar* (stone-mason) incompetent to be the assignee of a Brahman *shebait's* right, on the ground that he was incompetent to perform the worship of the diety at the temple, adding: "The office of *shebait* of a temple was an hereditary office which could not be held by any one who was not a Brahman *panda*."[5] But this statement must not be taken as laying down any general rule which would not be in consonance with the established practice.

2042. The manager may possess power in varying degree. He may be the sole manager or a joint manager, and supreme or subordinate, in his power of management. The appointment of a general trustee is consistent with the existence of subordinate representatives having the right to manage certain special portions of the property, and pay over the income so collected to the endowment, and even in some degree control its use. Such rights are not inconsistent, with the existence of a general trust, but they are fatal to the general trustee's claim to possession of the properties from which those revenues were derived.[6]

Appointment of the Manager.

272. (1) The founder is entitled to provide for the management of any endowment created by him.[7]

(2) He may nominate a *shebait* and provide for his successor and effect will be given to his wishes, if not inconsistent with the general law.[8]

(3) Where the founder makes an endowment without providing for its management, the right of management vests in the founder and his heirs.[9]

(4) The right of the founder to provide for the management devolves upon his heirs on his death.[10]

(5) The court may appoint a manager in the last resort.[11]

2043. Analogous Law.—The founder of an endowment naturally possesses the right to arrange for its management. As such, it is for him to set out a scheme of management, nominate trustees, and give general

(1) *Krishna* v. *Kali Sunkar*, 1 I.C. (C.) 916.
(2) *Ram Parkash* v. *Anand Das*, 43 C. 707 (719) P.C.
(3) *Ibid.*
(4) *Annaya* v. *Ammakka*, 41 M. 886 F.B.
(5) *Jalandhar* v. *Jharula*, 42 C. 244 (252) P.C., reversing O.A. *Jharula* v. *Jalandhar*, 39 C. 887.
(6) *Ambalavana* v. *Sri Meenakshi*, 43 M. 665 P.C.
(7) *Kamini* v. *Asutosh*, 16 C. 103 P.C., and cases cited in f.n. below.
(8) *Pramatha Nath* v. *Pradhyumna*, 52 C. 809 P.C.; *Manohar* v. *Bhupendra Nath*, 60 C. 452 (551) F.B.
(9) *Girdharji* v. *Romanlalji*, 17 C. 3 P.C. and other cases cited in § 2046.
(10) *Pramath Nath* v. *Pradhyumna*, 52 C. 809 P.C.
(11) *See* § 2049.

directions as to the mode and manner in which he wishes to serve the object of his bounty.[1] Even where he endows an existing institution, it is for him to state the conditions of his offer, since, according to Hindu Law, when a religious endowment has been founded, the right to appoint a manager or superintendent remains in the founder and his descendants, unless there is evidence to show that the founder or his descendants have made any inconsistent disposition.[2]

2044. Who are the Founders.—Where the endower is a single individual, he is, of course, the founder. But an institution is, sometimes, founded by subscriptions by a single individual,[3] or conjointly by the members of a caste, sect or tribe, in which case, that individual,[4] of all the original subscribers, as the case may be, would be classed as the founder or founders.[5] A subsequent donor cannot claim that privilege.[6] So where one community found a temple dedicated to the public it was held that "although the donations were irrevocably dedicated to certain public purposes, the donors have never lost the right, which was attached to the caste since the beginning, to manage the temple which they founded, and the management can only be interfered with as a public charitable trust on proof of maladministration."[7] Where several members are entitled to management in rotation or by turns, the exclusion of one by the other, may become adverse, conferring on the members excluding a title by prescription, or at least, as a valid family arrangement, which will hold good until altered by the court or superseded by a new scheme, effected with the concurrence of all parties interested.[8] No person can be appointed as *shebait* whose interest is adverse to that of the idol. Such are persons who deny the endowment and assert a personal right to the property, who cannot be appointed *shebaits* or custodians of the income of the properties and supervisors of the worship of the deity.[9] It is the right of the founder to make rules for the management of the endowment and the appointment of its *shebaits*, and to alter them from time to time, so long as, by doing so, he does not prejudice the endowment or some right of property of the *shebait* or of third parties already accrued.[10] In an ordinary case, the founder and the *shebait* are the same person, and whether it is so or not, the *shebait* is the mouthpiece of the idol, and anything that the *shebait* does, must, consistently with his devotion and duty to the idol, be regarded as the will of the idol. Where, therefore, the founder in his will, gave certain directions for the removal of the idol, the court gave effect to them, not as the directions of the testator but as the will of the idol itself, expressed through its guardian and manager.[11] After the death of the founder, the rules made by him cannot be altered by any successor in estate or office, unless he had empowered some one to do so, but so long as they are not materially altered, it is open to the *shebait*, or

(1) *Kamini* v. *Asutosh*, 16 C. 103 P. C.; *Baldeo* v. *Gobind*, 36 A. 161; *Lahar Puri* v. *Puram Nath*, 37 A. 298 P.C.; *Jadunath* v. *Sitaramji*, 39 A. 553 P.C.; *Sheo Prasad* v. *Aya Ram*, 29 A. 663; *Rajbans* v. *Karya*, 8 A.L.J. 286: 10 I.C. 824.

(2) *Sheo Prasad* v. *Ayaram*, 29 A. 663; *Narsingh* v. *Durjan*, (1881) A.W.N. 52.

(3) *Venkataramma* v. *Damodaram*, 51 M.L.J. 457: 98 I.C. 298: (1926) M. 1150.

(4) *Ibid.*

(5) *Luchmee* v. *Rookmanee*, (1857) S. D.A.M. 152; *Endowed Societies Act* (In re), 10 A.C. 304 (308, 309).

(6) *Lalit Mohan* v. *Brojendra Nath*, 53 C. 251.

(7) *Thackersey* v. *Hurbhum*, 8 B. 432 (462).

(8) *Ramanathan* v. *Murugappa*, 27 M. 192, affirmed O.A. 29 M. 283 (288) P.C.

(9) *Krishna* v. *Kali Sunkar*, 1 I.C. (C.) 216.

(10) *Sripathi* v. *Khudiram*, 41 C.L.J. 22: 82 I.C. 840: (1925) C. 442.

(11) *Pramatha Nath* v. *Pradyumna*, 52 C. 809 P.C.

all the *shebaits* jointly, to add to or alter them for the better management of the endowment.[1]

2045. The owner of the soil who dedicates a way to the public, is entitled to sue for an injunction against one who destroys the improvements effected by him. He is not required to prove special damage.[2]

2046. Where the founder establishes an idol, or endows for the establishment of one, without making any provision for its worship, the office of *shebait* presumably vests in the founder and, on his death, upon such person as he might have appointed or designated as his successor, or in his heir,[3] unless there is any custom or usage showing that the devolution is otherwise.[4] Where, therefore, the founder appointed, by will, his widow as *shebait*, giving her the power to appoint her successor, which she did by will, but the person so appointed was born after her death, whereupon it was contended that the appointment of a successor, who was unborn at the death of the testatrix, was invalid as being opposed to the rule laid down in the *Tagore case*, to the effect that the donee must be in existence at the death of the testator; but it was held that the right of the founder of a religious trust to lay down a general rule of succession to the managership, must be regarded as exceptional and is not inconsistent with the Hindu Law or usage,[5] provided it does not contravene the rule in *Tagore* v. *Tagore*.[6]

Clauses (2), (3).

2047. Even where the founder appoints trustees, in the absence of custom or any provision in the deed of foundation to the contrary, the right of appointment of new trustees vests in the founder's heirs.[7] As regards the members of a Mitakshara family, who are joint *shebaits* the right of shebaitship passes by survivorship.[8] Where the management vests in the founder's family, the management of one member of the family must be regarded as being on behalf of all the members, including females, and not adverse to them.[9]

2048. In the absence of the founder, his heir possesses the right to see to the proper administration of the trust, and in case of its mismanagement, to invoke the assistance of the court for its proper management.[10] As regards a public trust, this right is now extended by the Legislature to any person "interested" therein.[11] Succession to a religious

Cl. (4). Founder's Heirs.

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(1) *Pramatha Nath* v. *Pradyumna*, 52 C. 809 P.C.

(2) *Bahadur* v. *Parash Nath*, 31 C. 839.

(3) *Girdharji* v. *Romanlalji*, 17 C. 3 P.C.; *Jagadindra* v. *Hemanta*, 32 C. 129 P.C.; *Pramatha Nath* v. *Pradhyumna*, 52 C. 209 P.C.; *Mohan* v. *Madhusudan*, 42 A. 461; *Ravichand* v. *Somal*, (1886) B. P.J. 273.

(4) *Girdharji* v. *Romanlalji*, 17 C. 3 P.C.; *Peet* v. *Dharee*, 13 W.R. 396; *Ramchandra* v. *Ram Krishna*, 33 C. 507; *Mohan* v. *Gordhan*, 35 A. 283 P.C.; *Lahar* v. *Puran*, 37 A. 298 P.C.; *Jadunath* v. *Sitaramji*, 30 A. 553 P.C.; *Deokinandan* v. *Brijnandan*, (1924) Pat. 502.

(5) *Mathura Nath* v. *Lakhi Narain*, 50 C. 426 (436, 437), *contra* in *Promotha Nath* v. *Anukul Chandra*, 29 C.W.N. 17: (1925) C. 225.

(6) *Gnansamband* v. *Velu Pandaram*, 23 M. 271 P.C.; *Manohar* v. *Bhupendranath*, 60 C. 452 (551) F.B.

(7) *Jai Bansi* v. *Chattar Dhari*, 5 B.L.R. 181.

(8) *Kokilasari* v. *Rurdanand*, 5 C.L.J. 527.

(9) *Meenakshi* v. *Somasundaram*, 44 M. 205.

(10) *Pramatha* v. *Pradyumna*, 52 C. 809 P.C.; *Manohar* v. *Peary Mohan*, 24 C.W.N. 478: 54 I.C. 8.

(11) Act XIV of 1920, S. 3.

office does not follow the ordinary Hindu Law, though its provisions cannot be altogether ignored in the selection of an heir, nor can a line of heirs be created that is repugnant to that law.[1] The plaintiff, who held the office of an *archaka* for two days in each month, having resigned his office, was succeeded by his mother. On her death, he reclaimed the office, but his claim was resisted on the ground that, by his resignation, he civilly dead, but the court held him entitled, on the ground that, being eligible and alive, the fiction of civil death could not apply to the holder of a religious office.[2]

Where there are several hereditary trustees of a public charitable trust, there is nothing improper in one of them being appointed as managing trustee for certain purposes by the other trustees, though, so far as acts like the institution of suits, etc., are concerned, they must all be parties and must act after mutual consultation. A notice to quit, given by the managing trustee, is valid to determine the tenancy.[3]

Clause (5).

2049. Appointment by Court.—Since a trust cannot fail for want of trustees, the court will appoint a manager on the failure of those entitled to appoint him. Where a *shebait* is dead, and there is no provision in the deed of endowment about the mode in which the office is to be filled up, the court will not read into the deed of endowment a provision for appointment to the office of *shebait* which is not to be found therein. It becomes incumbent upon the representatives of the founders to make an appointment to the office of *shebait*, and upon failure to do so, the court has power to appoint a new trustee and will exercise the power whenever there is a failure of a suitable person to perform the trust, either from original or supervening disability to act. The appointment of a fit and proper person to be a new trustee is, however, not a matter of arbitrary discretion of the court. The appointment must be made subject to well-known and defined rules, stated by Turner, L.J., as follows: (*i*) The court will pay due regard to the wishes of the author of the trust if known or ascertainable; (*ii*) the court will not appoint a new trustee with a view to the interest of some of the persons, beneficially interested under the trust, in opposition either to the wishes of the founders or to the interest of other *cestuis que trusts;* and (*iii*) the court, in appointing a trustee, will have due regard to the question whether the appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into execution;[4] to which may be added, that, in making an appointment, the court will not fail to pay due regard to usage.[5]

Succession of the Manager.

273. (1) In the absence of anything appearing to the contrary, the succession of the manager is regulated by custom and usage of the endowment.[6]

(2) Without prejudice to the generality of the foregoing provisions, the right of management and control of an endowment vests in the founder and his heirs;[7] but the founder is entitled to nominate

(1) *Manohar* v. *Bhupendra Nath*, 60 C. 452 F.B.; *A.-G.* v. *Lal Behari*, 61 C. 393 (397, 398); *Kandarpa Mohan* v. *Akshaychandra*, Ib., 106, reversing O.A.: 60 C. 706.

(2) *Mittevi* v. *Peduti*, 21 M.L.J. 490: 9 I.C. 496.

(3) *Angamuthu* v. *Ramalinga*, 39 M.L.J. 685: 60 I.C. 766.

(4) *Raj Krishna* v. *Bepin*, 40 C. 251 (258).

(5) *Sham Devi* v. *Ram Nath*, 91 I.C. 465: (1925) L. 273.

(6) *Goosami Sri Girdharji* v. *Romanlalji*, 17 C. 3 (20) P.C.; *Jagadindra* v. *Hemantha*, 32 C. 129 (139) P.C.

(7) *Ib.*, *Narayan* v. *Bhuban Mohini*, (1934) C. 244.

his successor;[1] but in so nominating his successor from his heirs he cannot create a line of heirs inconsistent with the law of inheritance.[2]

Illustrations.

(*a*) *A*, bequeaths his estate to his family idol and provides that its management shall be regulated by the rule of primogeniture. The provision for management is illegel in that it would create a devolution of property inconsistent with Hindu Law.[3]

(*b*) *A*, bequeaths his estate to his family idol and provides that its management shall vest in his eldest son. The provision for management is legal in that the gift to his eldest son is absolute.[4]

2050. Succession to Shebaitship.—The management of a religious foundation may become hereditary in a single family customarily, or under the terms of a foundation or by lapse of time creating in the *shebait* a right to hereditary office. The question whether such office is precarious or hereditary is a question of fact to be decided in each case. There are many old foundations of which the history of their origin is lost in antiquity; all that is known of them is that they have been managed by a single person who has inherited the management from his predecessor.

All religious endowments are not subject to the same rule, nor indeed are their rules of succession similar. There are those in which time has strengthened the right of the manager to a virtual ownership. There are others in which the manager is no better than a trustee, while there is yet an intermediate class in which the manager still holds the position of the guardian of an infant, possessing even larger powers of appropriating a portion of the income for his own maintenance for which he is not accountable. It cannot be generally asserted that a manager of an endowment is or is not a trustee. It all depends upon the endowment and his association with it.

2051. Succession to Mahantship.—It is now settled that the position of a *mahant*, in relation to the *muth* over which he presides, is, speaking generally, that of a trustee and not of an owner,[5] though he possesses larger powers of internal management. But being the trustee, he has no right to appoint a successor, and the question of succession to him must be governed by the particular usage of the institution and, in fact, the general law. If, by the practice and usage of an institution, the *mahant* is entitled to nominate a successor, by courts will give effect to it.[6] The *mahant* cannot appoint a successor by will,[7] though he may be authorized by usage to appoint one,[8] but that "usage forms the controlling rule with regard to the right to the office of *mahant* may now be considered as having been conclusively settled by authority."[9] But while it is so, usage

(1) *Gnansambandha* v. *Velu Pandaram*, 23 M. 271 (281, 282) P.C.; *Manohar* v. *Bhupendranath*, 60 C. 452 (499, 500) F.B.; *Kandrapamohan* v. *Akshayachandra*, 60 C. 706; *Administrator-General* v. *Lalbehari*, 61 C. 393; *Lal Behari* v. *Administrator-General*, (1935) C. 284.

(2) *Ib.*

(3) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C. applied in *Lal Behari* v. *Administrator-General*, (1935) C. 284; *Administrator-General* v. *Lal Bihari*, 61 C. 393; *Kandarparmohan* v. *Akshay Chandra*, Ib., p. 106 distinguishing *Madhav Rao* v. *Balabhai*, 52 B. 176 P.C.

(4) *Ram Parkash* v. *Anand Das*, 43 C. 707 (713, 714, 732) P.C.. explained in *Vidyavaruthi* v. *Balusami*, 44 M. 831 (838) P.C.; *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.; *Balusawmy* v. *Venkatasawmy*. 40 M. 745 (749).

(5) *Ibid.*

(6) *Kamini* v. *Asutosh*, 16 C. 103 P. C.

(7) *Ram Parkash* v. *Anand Das*, 43 C. 707 (723) P.C.

(8) *Saminatha* v. *Sellappa*, 2 M. 175 (179), explained, *per* Lord Shaw in *Ram Parkash* v. *Anand Das*, 43 C. 707 (715) P.C.

(9) *Ram Parkash* v. *Anand Das*, 43 C. 707 (715) P.C.; *Janaki* v. *Gopal*, 9 C. 766 P.C.; *Ganda* v. *Chatar Puri*, 9 A. 1 P.C.; *Grudharee* v. *Nandokishore*, 2 Hay

generally leans towards the succession of the senior *chela* as the rightful successor, and where there is no evidence of any usage to the contrary, the court will be justified in presuming such usage to govern the succession.[1] In many *muths*, the *mahant* is elected by the *sanyasis* of the *muths* of his order and, in the absence of custom and the power of appointment, this should be presumed to be the rule of election.[2]

2052. According to Hindu Law, neither the office of a *mahant* nor the property of a *muth* can be the subject of a partition,[3] bargain or huckster. It has been held as proved that the *mahant* of the *muths* of the Nanak Shahi Udasi sect possesses the power to nominate his own successor.[4] But in this case, the right of nomination is itself a trust which must be discharged in the interest of the institution. Where, therefore, the *mahant* makes a nomination of his successor out of selfish or sordid motives and it is not in the interest of the foundation, the court will have no hesitation in declaring the appointment void. Such was the case of the *Mahant* who had appointed his adversary as successor to quiet him in his own prosecution by him for murder and forgery of a will.[5]

2053. Gossains and Sanyasis.—The orthodox Hindu *muths* are tenanted by *gossavis, sanyasis, bairagis,* or asceties of other sects who are drawn from the Hindu society without distinction of caste, every Hindu being competent to enter a religious order. In the case of Dasnami Gossavis or Sanyasis, the initiation is gradual, the disciple being maintained for a year or two as a novitiate to enable him to become acquainted with the customs and usages of the order, after which, on attainment of his age of discretion which according to Hindu Law implies completion of the sixteenth year, he is finally admitted into the order by the ceremony of *Biraj Homa* in which the guru whispers into his ears the *mul mantra* or the mystic formulae after which his application to the order becomes irrevocable.[6]

2054. Muths: Their Origin and History.—A considerable portion of endowed property is held by the institutions called *muths* or monasteries, a term, which, in its original and narrow sense, signified the abode of an ascetic or *sanyasi* or *pardesi*.[7] In ancient India, religious learning was imparted by a teacher who drew to himself a number of disciples who lived and learnt with their *guru* who gave them shelter. These congregations of tutor and students lived the life of a religious family. At times, a number of *rishis* foregathered in an improvised shelter where they taught their students. These were the prototypes of colleges and monasteries. With the rise of Buddhism, these institutions received a considerable stimulus, born of a new faith with its levelling doctrines and proselytising vigour. Congregations of monks were formed to preach and practise its sublime philosophy. These monasteries offered welcome refuge to those who desired to escape the turmoils and troubles of wordly life. They were

633; *Prayal* v. *Kriparam*, 8 C.L.J. 499; *Basdeo* v. *Gharib Das*, 13 A. 256; *contra* in *Sellappaswamy* v. *Manikaswamy*, (1911) M.W.N. 359: 11 I.C. 336.

(1) *Raja Ram* v. *Bhata*, 38 I.C. 221; *Gobinda* v. *Ram Charan*, 52 C. 748; *Krishnagiri* v. *Shridhar*, 46 B. 655 (Designated *chela* succeeds even though his *guru* died before his formal initiation).

(2) *Prayad* v. *Kriparam*, 8 C.L.J. 499 (505), following *Madho* v. *Kamta*, 1 A. 539; *Ramji* v. *Lachu*, 7 C.W.N. 145.

(3) *Gobinda* v. *Ram Charan*, 52 C. 748.

(4) *Dharam Dass* v. *Sadho*, 40 I.C. (A.) 177.

(5) *Nataraja* v. *Kailasam*, 25 C.W.N. 145 P.C.: 57 I.C. 564, following *Ramalingam* v. *Vythilingam*, 16 M. 490 (498) P.C.

(6) *Digambar* (*Mahant*) v. *Bhirongir*, 18 L. 538.

(7) *Giyana* v. *Kandasami*, 10 M. 375.

the rendezvous alike of the *elite* of the faith as of the bereaved and distressed souls from all causes. Whatever tempest may rage without, within their walls there was peace. The rising power of the doctrine of *nirvan* aroused the Brahman hierophants from their accustomed lethargy. In the eighth century, Shankar, an orthodox Hindu scholar, rose to re-establish the ancient faith. Shankar was an ascetic and inculcated asceticism as the best antidote for the new-fangled creed. Like the Buddhists, he, too, established monasteries and founded the order of *sanyasis* called *aranyas, asramas, vanas, bhartis, parvatas, puris, sagaras, saraswatis*; and *tirthas*, who lived in *muths* where they took and taught the disciples. The head of these *muths* was called the *mahant* or *acharya*.

Manager's rights and duties.

274. The manager of an endowment, is bound to deal with its property with the same care as a trustee should in charge of a trust property[1] and in particular—

(1) He must carry out the founder's directions, if any, as to the management of the property;[2]

(2) He must maintain the customary usages of the institution;[3]

(3) He is entitled to the possession of all endowed property; and as *shebait*, he is entitled to the custody of the idol and all its paraphernalia;[4]

(4) He must maintain accounts of the trust and is entitled to an indemnity for anything of his own spent thereon;[5]

(5) And unless he is otherwise provided for, he has a right to use a reasonable portion of its income upon his own maintenance;

(6) He may retain or apply the surplus as may be usual or customary;[6]

(7) He may improve the property out of its surplus;[7]

(8) He is accountable to the founder, and in his absence, his legal representatives;[8]

(9) He is entitled to sue and is liable to be sued on behalf of the trust.

2055. **Analogous Law.**—All the clauses of this section are drawn from the decided cases. The duties of the manager must depend upon the nature of the endowment. If it is charitable without being religious, the manager has merely to administer the fund in accordance with the wishes of the founder or the general purpose of the foundation. Where, however, the trust is religious, the manager's duties are more artificial, and must conform to the forms and rituals, if any, prescribed or usual in such cases.

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(1) S. 15, Trusts Act (II of 1882); S. 151, Contract Act; *Speight* v. *Gaunt*, L.R. 9 A.C. 1 (4).

(2) *Cf.* S. 11, Trusts Act.

(3) *Vidyapurna* v. *Vidyanidhi*, 27 M. 435 (455); *Sankaralinga* v. *Rajeswara*, 12 C.W.N. 940 (951) P.C.

(4) *Seshadri* v. *Ranga*, 35 M. 631 (634).

(5) *Thackersay* v. *Harbhum*, 8 B. 432 (457).

(6) *Gajapati* v. *Bhagawan*, 15 M. 44; *Manohar* v. *Lakhmiram*, 12 B. 247 (251, 252), affirmed O.A.; *Chotalal* v. *Manohar*, 24 B. 50 P.C.; *Jugul Kishore* v. *Lakshman*, 23 B. 659; *Rajeshwar* v. *Gopeshwar*, 35 C. 226.

(7) *Thackersay* v. *Harbhum*, 8 B. 432 (457).

(8) *Ib.*

For the rest, his duties are in conformity with the general law,[1] and will now be considered.

The general duty of the manager is to take that reasonable care in the management of the trust which a prudent person, under similar circumstances, would take of his own property.[2]

But though this is the ideal, mismanagement of Hindu endowments by their managers is a by-word of reproach. In a majority of cases the terms of the grant are extremely vague—in other cases, they are not even traceable, while in most cases, they follow a traditional practice. As remarked by West and Buhler: "The idol, deity or the religious object is looked on as a kind of human entity, and the successive officiators in worship as a corporation with rights of enjoyment but not generally of partition or alienation, except so far as this may be necessary to prevent greater injury. Such endowments are frequently founded by gifts and bequests simply to the endowments. No rules have, in a majority of these cases, been formally prescribed. The intention of the foundation has to be gathered from the traditional practice, and the succession is thus determined by the custom of each particular institution, though this may have become embraced in some more extensive custom. And as to the management of an endowment, it is not competent for the holders in one generation to impose rules on those of another. The endowment, once made, cannot be resumed, but performance of the duties may be enforced."[3]

Clause (1).

2056. Founder's Directions.—This clause is in consonance with the general rule enacted in S. 11 of the Trusts Act, which requires the trustee to fulfil the purpose of the trust, and to obey the directions of the author of the trust, given at the time of its creation, except as modified by the beneficiaries competent to contract, provided that where the beneficiaries are incompetent to contract, the directions of the District Judge should be taken, and the trustee is not bound to obey any direction which is impracticable, illegal or manifestly injurious to the beneficiaries. Under S. 43 of the Religious Endowments Act,[4] and S. 34 of the Trusts Act, and, as before stated, under S. 7 of the Charitable and Religious Trusts Act, it is open to the manager to take the advice of the court on any question respecting the management or administration of the trust property. The trustee is not bound to carry out the details of his instructions, since his position as trustee arms him with a certain discretion in the interest of the trust property. Where, therefore, he has acted erroneously but honestly, according to his best judgment, in the interest of the trust, the court will not too narrowly canvass the matter in which he has overborne his instructions.

Clause (2).

2057. Must Observe Customary Usages.—The manager must observe the customary usages of the foundation. As observed by the Privy Council: "It is the duty of the trustee or manager to maintain the customary usages of the institution, and if he fails to do so, he is.....guilty of a breach of trust, and still more so, if he deliberately attempts to effect a vital change of usage and make it binding on the worshippers, by obtaining a decree of the court

(1) Trusts Act XXVIII of 1867; similar provision exists in 22 & 23 Vict., C. 35, S. 22; *Madras Doveton Trust Fund*, In re, 18 M. 443.

(2) S. 151, Contract Act; *Speight* v. *Gaunt*, L.R. 9 A.C. 1 (100).

(3) W. and B., H.L., 301, 302; cited in *Vidyapurna* v. *Vidyanidhi*, 27 M. 435 (449).

(4) XX of 1863.

to establish it."[1] In the case of temples, the endowments, whether in the shape of landed property or *tasdik* allowances, have to be devoted to the carrying out of the specific purposes connected with the temples, *i.e.*, the daily worship and the periodical ceremonies and festivals, purposes defined and settled by usage and custom and generally recorded in what is known as the '*dittam,*' and the *dharmkartas* are mere trustees for carrying out or the executing of such trusts. In the case of *muths*, however, such defined and specific purposes, as are immediately connected with the maintenance of the *muth* as an institution, are in the nature of things very limited, and a large part of the income derived from the endowments of the *muth* as well as from the money offerings of its disciples and followers—which offerings as a rule are very considerable—is at the disposal of the head of the *muth* for the time being, which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting on his conscience, regulated only by the force of public opinion, and he is in no way, whether as a trustee or otherwise, accountable for it in law.[2]

2058. The customary usages must necessarily differ according to the nature and purpose of the foundation. If it is a temple, the ordinary usage consists in preparing food (called *bhog*) for the deity, celebrating certain festivals, arranging for fairs[3] and collecting votive offerings. If he neglects to perform his usual and customary duties, or is guilty of malversation or misconduct in the performance of them, the court will restrain him. Such would be the case where the manager refused to perform the usual festivals though he was in funds: *a fortiori* would he be guilty of such misconduct, if it was usual to celebrate them with the aid of voluntary contributions. "And, of course, the courts are bound to restrain a trustee from injuring the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to the essential or important matters connected with the institution. That such departure on the part of a trustee amounts to a breach of legal duty incumbent on him is the ground on which the court exercises jurisdiction over him."[4] The manager must conform to the usage. He cannot alter it. He cannot alter the form of worship[5] or the ceremonies and processions in connection with idols.[6] He cannot, for instance, remove them from the temple, on the ground that it is dilapidated, if it is objected to by a majority of the worshippers.[7] And, of course, in this, as in all other matters, he must be guided by public opinion.

2059. The manager of a public temple cannot make rules preventing from admission of any worshipper thereto for the purposes of worship, though he may levy a small admission fee to prevent over-crowding, or otherwise regulate admission to a particular part owing to the value of the idol and its ornaments.[8] In this and other matters of detail, the manager

(1) *Sankaralinga* v. *Rajeswara*, 12 C. W.N. 940 (951) P.C.

(2) *Vidyapurna* v. *Vidyanidhi*, 27 M. 435 (455).

(3) *Elayalwar* v. *Namberunmal*, 23 M. 298 (304).

(4) *Elayalwar* v. *Namberumal*, 23 M. 298 (304); *Krishnasami* v. *Samaram*, 30 M. 158.

(5) *Venkatarayar* v. *Srinivasa*, 7 M. H.C.R. 32 (36).

(6) *Subharaya* v. *Chellapa*, 4 M. 315 (316).

(7) *Hari* v. *Antaji*, 44 B. 466.

(8) *Shamyarlal Purshottam* v. *Dakor Temple Committee*, 28 Bom.L.R. 309: 94 I.C. 47: (1926) B. 179; *contra* in *Kalidas* v. *Gor Parjaram*, 15 B. 309 (316, 317).

doubtless possesses a power which must be exercised not capriciously but only in good faith on necessary occasions and for necessary and legal purposes, as for preserving orderliness and decency of worship.

2060. Possession of the Endowment.—The manager has the sole right to be in possession of the endowment, the idols, its jewels and other paraphernalia. Where there are several trustees, they are allowed to partition the endowment for convenience of management. And where they have equal right of worship, they are permitted to exercise it by rotation. They may even remove the idol, if it has no local habitation, for the period of their turn, but on condition that they deliver it, at their own expense, to the owner of the next turn. But this is an exception and not the rule, since idols ordinarily gain in sanctity by the reason of their locality, and where they have for long remained in a place, it becomes their abode from which they cannot be removed.

Clause (3).

2061. The right of the manager to superintend the work of all servants employed on the foundation arises from the very nature of his office as manager. He is entitled to punish and dismiss all servants, including the hereditary priest, for misconduct,[1] and unless the dismissal is malicious or *mala fide*, the civil court has no jurisdiction to review his decision,[2] unless he can shew that there was a trust in his favour.[3] In any case, the fact that the servant was dismissed without notice given or explanation taken is no ground for interference. "The nature of the offence may be such that instant suspension from the functions of the office would be necessary in the interests of the institution, and to hold that the officer could not be suspended without notice and without explanation received from him, might be seriously detrimental to the interests of the temple."[4]

Authority over Servants.

2062. The possession of the manager, being *qua* trustee, cannot be adverse to the beneficiaries. In determining what right adverse possession would confer on the holder, the *animus possidendi* is the decisive factor. The character in which possession is held must determine the right which the possession would confer. The fact that the trustee was misappropriating the rents, would not make his possession adverse, though it would make him liable to account for the rents so misappropriated. The plaintiff's father, as trustee, had let certain temple lands to the defendant. The plaintiff sued to recover them. It was proved that the trust had vested in another. The plaintiff had, however, received rents of the land and appropriated them to his own use. He claimed the lands by adverse possession. But the court dismissed his shit, holding that the land belonged to a trust and could not be recovered by the plaintiff who was the trustee, however wrongfully he may have used its rents.[5]

Manager's possession cannot be adverse.

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(1) *Seshadri* v. *Ranga*, 35 M. 631.
(2) *Bhavani* v. *Timmanna*, 30 B. 508; *contra* in *Krishnaswamy* v. *Gomatuni*, 4 M.H.C.R. 63; *Seshadri* v. *Ranga*, 35 M. 631 (632).
(3) *Ram Charan* v. *Rakhol*, 41 C. 19 (34).
(4) *Seshadri* v. *Ranga*, 35 M. 631 (634).
(5) *Thuppan* v. *Hichiri*, 37 M. 373 (377).

2063. Must Keep Accounts.—The manager must maintain accounts even if he be himself the founder.[1] His failure to keep accounts is a grave misconduct justifying his removal.[2] It is the manager's duty to protect and preserve the endowment, to manage it prudently and to conserve its resources with scrupulous care. It is his duty to take stock of all the dedicated property, and realize bad securities before they are lost.[3] If his predecessor has wrongly alienated any of the properties, it is his duty to recover them before they become irrecoverable, and if, by his fraud, or negligence, any of the properties are lost, he is liable for it.[4] All surplus must be promptly invested in sound securities, otherwise, he will be liable for interest.[5] He may invest in any securities, provided they are of a permanent and not perishable or terminable nature.[6]

Clauses (4), (5), (7), (8).

The manager must not mix the trust accounts with his own, since it leads to confusion. If he contravenes this rule and mixes trust money with his own and the two cannot be separated, the trust will be entitled to the whole.[7]

The manager's salary is, sometimes, fixed, but in many cases he is left to make what he can out of it. In such cases, it is difficult to call him to account, for he is accountable to no one. Such is ordinarily the position of the *mahant* of a *muth*.[8] Wherever he is accountable at all, his liability will be determined by the rules here stated.

2064. The destination of the votive offerings made to a *shebait* depends upon the status and holiness of the recipient and his relationship to the beneficiary. Such offerings made to a *mahant*[9] or the head of a sect or order to a *guru* by his disciples or the like, are *prima facie* intended to be personal presents to them, though charged with the duty of their application to the institution which they represent, but such obligation is merely moral and not legal.[10] They are not accountable for them to the auditor of the institution unless they constitute a part of its sustenance, in which case they would be so accountable. As a rule, votive offerings made on festive and ceremonial occasions by the general body of pilgrims, worshippers or devotees comprise small gifts, the destination of which is determined by usage and rules of the institution. In such case, a trust cannot be presumed in the absence of an intention to create it. But there can be no trust unless its purpose, the trust property and the beneficiaries are so indicated that the trust could be administered by the court if the occasion arose.[11]

Votive offerings.

Apart from much exceptional cases the manager is entitled to receive votive offerings which he must credit in accounts.

(1) *Thackersay* v. *Hurbhum*, 8 B. 432 (467).
(2) *Manohar* v. *Lakhmiram*, 21 B. 247 (261, 262), affirmed O. A., *Chotalal* v. *Manohar*, 24 B. 50 P.C.; *Jugal Kishore* v. *Lakshman Das*, 23 B. 659; *Rajeswar* v. *Gopeshwar*, 35 C. 226; *Srinivasa* v. *Evalappa*, 45 M. 565 (584, 585) P.C.
(3) *Thackersay* v. *Harbhum*, 8 B. 432 (465).
(4) *Ib.*
(5) *Rajaram* v. *Lakshmi*, 13 M.L.J. 206.
(6) *De Souza* v. *De Souza*, 12 B.H.C. R. 184; *Thackersey* v. *Hurbhum*, 8 B. 432 (466).
(7) *Oatway Hertslet* v. *Oatway*, (1903) 2 Ch. 356.
(8) *Saminatha* v. *Sellappa*, 2 M. 175 (179); *Vidyapurna* v. *Vidyanidhi*, 27 M. 435 (449).
(9) *Vidyapurna* v. *Vidyanidhi*, 27 M. 435; *Kailasam* v. *Nataraja*, 33 M. 265.
(10) *Chhotahbai* v. *Chandra Basak*, 57 A. 330 P.C.
(11) *Ib.*, p. 342.

"Where an idol is set up temporarily for worship, or where the offerings are of a perishable nature, such as articles of food, the priest in attendance, as the nearest Brahmin available, generally appropriates the offerings;[1] and the same is the case where the idol itself is the private property of the priest. But where the idol is an ancient one, permanently established for public worship, and the offerings are generally of a more or less permanent character, being coins and other metallic articles, in the absence of any custom or express declaration by the donor to the contrary, they are, as they ought to be, taken to be intended to contribute to the maintenance of the shrine with all its rites, ceremonies and charities, and not to become the personal property of the priest. However much a Hindu votary may wish that his offerings to public shrines should ultimately go to the use of meritorious Brahmins, he can never be supposed to intend, nor does the Hindu Law anywhere allow, that they should become the property of the priest, to be squandered by him or devoted to purposes foreign to the endowment.[2]

Cl. (6). His Improvements.

2065. All acquisitions of the *shebait*, out of the income of the endowed property, would be treated as accretions to the estate, since it is his duty to apply all such income to the preservation and improvement of the *corpus, a fortiori* where he has all along treated them as belonging to the idol.[3] Where the *shebait* is empowered to expend the income from a fund, he is equally entitled to expend the income derived from such fund and its accumulation.[4]

Clause (7).

2066. His Accountability to the Founder.—The manager's accountability to the founder has already been the subject of discussion under a previous section (**S. 272**), and within the limits set out in the sequel he is equally accountable to the beneficiaries (**S. 281**).

Clause (8).

2067. His Right of Suit.—The manager is entitled to sue on behalf of the endowment as its guardian or next friend, and he may be sued as such.[5] In some cases, the manager is held entitled to sue and be sued in his own name, without the idol being joined as the party interested.[6] This procedure is at variance with the general principles but is said to be supported by practice. But there seems nothing to commend it. In the case of a private religious trust, in which the public are not interested and the *shebaits'* own conduct is in dispute, it is for the court to appoint a disinterested next friend to sue and conduct the suit.[7]

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(1) *Gangadhar* v. *Doraisami*, (1937) M.W.N. 975.

(2) Banerjee, J., in *Girijanund* v. *Sailajanund*, 23 C. 645 (655, 656), following *Manohar* v. *Lakhmiram*, 12 B. 247. To the same effect, *Ganpatrav* v. *Ramadhin Das*, (1874) B.P.J. 258; *Ganpatrao* v. *Anopram*, (1879) B.P.J. 361; *Chotalal* v. *Manohar*, 24 B. 50 P.C.

(3) *Kartick Chandra* v. *Rudra Nandagir*, 25 C.W.N. 908.

(4) *Cf. Gnanendra* v. *Surendra*, 24 C.W.N. 1026 P.C.

(5) *Jodhi Ram* v. *Basdeo*, 33 A. 735 (737) F.B., overruling *contra* in *Raganathji* v. *Shah Lal*, 19 A. 530.

(6) *Juggodumba* v. *Puddomoney*, 15 B.L.R. 318 (330), followed in *Babajirao* v. *Laxman Das*, 23 B. 215 (223); *Pramada* v. *Poorna Chandra*, 35 C. 691 (698); *Dinabhandu* v. *Chamiruddi*, 34 I. C. (A). 548.

(7) *Hanhayalal* v. *Hamid Ali*, 8 L. 357 P.C.; *Sharatchandra* v. *Dwarkanath*, 58 C. 619, following *Pramatha Nath* v. *Pradyumna*, 52 C. 809.

Since an idol is a juristic person perpetually in minority, the manager suing for an idol is entitled to the extension allowed by S. 6 (old S. 7) of the Limitation Act.[1]

2068. Persons interested as worshippers in a public religious endowment may be added as parties to a suit instituted by a trustee on behalf of the endowment against third parties, if such joinder is considered by the court as desirable in the interests of the trust.[2] Such an occasion was held to arise where the worshippers complained of a breach of trust by the manager, who had colluded with the other side to the prejudice of their right of worship.[3] As S. 145 of the Code of Criminal Procedure deals only with immovable property, the court may declare the possession of a temple, but can pass no order as to the offerings[4] or of the right to act as priest.[5]

2069. Decree Against Manager Binds the Trust.—From the fact the manager represents the trust in all suits affecting its interest, it follows that a compromise made,[6] and decrees fairly obtained by or against the manager as representative of the trust, equally bind both his successor and the trust. But before applying the principle of *res judicata* to such judgments, the court should be satisfied that the judgments relied upon are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tried and decided in the suits which led to them, and the execution of such judgments should be decreed only against the rents and profits of the *debutter* property.[7] But this is not an invariable rule, since, if the rents and profits are inadequate to satisfy the decree, the *corpus* itself may be seized and sold.[8] Consequently, it is open to the creditor advancing money for the trust to obtain a decree not only personally against the trustee but also one charging the trust funds, for which purpose the court may permit even an amendment of the plaint.[9]

The trust estate is liable for a tort committed by its trustee in the reasonable management of the trust.[10]

2070. Manager's Personal Liability.—The fact that a person is the manager of a trust does not suspend his civil rights. He is able to contract in his own name and on his own credit, and a decree obtained against him on his personal contract or security does not affect the trust,[11] which is only liable for a debt contracted by him on its behalf and for a decree passed against him as its representative.[12]

2071. Manager's Remuneration.—The manager of a religious institution is ordinarily paid or permitted to use a part of its income for his

(1) *Jagadindra* v. *Hemanta*, 32 C. 129 P.C.; *Sankamurti* v. *Chidambara*, 17 M. 143.

(2) *Jeyangaruluvaru* v. *Sri Hati*, 4 M. H.C.R. 9; *Narayanasami* v. *Irulappa*, 12 M.L.J. 355; *Chidambaram* v. *Rangachariar*, 29 M. 106 (110).

(3) *Sankaralinga* v. *Rajeswara*, 31 M. 236 (250) P.C.

(4) *Ram Saram* v. *Raghu Nandan*, 38 C. 387; *Kader* v. *Kader*, 29 M. 237.

(5) *Gwiram* v. *Lal Behari*, 37 C. 578.

(6) *Pammayah* v. *Kandasamy*, 12 M. L.W. 562: 60 I.C. 22.

(7) *Golab* v. *Prosonno*, 11 B.L.R. 332, affirmed O.A.; *Prosonno* v. *Golab*, 14 B. L.R. 450 P.C.

(8) *Pramada* v. *Poorna*, 35 C. 691.

(9) *Laxmindrathirtha* v. *Raghavendra*, 43 M. 795; *Sundaresan* v. *Viswanada*, 45 M. 703.

(10) *Raybould* v. *Turner*, (1900) 1 Ch. 199; *Pramada* v. *Poorna*, 35 C. 691 (699).

(11) *Bishen Chand* v. *Nadir*, 15 C. 329 P.C.; *Peary Mohan* v. *Narendra*, 5 C.W.N. 273; *Ram Krishna* v. *Padama Charan*, 6 C.W.N. 663; *Babai Rao* v. *Luxman Das*, 28 B. 215.

(12) *Palaniappa* v. *Devasikamony*, 40 M. 709; *Anantkrishna* v. *Prayag Das*, I.L.R. (1937) C. 84.

own sustenance. In the case of the *mahant* of a *muth*, in Southern India, he is virtually given a free hand over its disposal, though his power in this matter is to a large extent regulated by usage. It has already been seen that all managers, though possessing the like, do not necessarily possess the same powers. In this respect the *mahant* stands at the head of them while a *dharmkarta* is an ordinary trustee, and has, indeed, no larger powers.[1]

Right of Reimbursement.

2072. The manager is entitled to be reimbursed the proper[2] expense which he has incurred in carrying out the directions of the testator, or otherwise on objects of necessity. The right of indemnity is incident to the position of a trustee. The liability in respect of that indemnity is the first charge on the trust estate. So, where one Bejay succeeded to his father as *shebait* of a religious trust and his right was contested by one Peary who obstructed Bejay's possession, with the result that its income, calculated at Rs. 10,000 a year, fell to less than a moiety. Bejay defended his title and spent Rs. 71,572 out of his private funds in protecting the *debutter* estate and performing his obligations as *shebait*. It was held that the estate was liable to indemnify Bejay for the amount spent by him in defending his own title as *shebait* and in protecting the estate and carrying out the directions of the founder's will.[3]

Shebait's Rights.

275. (1) In the absence of anything appearing to the contrary, the right of a *shebait* to the management of an endowment extends to a right of property therein, which is enjoyable, as such, and alienable consistently with his duties as such *shebait*:[4]

(2) Provided, however, he is a trustee within the scope of section 10 of the Limitation Act, and any property comprised in an endowment "shall be deemed to be property vested in trust for a specific purpose".[5]

(3) As such, he is disqualified from implementing his rights by prescription or any mode of adverse possession.[6]

2073.—Analogous Law.—It was held by the Privy Council in a case,[7] decided before the amendment of section 10 of the Limitation Act, that a *shebait* or a manager, in possession of an endowment does not hold it as a trustee in the English sense of the term, in which sense, that word was used in that section, with the result that an adverse possession against a *shebait* became adverse to the endowment, and that a trespasser could prescribe for a title against the endowment by twelve years' adverse possession against the *shebait*. To this extent that case of the Privy Council and other cases of the same Board that followed it have been

(1) *Srinivasa* v. *Evalappa*, 45 M. 565 P.C.

(2) *Panchakshari* v. *Venkat Ratnam*, 58 M. 160 (costs of an infructuous second appeal excluded) *see* S. 2092.

(3) *Peary* v. *Narendra*, 37 C. 229 (234, 235) P.C.

(4) *Manohar* v. *Bhupendranath*, 60 C. 452 (494, 495) F.B.

(5) S. 10, Lim. Act (Amended by Act I of 1929) which came in force on 1st January, 1929 overruling, *Vidya Varuthi* v. *Balusami*, 44 M. 831 P.C.; *Annamalai* v. *Muthukaruppan*, 8 R. 645 P.C.; *Chhatra Kumari* v. *Mohan Bikram Shah*, 10 Pat. 851 P.C.

(6) *Manickammal* v. *Murugappa*, (1935) M. 483 (485).

(7) *Vidya Varuthi* v. *Balusami*, 44 M. 831 P.C.

superseded by an amendment of the Limitation Act by an Act[1] that came into force on 1st January, 1929.

2074. To that effect these cases have ceased to be good law. But the fact remains, and has been reiterated, that the term trust, as used to describe a religious and charitable trust in this country, has not the same meaning as trust in the English sense enacted in other Acts of the Legislature, *e.g.*, the Charitable and Religious Trusts Act, 1920,[2] and other Acts[3] in which that term is used. Under English Law, and in the Acts last referred to, that word postulates the existence of legal and equitable rights foreign to the Hindu Law of endowments. An illustration would make the distinction clear. Suppose *A*, the owner of property entrusts his property to *B* for the benefit of *C*. Here certain rights and liabilities in the three persons still remain. But if in such a case, *B* is the *shebait* and *C* is the idol, the rights of the three are quite different; though for certain purposes and certain purposes only, *B* would be treated as a trustee as has been explained in the section.

Rights and duties of Joint Managers.

276. (1) In the absence of anything appearing to the contrary, where an endowment is in charge of two or more managers, unless they agree to act in rotation, they must act jointly or divide their duties for facility of management[4] but they remain severally liable for any default in their duties.[5]

(2) The managers may delegate their authority to another, but the person so appointed acts under the manager, and is liable to him for his acts of commission and omission.

2075. Analogous Law.—The rule abated in the two clauses is narrowed than that enacted in Ss. 44 and 27 of the Trusts Act. Where the management vests in more than one person jointly, they must all act jointly and are entitled to joint possession and management, though they may not all agree amongst themselves, in which case, the person aggrieved must have recourse to a suit for settling a scheme of management.[6] Where the management is entrusted to several persons, some of whom died, the survivors are entitled to manage an endowment and, as such, entitled to restrain by an injunction any one disturbing their possession. Where, therefore, the managers appointed one *M* to collect rent, and some of the managers died, whereupon one *V*, the *chela* of *M*, refused to account to the survivors for rent, the court restrained him from realizing the rents in future.[7]

2076. It is competent for co-trustees to settle a scheme of management by each of the co-trustees in rotation, at any rate, where no emoluments are attached and the office is an hereditary one. Where emoluments are attached and the office is hereditary, the emoluments will be subject to partition, in the strict sense of the term, like any other family property.

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(1) Act I of 1929.
(2) Act XIV of 1920.
(3) *E.g.*, The Religious Endowment Act, (XX of 1863); Trusts Act (II of 1882); Charitable Endowments Act (VI of 1890); Indian Trustees Act (XXVII of 1866); The Trustees and Mortgagees Powers Act (XXVIII of 1866).
(4) *Ramanathan* v. *Murugappa*, 29 M. 283 (289) P.C.
(5) S. 27, Trusts Act (II of 1882).
(6) *Meenakshi* v. *Somasundaram*, 44 M. 205.
(7) *Karam Singh* v. *Bir Singh*, 2 L. 252.

But whatever may be the number of co-trustees, the office is a joint one, and the co-trustees all form, as it were, but one collective trustee, and, therefore, must execute the duties of the office in their joint capacity.[1] The manager of a temple fills a double *role*. "As regards the property, the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which, in course of time, has become vested, by descent, in more than one person. In such a case, in order to avoid confusion or an unseemly scramble, it is not unusual, and it is certainly not improper, for the parties interested, to arrange, among themselves, for the due execution of the functions belonging to the office, in turn or in some settled order and sequence. There is no breach of trust in such arrangement nor any improper delegation of the duties of a trustee."[2]

2077. Such arrangement, however, creates no right, but is supported on the ground of convenience, and may be, at any time, revoked by all the co-trustees,[3] though it could not be varied or revoked by any one of them as inconvenient to himself. Any co-trustee may enforce the agreement against any one obstructing him in his right.[4] A decision by the majority is binding on the minority when it is arrived at, after full opportunity given for mutual discussion, by all the members in which the minority had an opportunity to record their dissent.[5]

In the case of private or family idols, which have no local habitation, such as a temple, it is open to the co-trustee to remove them to another house for the period of his turn,[6] but he must return them, at his own expense, to the next turn owner.

Managers' power of alienation.

277. (1) In the absence of any custom or usage to the contrary, the manager's power of alienation of property comprised in an endowment is akin to that possessed by the guardian of a minor's estate, that is to say, he may incur debts, charge or alienate the corpus of an endowment, if justified by legal necessity or its benefit.[7]

(2) An alienation of such property, made by its manager for a purpose other than legal necessity or benefit is not valid beyond the term of the manager's office,[8] **or his death,**[9] **nor can such alienation, if consented to by his successor, inure beyond his own term.**[10]

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(1) *Ramanathan* v. *Murugappa*, 27 M. 192 (199).

(2) *Ramanathan* v. *Murugappa*, 29 M. 283 (289) P.C.

(3) *Narayanasami* v. *Kumaraswami*, 7 M.H.C.R. 267 (270).

(4) *Ramessur* v. *Ishan Chunder*, 10 W. R. 457; *Gour Mohan* v. *Madan Mohan*, 15 W.R. 29 (30).

(5) *Teramath* v. *Lakshmi*, 6 M. 270; *Thattan* v. *Mangalath*, 34 M. 406.

(6) *Dwarkanath* v. *Janobee*, 4 W.R. 79 (80); *Ram Soondur* v. *Taruck Chunder*, 19 W.R. 28.

(7) *Prosonno* v. *Golab*, 14 B.L.R. 450 (458) P.C.; followed in *Vidya Varuthi* v. *Balusami*, 44 M. 831 (852, 853) P.C.; *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.; *Ananda* v. *Bhoju Lal*, 50 C. 292; *Dayamaji* v. *Sankar*, 42 C.L.J. 30: 87 I.C. 159; *Pethu Lal* v. *Dayamind*, 44 A. 721.

(8) *Ramdhan* v. *Parbati*, 16 Pat. 476: (1937) Pat. 519 (Shebait not bound by his predecessor's alienation without legal necessity).

(9) *Prosunno Kumari* v. *Gulab Chand*, 23 W.R. 253 P.C.; *Naina Pillai* v. *Ramnathan*, 47 M. 337 (352) P.C.; *Ponnambala* v. *Periyanan*, 59 M. 809 (818) P.C.; *Ramdhan* v. *Parbati*, 16 Pat. 476. *Naurangi Lal* v. *Ram Charan*, 9 Pat. 885.

(10) *Vidya Varuthi* v. *Balusami*, 44 M. 831 P.C.; *Ramdhan* v. *Parbati*, 16 Pat. 476.

(3) No person can, by adverse possession,[1] estoppel[2] against the manager or compromise with him[3] obtain any larger rights against the *debutter* estate.

(4) In an improper alienation of such property by the manager adverse possession against the endowment would, ordinarily, commence only on the manager's relinquishment of office or his death.[4]

(5) Provided that the possession of the auction-purchaser of the endowment in execution of a decree passed against it is adverse thereto as from the date of his purchase.[5]

Explanation.—**The term "manager" in this section includes any person actually filling that character whatever may be his designation or the defect in his appointment.[6]**

2078. **Analogous Law.**—This section is supported by case-law. The general rule here formulated is in accord with the statement of law of the Privy Council, who, speaking of the powers of the manager and head of the family, said: "The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *muth*, or of the guardian of an infant family."[7] This was laid down as far back as 1875, when the same Board said: "The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager of an infant heir which was thus defined in a judgment of this Committee, delivered by Lord Justice Knight Bruce: 'The power of the manager of an infant heir to charge an estate, not his own, is, under Hindu Law, a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his own wrong has helped to cause. Therefore, the lender, in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt.."[8]

"It is only in an ideal sense that property can be said to belong to an idol, and the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager. It would seem

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(1) *Ram Charan* v. *Naurangi Lal*, 12 Pat. 251 (260) P.C.

(2) *Nandalal* v. *Kumar Arun Chandra*, (1935) 41 C.W.N. 465; *Naina Pillai* v. *Ramnathan*, 47 M. 337 (353) P.C.; *Ponnambala* v. *Periyanun*, 59 M. 809 (818, 819) P.C.

(3) *Ramdhan* v. *Parbati*, 16 Pat. 476 (481, 483) distinguishing *Niladri* v. *Chaturbhuj*, 6 Pat. 139 P.C.; *Prosunno Kumari* v. *Golab Chund*, 23 W.R. 253 P.C.; *Mahadeo* v. *Karia*, 57 A. 159 (165, 166) P.C.

(4) *R. D. Cromartie* v. *Radha Damodar*, (1935) 62 C.L.J. 10. Art. 134-B, Limitation Act. (*See* S. 278.)

(5) *Subbaiya* v. *Mhd. Mustapha*, 46 M. 751 (756) P.C.; *Ponnambala* v. *Periyanun*, 59 M. 809 (820, 821) P.C.

(6) *Nanda Lal* v. *Kumar Arun Chandra*, 41 C.W.N. 464.

(7) *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (443) P.C.; *Magniram* v. *Kasturbhai*, 26 C.W.N. 473 P.C.

(8) *Hunooman Persaud* v. *Mt. Babooee*, 6 M.I.A. 393 (423).

to follow that the person so interested must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to preserve and maintain them."[1]

2079. Referring to this case, their Lordships, in another case said; that the position of a *shebait* was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate.[2] In some cases, the *shebait* is likened to a Hindu widow.[3] In another case of the Calcutta High Court, it was said: "The powers and duties of a *shebait* may now be taken as almost settled. Apart from his duties in connection with the worship and service of the idol, a *shebait* has the possession and management of the properties. In other words, his possession is that of a manager, and he is not only empowered, but bound to do, whatever is necessary for the benefit or preservation of its properties. The liability of the estate of an idol, for wrongs committed by its *shebait* in the reasonable management of its properties, is analogous to the liability of a corporation for wrongs committed by its agent in the course of their employment and in the apparent furtherance of its purpose,[4] and in both cases it is founded on the policy of law and without regard to personal default, for both the idol and the corporation are incapable of personal wrong doing. Neither can be invested with rights or duties, except through natural persons who are their agents."[5]

These powers may, it is said, be exercised even by a *de facto* manager.[6] But a person entrusted with the duty of a *shebait* cannot delegate his function to another.[7]

2080. Power of Transfer.—Property devoted to religious uses is, as a rule, inalienable,[8] and it is open to the founder to make it alienable.[9] In such cases, the debts of the institution can only be paid by attaching its income and in any case whatever the nature of the property or the necessity it is only the temporalities and not the sacred object or the spiritual rights and duties of the *shebait*, that can, at any time, be the subject of alienation.[10] The manager is then a trustee,[11] using that term only in the general sense, and possesses the power to sell, mortgage or let all

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(1) *Prosunno* v. *Golab*, 14 B.L.R. 450 (458, 459) P.C., followed in *Sheo Shanker* v. *Ram Shewak*, 24 C. 77 P.C.; *Hossein* v. *Mahanta*, 34 C. 249 (255); *Abhiram* v. *Shyamcharan*, 36 C. 1003 P.C.; *Parsotam* v. *Dat Gir*, 25 A. 296 (304, 311) (Powers those of a widow); *Juggessur* v. *Rodro*, 12 W.R. 299 (301).

(2) *Doorganath* v. *Ramchunder*, 2 C. 341 (352) P.C.

(3) *Juggeshur* v. *Rodro Narain*, 12 W. R. 299.

(4) *Mersy & Co., Trustees* v. *Gibbs*, L.R. 1 H.L. 93; *Taff Vale Railway* v. *Amalgamated Society*, (1901) A.C. 426.

(5) *Pramada* v. *Poorna*, 35 C. 691 (699).

(6) *Sheo Shankar* v. *Ram Shewak*, 24 C. 77 (82); *contra* in *Ramdas* v. *Mohesur*, 7 W.R. 446.

(7) *Bonnerji* v. *Sitanath*, 26 C.W.N. 236: 66 I.C. 140 P.C.

(8) *Prosonno* v. *Golab*, 14 B.L.R. 450 (458) P.C., followed in *Vidya Varuthi* v. *Balusami*, 44 M. 831 (852) P.C.

(9) *Tejo Bibi* v. *Murlidhar*, 48 A. 671.

(10) *Nagendra* v. *Rabindra*, 53 C. 132 (149, 156); *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235 P.C.; *Gnanasambanda* v. *Velu*, 23 M. 271 P.C.

(11) *Srinivasa* v. *Evappa*, 45 M. 565 (582) P.C.

or any portion of the endowed property in case of necessity[1] or benefit of the trust. He must not, however, alienate the *corpus*, if the necessity can be met by borrowing or an alienation of the rents and profits.[2] Even such property may be settled on a permanent lease such as *mirasi*, *putni* and *mokurari* grant.[3] Such a lease was granted by the *shebait* for the completion of a temple, which the Privy Council upheld with these words: "Here, can it be said the grant of a *mokurari patta* was an improvident way of raising money, if it were necessary to do it at all? It still left a rent for the sustentation of the idol; and if the transaction be *bona fide*, any subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced."[4] But apart from legal necessity or benefit, a *shebait* has no authority to lease *debutter* property even to a *co-shebait*.[5] A permanent lease, unsupported by unavoidable necessity cannot be granted by the *shebait* who, as a manager can, at the most, grant a lease to enure for his own lifetime.[6] A permanent lease, unsupported by unavoidable necessity, would, on the most favourable construction, enure only for the lifetime of the grantor.[7]

But there is nothing to prevent a *shebait* from transferring *debutter* land to another member of his family for the purpose of continuing the worship of the idol.[8]

2081. In one case, it was held that the profits of a *debutter* may be assigned so long as the worship is duly kept up.[9] But the profits of an endowment are as much *debutter* property as the corpus, and the same rule applies to both. As the Privy Council observed: "The *taluq* itself, with which these *jamas* were connected by tenure, was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its property. The *shebait* had not the legal property, but only the title of manager of a religious endowment."[10] The power to transfer is, of course, an incident of the office. Where, therefore, the manager is suspended or removed from office, or is merely a disputed claimant to office,[11] he cannot transfer any of the *debutter* land, even for a justifiable necessity, though, if the creditor was a *bona fide* transferee without notice, he would be necessarily protected.[12]

2082. The question what remedy the creditor has personally against the manager, on failure of the security, is one which cannot be answered without reference to the facts of each case, since the personal liability of

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(1) *Abhiram* v. *Shyamcharan*, 36 C. 1003 P.C.; *Naina Pillai* v. *Ramanathan*, 47 M. 337 P.C.; *Parsotam* v. *Dat Gir*, 25 A. 296; *Trimbak* v. *Lakshman*, 20 B. 495; *Nritya Gopal* v. *Mani Chandra*, 12 C.W.N. 63; *Devasigamani* v. *Palaniappa*, 34 M. 535; *Vira* v. *Valappil*, (1914) M.W.N. 909: 26 I.C. 239.

(2) *Vira* v. *Valappil*, 16 M.L.J. 503: 26 I.C. 239; *Devasigamani* v. *Palaniappa*, 34 M. 535.

(3) *Ramachandra* v. *Kasinath*, 19 B. 271; *Doorganath* v. *Ramchander*, 2 C. 341 (352) P.C.; *contra* in *Motee Dass* v. *Modhoosoodun*, 1 W.R. 4.

(4) *Doorganath* v. *Ramchunder*, 2 C. 341 (352, 353) P.C.

(5) *Prosunno Kumar* v. *Baroda Prosunno*, 22 C. 989.

(6) *Doorganath* v. *Ramchander*, 2 C. 341 P.C., followed in *Abhiram* v. *Shyamacharan*, 36 C. 1003 P.C.; *Ponnambala* v. *Periyanan*, (1936) P.C. 183; *Ramcharan Das* v. *Naurangi Lal*, 12 Pat. 251 P.C.

(7) *Ravji* v. *Vasudeo*, (1887) B. P.J. 5; *Papaya* v. *Ramana*, 7 M. 85.

(8) *Baroda* v. *Hemdata*, 13 C.W.N. 242.

(9) *Shibbessuree* v. *Beckwille*, 3 W. R. 152.

(10) *Shibessure* v. *Mothooranath*, 13 M.I.A. 270 (273).

(11) *Madho* v. *Ramratan*, 15 C.W.N. 838 P.C.: 11 I.C. 507.

(12) *Kasin* v. *Sudhindra*, 18 M. 359.

the debtor must largely depend upon the representation, express and implied, that induced the loan. *Prima facie* the *swami* of a *malli* has no private property and must be assumed to be pledging the credit of the *malli* when he borrows money for its purpose. Consequently, the personal liability of the *shebait* in such a case is out of question, and the *malli*, would be liable if the loan is shown to have been contracted for the benefit of the *malli*, or that the creditor had *bona fide* reason to suppose it was intended for such purpose.[1] But in any other case, where the manager has means of his own, he is bound by his contract, though the security he had offered failed.[2] But a debt so binding by estoppel cannot be recovered from his successors in the trust, though it might be available against his personal representatives.[3]

2083. Legal Necessity.—The legal necessity or benefit justifying alienation of the *debutter* property must naturally be adapted to the special requirements of the endowment and measured by the existing necessity justifying it. Besides the ordinary work of necessary reconstruction, completion or repairs of the buildings constituting or comprised in the endowment,[4] including those used for dwelling by the *mahant*[5] or other employees of the endowment, there are heads of expenditure which are equally necessary, such as the cost of restoration of the image,[6] the cost of litigation connected with the trust, defense of its title against hostile attack,[7] and the observance of customary practices, such as the performance of the *puja* or worship with due ceremonies,[8] the distribution of cloth at a festival,[9] the constant burning of a lamp where so required,[10] and the like.

2084. In judging of necessity, the first question is: What is the character of the institution and what objects was the income derived therefrom to be devoted to? The question of necessity cannot be decided upon the analogy of other institutions.[11] Where no deed of endowment is forthcoming, the rules, according to which property and its income are to be dealt with in order to carry out the intention of the original endower, can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case. But these rules, so to be inferred, must not be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual, as it could hardly fail to be, then the preservation and use of the dedicated property, to support and maintain that worship, must be assumed to have been similarly intended to be perpetual. A rule, therefore, which would authorize and empower the *shebait*

(1) *Shankar* v. *Venkapa*, 29 B. 422 (425); *Krishnan* v. *Sankara*, 9 M. 441 (444); *Lakshmindra* v. *Raghavendra*, 43 M. 795.

(2) *Krishnan* v. *Sankara*, 9 M. 441 (444), following *Elkington's case*, L.R. 2 Ch. 511; *Bridger's case*, L.R. 9 Eq. 75.

(3) *Ganesh* v. *Keshav*, 15 B. 625 (637).

(4) *Doorganath* v. *Ramchunder*, 2 C. 341 P.C.; *Tahboonissa* v. *Sham Kishore*, 15 W.R. 228; *Collector* v. *Hari*, 9 B. 546.

(5) *Kumud* v. *Tripura*, 60 I.C. (C.) 464.

(6) *Tahboonissa* v. *Sham Kishore*, 15 W.R. 228.

(7) *Jagarnath* v. *Bibi*, 13 I.C. 85; *Parsotam* v. *Dat Gir*, 25 A. 296; *Vidyapurna* v. *Vidyanidhi*, 27 M. 435; *Peary Mohun* v. *Narendra*, 37 C. 229 (234) P. C., following *Walters* v. *Woodbridge*, 7 Ch.D. 504.

(8) *Pandara* v. *Karutha*, 21 M.L.J. 129: 9 I.C. 150.

(9) *Samantha* v. *Sellappa*, 2 M. 175.

(10) *Collector* v. *Hari*, 6 B. 546 (549).

(11) *Dost Mohomed* v. *Nazir Ali*, 6 M. L.W. 134: 42 I.C. 474; *Ramanadhan* v. *Vava*, 40 M. 116 P.C.

of such temple, arbitrarily, and at his own mere will and pleasure, to alienate the dedicated property, either piecemeal or *en bloc*, would be so repugnant to the whole purpose and object of the endowment that it could not be rationally held to embody the intention of the original founder. A *shebait* is not justified in selling *debutter* land solely for the purpose of raising capital to embark in money-lending business, however lucrative that business may be. He is not entitled to sell *debutter* land solely for the purpose of so investing the purchase of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the *debutter* land itself.[1]

2085. A *shebait* is entitled to mortgage the endowed property, to prevent its forfeiture or sale for non-payment of land revenue or other paramount charge.[2] So, again, where title to the "*gaddi*" was in dispute, expenses incurred in defending it, were held chargeable on the endowment.[3]

Though the head of a *muth* possesses larger powers of disposition over its income, he has no larger authority to alienate the *corpus* than the head of any other religious institution.[4]

2086. The term "necessity" implies pressure. There may be a debt, a legal debt chargeable on the trust, and yet no pressure. The manager cannot forecast wants and incumber the property, which might otherwise have never been lost. So, where there was a decree against a *muth*, but no attachment, the court held a bond executed by the manager as supported by no necessity, adding: "It was given in respect of antecedent transactions, and there was no necessity for Sheocharan giving such a bond. There was no danger to the estate which the money was advanced for the sake of averting. The plaintiff might have sought any remedy which he had against the *muth*: but it does not appear that any proceedings were taken for sequestration or attachment of the property; and there was not, therefore, any necessity for giving this bond and thus really giving a fresh right of suit, when, as regards at least a portion of the claim, a suit for it would have been barred by the law of limitation."[5]

2087. Benefit.—Benefit; as distinguished from necessity; is a distinct and recognized head of expenditure permitted by law. As stated before, it was at one time classed under the head of necessity from which it is, however, clearly distinguishable (**Ss. 116-119**). The term has already been generally defined (**Ss. 112, 114**), and its application with reference to cases arising in connection with religious and charitable endowments is all that calls for notice here.

What is benefit to an endowment must necessarily depend upon the nature and character of the endowment. The manager is, at all times, entitled to observe the customary usage of an institution. As such the head of a *muth* was held entitled to borrow money for the purpose of celebrating a festival, even though it lasted for a period of two years

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(1) *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.

(2) *Parsotam* v. *Dat Gir*, 25 A. 296 (311, 312); *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.

(3) *Parsotam* v. *Dat Gir*, 25 A. 296 (311, 312) but so not the costs of an infructuous second appeal.

(4) *Pandara* v. *Karutha*, 21 M.L.J. 129: 9 I.C. 150; *Gobinda* v. *Ram Charan*, 29 C.W.N. 931: (1925) C. 1107.

(5) *Ramchurn* v. *Nunhoo*, 14 W.R. 147.

and entailed on the *muth* the liability of feeding as many Brahmins as attend it.[1] As compared to this, the reconstruction of a dining hall, which had fallen into disrepair and which the Government had ordered to be put in repair, is clearly justified by necessity.[2] So would be his other acts of ordinary management, though there is a clear distinction between acts that are necessary and those that are merely beneficial. For instance, the construction of a *dharamshala*, to accommodate pilgrims visiting a shrine, may be a "benefit" to the shrine, though it would not justify its mortgage. On the other hand, its mortgage to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration would be a distinct benefit.[3] But the grant of a perpetual lease to fill up a tank on the property, which the *shebait* could not afford to do, is not such a benefit as would justify alienation of the trust property.[4]

2088. Partition.—As endowment is, sometimes, used in a dual sense as signifying the property dedicated to an object as also the object itself. Closely connected with the subject of endowment is that of the offices held by those entrusted with its management. A religious endowment would thus comprise (*i*) the property, (*ii*) the sacred object and (*iii*) the persons charged with the management of (*a*) the property and (*b*) the object. As regards the object[5] and the sacred office, they are ordinarily both impartible, though, in a family partition, even idols are known to have been thrown into the hotchpot, and as regards religious offices, though they are, strictly speaking, indivisible, still modern custom has sanctioned a departure by permitting their partition by allowing the persons entitled to a share to officiate by turns,[6] but such partition is only allowed when (*a*) it is in accordance with the wishes and intentions of the founder of the endowment, or (*b*) is justified by the usage or practice in the family.[7] A sacred institution is not partible merely because its branches are scattered and their partition would facilitate management. So where a *math* had several asthals or branches their separation by partition was held to be improper, unless justified by special circumstances.[8]

2089. Exchange.—The manager's right to effect an exchange of the dedicated property is, of course, to be tested by the same touchstone of necessity. If the property had deteriorated in value, owing to the deposit of sand or other deleterious material or by the shifting course of a stream, an exchange would be *prima facie* justifiable. So, again, it may be justified by more economic management, as where an outlying village is given away in exchange for another village more conveniently situated. The question, in such case, is not why there was an exchange, but whether it was necessary and conducive to the good of the endowment.

2090. Lease.—In the first place, whatever powers the manager may possess to grant leases, they are personal to him as manager, and cannot be delegated by him to an agent.[9] His power to grant permanent leases must

(1) *Vibhudapriya* v. *Lakshmindra*, 50 M. 497 P.C.
(2) *Ib.*
(3) *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.
(4) *Inananjan* v. *Adormoney*, 13 C.W.N. 805: 3 I.C. 92.
(5) *Pramath Nath* v. *Prdyumna*, 52 C. 809 (821) P.C.
(6) *Trimbak* v. *Lakshman*, 20 B. 495; *Rajesmar* v. *Goppessur*, 34 C. 828.
(7) *Rajeswar* v. *Gopessur*, 34 C. 828; *Ramkumar* v. *Jogender*, 4 C. 56; *Mancharan* v. *Pran Shanker*, 6 B. 298.
(8) *Ramcharan* v. *Govinda*, 56 C. 894 (901) P.C. (observed that their remarks were merely *obiter*).
(9) *Bonnerji*, v. *Sita Nath*, 26 C.W.N. 236 (241) P.C.; *Kotasseri* v. *Kanholi*, (1922) M.W.N. 428.

be measured by the same rule of necessity or benefit to the estate. Ordinarily, he has no power to grant permanent leases of endowed property, at a fixed rent, which is little distinguishable from a permanent alienation.[1]

A permanent tenancy created without necessity can only last during the grantor's lifetime. But if it is continued by his successor, the possession of the lessee does not become adverse to him so as to deprive the latter of his right of ejectment.[2] There is no presumption that the lease of *debutter* property is permanent, though the rent was fixed. The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be, and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity; it cannot be made in favour of that which offends a legal principle.[3]

2091. The fact that the lessee is itself a charitable institution does not validate an otherwise invalid lease. So, it is immaterial that the site leased was a house site and yielded no rent and had been let at an unvarying rent on a fixed premium.[4] One manager cannot validate an invalid lease granted by his predecessor, and the legality of such ratification may be challenged by a presumptive reversioner.[5]

A long lease for 40 years by a manager about to vacate office is open to the same objection as a permanent lease.[6]

A lease treated as permanent and acquiesced in by successive trustees cannot, however, be determined by notice.[7] But if one manager grants an invalid lease and his successer accepts rent, in the absence of a registered lease, the only tenancy created against him is a new lease, terminable in accordance with the provisions of section 106 of the Transfer of Property Act. But though the manager cannot, without necessity, grant permanent leases, he is not debarred from his right as manager to grant leases for a reasonable term and create derivative tenures and estates in conformity with usage or as an act of ordinary prudent management.[8]

The general rule as to a manager applies equally to the *mahant* of a *muth* who, though possessing larger power of internal management, has not the power to grant a permanent lease except for necessity or benefit of the institution.[9] But though the manager possesses no power to grant long leases without necessity, its propriety cannot be suffered to be questioned after a long lapse of time, say, one hundred years, when its propriety will have to be presumed.[10]

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(1) *Shibessouree* v. *Mothooranath*, 13 M.I.A. 270 (275); *Doorganath* v. *Ram Chunder*, 2 C. 341 P.C.; *Prosunno* v. *Saroda*, 22 C. 989; *Abhiram* v. *Shyama Charan*, 36 C. 1003 P.C., reversing O.A. *Shyama Charan* v. *Abhiram*, 33 C. 511; *Krishna* v. *Sukhas*, 10 C.W.N. 1000; *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.; *Vidya Varuthi* v. *Balusami*, 44 M. 831 P.C.

(2) *Vidyavaruthi* v. *Balusami*, 44 M. 831 (855) P.C.

(3) *Satya Sri* v. *Kartik*, 16 C.W.N. 227: 13 I.C. 536; *Murugappa* v. *Rangaswami*, 33 I.C. (M.) 57.

(4) *Devasignamani* v. *Palaniappa*, 34 M. 535; *Muthusamier* v. *Sreemethanithi*, 38 M. 356; *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.

(5) *Nanda Lal* v. *Kumar Arun Chandra*, 41 C.W.N. 464.

(6) *Palaniappa* v. *Sreenath*, 40 M. 709 P.C.; *Mangalasami* v. *Raja of Ramnad*, 1 M.L.W. 1074: 27 I.C. 361.

(7) *Narasimha* v. *Gopala*, 28 M. 391.

(8) *Prosunno* v. *Golab*, 14 B.L.R. 450 (459) P.C.

(9) *Balaswamy* v. *Venkataswamy*, 40 M. 745.

(10) *Chockalingam* v. *Mayandi*, 19 M. 485, approved in *Magniram* v. *Kasturbhai*, 46 B. 481 (488) P.C.

2092. Acquisition of Endowed Land.—Since a manager is not "competent to alienate the land" within the meaning of S. 13 of the Land Acquisition Act, it follows that the price payable on compulsory acquisition of land should be invested as provided in S. 32 of that Act.[1]

Effect of a Compromise.

2093. The manager cannot enter into a valid compromise binding upon his successor, unless it is shown to have been entered into for the benefit of the endowment.[2] The manager cannot settle the right to his office by compromise, since, while a party may settle by compromise a matter of a private individual right, he cannot so settle a right which is not purely of a private civil character. A right in which the public are interested, will not be permitted to be adjusted by arbitration or compromise. "The court itself has certain duties in connection with a case in which a judgment *in rem* has to be pronounced, or in a case which involves the right of the public or the right to a religious and charitable office or the right of a minor or other incapacitated person."[3] An agreement or compromise affecting such right is not a lawful agreement or compromise.[4] A decree, even if passed on such compromise, will not bind the public whose rights are affected only by decrees passed upon their merits.[5] But the rule has no application to cases in which the public rights are not infringed.

For instance, it is competent to the *shebait* to compromise a suit in respect of the *debutter* property, and such compromise will bind his successor in office, if made in the interest of the endowment.[6]

Clauses (3), (4).

2094. Since an improper sale by the manager of an endowed property of which he is in possession is permissive and not adverse, law permits the transferee to hold it as such, during the term of his office or death, after which the transferee's title would on completion of twelve years possession ripen into ownership whether the manager ratifies it or fails to eject him. If he ratifies it, another person interested in the endowment may, within 12 years from the vendor's death, dispossess him or set aside his purchase under Art. 134-A, or 134-B of the Limitation Act. But if both he and the succeeding manager take no action, the purchaser would, by the operation of either of those Articles or Art. 144 prescribe for an absolute title with the result that no succeeding manager can eject him.[7] But where the first manager has sold or given a permanent or a long term lease of such property and the property sold or leased is the entire *muth* or other endowment, the sale or lease of the whole being void, the vendee or the lessee, as the case may be, must be ejected forthwith. His possession being from its very inception wrongful, he will perscribe for an absolute title within the period of limitation prescribed by Art. 144. But if on the other hand, the lease relates to only a portion of the estate which the manager may lease for legal necessity, that necessity failing, the lessee's possession is still permissive, and therefore, not wrongful during the lessor's term of office, in which case the limitation starts against

(1) *Kamini* v. *Promotho*, 39 C. 33, followed in *Ram Prasana* v. *Secretary of State*, 40 C. 895 P.C.

(2) *Girijanund* v. *Sailajanund*, 23 C. 645.

(3) *Sundarambal* v. *Yogavanayurukkal*, 38 M. 850 (865).

(4) *Ib.* p. 862.

(5) *Jenkins* v. *Robertson*, L.R. 1 H. L. Sc, 117; followed in *Sundarambal* v. *Yogavanagurukkal*, 38 M. 850 (863); *Bhaskara* v. *Narayanasamy*, 12 M.L.J. 360; *Gyanananda* v. *Kristo*, 8 C.W.N. 404.

(6) *Hossein Ali* v. *Bhagwan Das*, 34 C. 249 (255).

(7) *Ponnambala* v. *Periyanan*, 59 M. 809 (822, 823) P.C.

him only on his death. If, however, his successor affirms and ratifies the lease or accepts rent, the lessee's possession would then continue to be permissive during the term of the second manager, giving the third succeeding manager the right to eject him within the statutory period of 12 years, under Art. 144.[1] In this and similar cases, to be decided apart from the Amending Act, the distinction between a transfer void and voidable has to be borne in mind.[2]

2095. De Facto Manager.—The powers of a *de facto* and a *de jure* manager are the same,[3] provided he is in actual possession. So, where the plaintiff sued to recover on a bond given by the *de facto* manager of a *muth* as a charge on the *muth*, it appeared that the obligor had turned the manager out of possession, and as his own right to possession was contested at the time he executed the bond, he was in no better position than a trespasser and a wrong-doer and, as such, incompetent to represent the *muth* in its dealings with its creditors.[4] A *de facto* manager cannot inherit the power of another *de facto* manager even though he be his natural heir.[5] A *de facto* manager of a math recognized as such by the public is sufficiently competent to eject a trespasser for its benefit.[6]

Explanation.

2096. Mahant, Shebait, Dharmkarta.—The liability of the manager is not affected by the designation of his office. He may be a *mahant* of a *muth*[7] or the *shebait* of a temple or a mere trustee of a charitable public trust, but in each case, his right of alienation is subject to the same rule.[8]

2097. Setting Aside Improper Alienation.—An improper alienation made by the manager, being in breach of trust and in excess of his power, may be set aside by suit instituted by anyone interested in the endowment, including the alienor himself.[9] Where, for instance, it is a public religious endowment, it may be set aside by suit instituted by any worshipper suing in the interest of his class. No sanction, such as is provided for in S. 92 of the Code of Civil Procedure or S. 18 of the Religious Endowment Act, is necessary to maintain it.[10] The same right belongs to all beneficiaries who sue only in the right of the trustee. They are his *aliases*, and in

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(1) *Ponnambala* v. *Periyanan*, 59 M. 809 (822, 823) P.C.

(2) *Verumah Valia* v. *Ravi Vurmah*, 1 M. 235 P.C.; *Gnanasambanda* v. *Velu Pandaram*, 23 M. 271 P.C.; *Vidya Varuthi* v. *Balusami*, 44 M. 831 P.C.; *Subhayyar* v. *Mhd. Mustapha*, 46 M. 751 P.C.; *Ramcharan Das* v. *Naurangilal*, 12 Pat. 251 P.C. explained in *Mahadeo Prasad* v. *Karia Bharti*, 57 A. 159 (165, 166) P.C.; *Ponnambala* v. *Periyanan*, 59 M. 809 (817, 821) P.C.; but see *Hamid Miya* v. *Nagindas*, 57 B. 709; *Damodar Das* v. *Lakhan Das*, 37 C. 885 P.C.

(3) *Saminatha* v. *Purushottama*, 16 M. 67; *Kasim* v. *Sudhindra*, 18 M. 359; *Panchkuari* v. *Amode Lal*, (1937) C. 559.

(4) *Ramchurn* v. *Nunhoo*, 14 W.R. 147; *Madho Prasad* v. *Ramrattan*, 15 C. W.N. 38.

(5) *Panchkuari* v. *Amode Lal*, (1937) C. 559.

(6) *Ramcharan* v. *Naurangi Lal*, 12 Pat. 251 P.C.; *Mahadeo* v. *Karia Bharti*, (1935) P.C. 44.

(7) *Basudeo* v. *Jugal Kishore*, 35 M.L. J. 5 P.C.

(8) *Gopal Dass* v. *Kerparam*, (1830) B.S.D.A. 250; *Shibeesuree* v. *Mothooranath*, 13 M.I.A. 270; *Prosunno* v. *Golab*, 14 B.L.R. 450 P.C.; *Abhiram* v. *Shyama Charan*, 36 C. 1003 (1013) P.C.; *Jnananjan* v. *Adoremoney*, 13 C.W.N. 305; *Sambanda* v. *Narasambandapandara*, 1 M. H.C.R. 298; *Gnanasambanda* v. *Velu*, 23 M. 271 P.C.; *Vidyapurna* v. *Vidyanidhi*, 27 M. 435 (439, 456); *Murugesam* v. *Manickavasaka*, 40 M. 402 P.C.; *Narayan* v. *Chintaman*, 5 B. 393; *Collector* v. *Hari*, 6 B. 546; *Ganesh* v. *Keshavrav*, 15 B. 625.

(9) *Nogendra Nath* v. *Rabindra Nath*, 53 C. 132.

(10) *Venkataramana* v. *Kasturiranga*, 40 M. 212 (223, 226) F.B.; *Chidambaranatha* v. *Nallasiva*, 41 M. 124.

England, they are bound to use the name of the trustee as co-plaintiff.[1] On the alienation being set aside, the court should order delivery of possession of the alienated property to the trustee, without driving the latter to a fresh suit for possession. For this purpose, it is necessary that the trustee should also be impleaded in the suit, as plaintiff if willing, otherwise as defendant.[2] The limitation for such suit is that now prescribed in the amended and added articles of the Limitation Act, commencing from a date stated in the sequel (§§ 2100-2110).

2098. **Burden of Proof.**—Following the rule already stated, it has been laid down that it lies on him who sues to enforce an alienation made by a manager to prove both its *factum* and its necessity[3] (**S. 153**). But though this is the rule, the burden may be discharged by proof of the fact that successive holders of the office had recognized the validity of the alienation and acted upon that basis, "and as time goes on, this may itself come to be a not unimportant element of probation upon the issue. It must also be fully borne in mind that with the lapse of time, the parties to the transaction may die or disappear . . . . and it is conceivable that, as years elapse, in such cases nearly all the material evidence may, in course of time, disappear, while the debt itself still remains, having from its initiation till almost the date of suit been recognized by all concerned as a debt truly constituted by the *adinam*. In such a case, a court is much more easily satisfied that the debt was properly incurred than where the transaction was itself recent and can, therefore, be the subject of more exact evidence, or where the transaction, although remote, has been the subject of a challenge or dispute by those charged with the interests of the institution."[4] So, in another case, where a lease granted by the *shebait* was challenged after a hundred years, the Privy Council said: "At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy, which the courts always adopt, of securing, as far as possible, quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made."[5]

2099. Where the head of an endowment had conveyed some properties to his wife, and his successor sued her in ejectment, it was held that it was on the donee to prove that the property conveyed to her by the last holder was his private property in that it was either acquired by him with funds of his own, or out of funds which might be regarded as his official perquisites.[6] Property so acquired would be *prima facie* the shebait's private property, though it may be known that it was an accretion to the endowment, because it was acquired out of the endowment fund and treated by the acquirer as a part thereof.[7]

Prima facie, of course, the *mahant* of a *muth* has no personal property of his own; for, from the very necessity of his constitution, he is a member

(1) *Chidambaranatha* v. *Nallasiva*, 41 M. 124.
(2) *Subramania* v. *Nagarathana*, 20 M. L.J. 151: 5 I.C. 901.
(3) *Basdeo* v. *Sri Kishen*, 13 O.C. 79: 5 I.C. 1005.
(4) *Murugesam* v. *Manikavasaka*, 40 M. 402 (408) P.C.; *Chockalingham* v. *Mayandi*, 19 M. 485 P.C., followed in; *Magniram* v. *Kasturibhai*, 26 C.W.N. 473 P.C.
(5) *Magniram* v. *Kasturibhai*, 26 C.W.N. 473 P.C.
(6) *Kamla* v. *Mahanu*, 25 C.W.N. 217: 58 I.C. 900 P.C.
(7) *Ib.*; but see *Kartick Chandra* v. *Rudranandagir*, 25 C.W.N. 908.

of the order of celibates and ascetics who own no personal property.[1] But at the same time, it is customary for the devout to offer *pranami* to the *mahant*, which becomes his personal property and is unconnected with the votive offerings made to the *muth* or the deity.[2] The *mahant* is entitled to own this property, and it may, at times, enable him to acquire a valuable estate which he may own as his own. But as this is an exception and not the rule, it cannot be presumed, but must be proved in every case in which it is so alleged.

Such was held to be the case of a person who holds the office of *granthi* of the Golden Temple at Amritsar, who is at liberty to spend the income of his office in any manner he pleases, and he is not bound to spend any portion of it in charity. If he acquires property out of such income, he is free to dispose of it as he thinks best, and on his death, it descends to his natural heirs. Where, however, a *granthi* succeeds to a property from another *granthi*, to the exclusion of natural heirs, there is a presumption that such property has been dedicated to religious uses, even in the absence of positive evidence of actual dedication.[3]

278. (1) **A suit to set aside an improper alienation of endowed property, movable or immovable, or for following such property or the proceeds thereof, or for an account of such property or proceeds, by a person interested therein, against the manager, his legal representative or assign without valuable consideration is subject to no limitation.**[4]

Limitation for possession or to set aside improper alienations.

(2) But such suit, instituted against his assigns for valuable consideration, must be instituted within 12 years from the date of such alienation, if the property be immovable;[5] **and 3 years if the property be movable**[6] **from the time the alienation becomes known to him;**

(3) Provided that such transfer may be set aside by the succeeding manager within the period of 12 years, of the death, resignation of removal of the transferor whether the property be movable[7] **or immovable.**[8]

Exception.—**Nothing in this section applies to a right already determined before the amendment of the Limitation Act by Act I of 1929, which came into force on the 1st January, 1929.**

2100. **Analogous Law.**—Before the amendment of the Limitation Act by Act I of 1929, which came into force on 1st January 1929, the position of the beneficiary, the *shebait* and the transferee from him, had become the subject of serious comment both by the courts and the Civil Justice Committee who had recommended amendment of the law, which resulted in the enactment of Act, I of 1929. The only provision dealing with religious endowments were then contained in section 10 and Arts. 133 and 134 of the Limitation

Limitation (Amendment) Act, 1929.

(1) *Rampat* v. *Durga*, 23 O.C. 303: 60 I.C. 440.
(2) *Kumud* v. *Tripura*, 60 I.C. (C.) 464.
(3) *Indar Singh* v. *Fatesh Singh*, 1 L. 540.
(4) S. 10, Limitation Act.
(5) *Ib.* Arts. 134, 134-A.
(6) *Ib.* Arts. 48-A, 48-B.
(7) S. 10, Limitation Act, Art. 134-C.
(8) *Ib.* Arts. 134-B, 134-C. A suit by one mahant to set aside an alienation by another putative mahant is still subject to Art. 134-B. *Mahadeo* v. *Karia Bharati*, 57 A. 159 P.C.

Act. Section 10 of that Act exempted from any limitation a suit, instituted "against a person in whom property has become vested in trust for any specific purpose" or "against his legal representatives or assigns, other than an assign for valuable consideration" while Arts. 133 and 134 prescribed a period of twelve years for recovery of its possession from the date of purchase or transfer of such property. In a case decided in 1921, the Privy Council held, on review of the cases and the Indian Acts bearing on the subject of trusts, that all of them dealt with trusts in the technical English sense and that since religious endowments were not "conveyed in trust" to the *mahant* or the *shebait*, he was not a "trustee" with regard to them, save as to any specific property proved to have been vested in him for specific and definite object. Consequently, both Arts. 133 and 134 which prescribed for a limitation for such trusts did not apply to religious endowments, with the result that where a lessee claimed possession of some lands belonging to a *muth* which had been permanently leased to him by a previous *mahant*, 22 years before his suit, the court dismissed the suit as neither covered by Arts. 134 or 144.[1]

2101. In 1922, this case was followed in a case of the mortgage of *wakf* property by its *mutwalli* executed in 1899 for a purpose unconnected with the *wakf*, upon which the mortgagee foreclosed him and obtained possession in 1906. Seven years later in 1913, the *mutwalli* who had succeeded the mortgagor sued for ejectment, and it was held that Art. 134 was inapplicable, and that as the suit was instituted within 12 years of the mortgagee's possession, the *mutwalli* was entitled to eject him, and since one *mutwalli* could not alienate such property otherwise than to satisfy the legitimate needs and purposes of the *wakf*, a suit for recovery of money advanced by the mortgagee must be in the nature of a claim *in personam* and could not be secured by a mortgage of the *wakf* property itself.[2] But the majority of the full bench of five judges of the Madras High Court had in a case decided in 1917 held that Art. 134 as it was then worded, gave the plaintiff twelve years for recovery of possession from "the date of the transfer" and not from the date of possession.[3]

In this state of the law, the Civil Justice Committee recommended that (*a*) a special provision should be made to deal with property vested in the head of a religious institution and (*b*) that articles 133 and 134 should be revised[4] which was accordingly effected by the Amending Act of 1929, which came into force on the 1st January 1929. The result of this Amending Act was to include all religious endowments within the meaning of the phrase "property vested in trust for a specific purpose" and all their managers as trustees thereof.[5]

Further Art. 133 of the Act, which dealt with movable property, was repealed, and in its place two new articles, 48-A and 48-B added, giving the plaintiff the shorter period of 3 years for recovery or setting aside the sale of movable property comprised in a Hindu or Mahomedan endowment, from the date the sale becomes known to the plaintiff; and as regards immovable property, provision is made by the amendment of Art. 134 and

(1) *Vidya Varuthi* v. *Balusami*, 44 M. 831 P.C.

(2) *Abdur Rahim* v. *Narayan Das*, (1923) 50 C. 329 (337) P.C.; following *Vidya Varuthi* v. *Balasami*, 44 M. 831 P.C.

(3) *Seeti Kutti* v. *Kunhi Pathumma*, 40 M. 1040 F.B.

(4) *See* Statements of Objects and Reasons appended to the Amending Bill in the Gazette of India, Pt. V, dated 3rd September 1919, pp. 222, 223.

(5) S. 10, paragraph 2 added by Act I of 1929.

the addition of three new Articles, numbered 134-A, 134-B and 134-C, the first two providing for the recovery or setting aside of such property, in which case a period of 12 years is prescribed from the date when the transfer becomes known to the plaintiff, and the same period of twelve years both for recovery of movable and immovable property, comprised in an endowment when the suit is instituted by the manager to recover property or set aside a transfer by a previous manager from the time of his death.

2102. It will thus be seen that all transfers by a manager of a Hindu endowment whether by sale, mortgage, lease or otherwise of immovable property, and all sales of movable property, comprised in a Hindu endowment, may now be set aside by a succeeding manager within 12 years from the *death* of the transferor; but where the same relief is claimed by any other person, both the limitation and the *terminus a quo* are different, in that a suit for movables must be instituted within 3 years and that for immovables, 12 years from the date when the sale or transfer becomes known to the plaintiff.

With reference to this amendment it is clear that the Limitation Act is not merely adjective law since it creates and extinguishes rights by force of time, consequently, it cannot be retrospective and cannot, therefore, apply to a suit instituted before it came into force.[1] If therefore before that Act came into force, the *shebait* had instituted a suit for ejectment of a transferee for valuable consideration, who had taken possession of the endowed property from a previous manager, such transferee would be entitled to plead the prescription of his title by adverse possession, calculated from the date of transfer to him by a previous manager.[2]

2103. It should be added that the view of Hindu trusts taken by their Lordships in the cases already quoted has not been overruled by the Legislature by amendment of any of the Acts referring to Hindu trusts, *e.g.*, the Charitable Endowments Act[3] or the Charitable and Religious Trusts Act.[4] All that the Legislature has done is to include the managers of Hindu and Mahomedan endowments within the scope of S. 10, and to provide for special limitation, and remove the applicability of Art. 144 as the residuary article to suits specially provided for. But since these articles only apply to suits arising on transfer or sale, it follows that a person, not a transferee or vendee from the manager, is not precluded from acquiring a title against an endowment by adverse possession.[5]

2104. The several questions that arise, under the provisions of the Limitation Act before and since its amendment in 1929, may be thus categorised under the following heads: (1) Those who may sue; (2) Those who may be sued; (3) For what reliefs there is no limitation; (4) and for what reliefs there is; (5) what assigns for valuable consideration are exempted.

All these questions, except No. (4) will be found answered in section 10, while that question will be found answered in Articles 48, 120, 133 and 144

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(1) *Allah Rakhi* v. *Mhd. Abdur Rahim*, 56 A. 111 (117) P.C.; *Dwarkadas* v. *Rikhiram*, (1936) L. 784; *Raghunandan* v. *Mahadeo*, (1933) O. 38.

(2) *Ib.* pp. 121-122.

(3) Charitable Endowments Act (VI of 1890) which provides "for the resting and administration of property held in trust for religious purposes."

(4) Act (XIV of 1920).

(5) *Manickammal* v. *Murugappa*, (1935) M. 483 (486).

of the unamended Acts, and Articles 48-A, 134, 134-A, 134-B and 134-C of the amended Act. Taking these questions seriatim:—

(1) Who may sue.

2105. The persons entitled to sue under section 10 are not mentioned but their identity is made clear from the description of the relief to which the suit is confined, namely, "the following of trust property or its proceeds or for an account of such property or proceeds." As such suit can only be instituted by the beneficiary or some one interested in it and on its behalf, it follows that persons not so interested are not entitled to the benefit of this section. Consequently, a suit by one trustee to enforce his personal right against another trustee for executive management of the trust and as such, for the recovery of its property, dealt with by him, would be outside the rule;[1] but if such a suit is brought for the purpose of joint possession and joint management of the trust, or to oust the defendant who claimed to hold adversely to the trust, the section would apply.[2] The true test in such cases is whether the plaintiff's suit is in the interest of the trust or whether it is in reality a personal claim in which the trust stood to gain only incidentally.[3]

(2) Who may be sued.

2106. Secondly, as to the persons who may be sued under the section. Section 10, as unamended, has been held to exclude the manager of a Hindu or Mahomedan endowment, since its wording shows that it was intended to be restricted to express trustees in whom property had become vested for a specific purpose. As a right or bequest by dedication does not vest the property in any human agency, or for a specific purpose, all endowments were held to be outside the rule, (§ **2100**) with the result that a suit against the manager of such endowments was not entitled to the protection afforded to other trust property, which law protects on the ground of public policy, with the result that the manager of an endowment could only be sued under the general law; further since Art. 134, as it then stood, only provided for recovery of property "conveyed or bequeathed in trust" it equally kept out endowments.[4] This defect in the law was rectified by the Limitation (Amendment) Act, 1929[5] which was brought into force from 1st January of that year. By this amendment, the liability of an express trustee was extended to the manager of a Hindu, Mahomedan or Buddhist religious or charitable endowment. Under the cases decided before the amendment, section 10 was held to apply to all managers irrespective of their right to act as such. And where there are more managers than one all fall within the section. A manager *de son tort*, or one removed[6] or one who claims to be so[7] would likewise fall within the section.[8]

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(1) *Ambala Vana* v. *Meenakshi*, 43 M. 665 P.C.; *Nilakandan* v. *Padmanabha*, 14 M. 153; *Shree Nath* v. *Radhanath*, 12 C.L.R. 370; *Ranga Payi* v. *Baba*, 20 M. 398 (403).

(2) *Ambalavana* v. *Meenakshi*, 43 M. 665 P.C.; *Aurabinda* v. *Manorama*, 55 C. 903; *Jasodha Bibi* v. *Parmanand*, 16 A. 256; *Baidya Nath* v. *Har Datt*, 5 Pat. 249.

(3) *Ranga Rai* v. *Bala*, 20 M. 398 (403).

(4) *Vidya Varuthi* v. *Balusami*, (1921) 44 M. 831 P.C.

(5) Act (I of 1929).

(6) *Vira Sami* v. *Subba*, 6 M. 54.

(7) *Ambalam* v. *Bartle*, 36 M. 418; following *Balvant Rao* v. *Puranmal*, 6 A. 1 P.C.

(8) *Mani Ram* v. *Rupchand*, 33 C. 1047 (1060) P.C.; *Sadasoak* v. *Ram Chander*, 37 C. 620; *Moosabhai* v. *Yacoobbhai*, 29 B. 267 (281); *Kuppan* v. *Munde Kotha*, 37 M. 373; *Khatri* v. *S. S.*, 5 Pat. 539; *contra Behari Lal* v. *Shiv Narain*, 47 A. 17 (refers to paragraph I and holds it is limited to express trustees). But this does not apply to the newly added paragraph 2.

(3) and (4) For what relief.

2107. Thirdly, the relief described in section 10 must be "for the purpose of following such property or the proceeds thereof, or for an account of such property or proceeds". The words "for an account of such property or proceeds" were added to section 10 in the Act, as re-enacted in the present Act of 1908, which came into force on 1st January, 1909, since when such suit is exempt from the bar of limitation if it complies with the other conditions of the Act.[1]

In the previous discussion (who may sue, etc.), it has already been seen that the section is intended to protect the property and proceeds of an endowment, with the result that a suit that does not purport to recover or protect such property cannot be admitted to the privilege of this section.[2] The question in a given case is one of construction. The phrase "following the property or its proceeds" would include not only the endowment but also the property into which it is converted, including its accretion, produce, profits or other usufruct. For all such reliefs there is no limitation, and the plaintiff may sue at any time, since his right to sue can never be extinguished by the efflux of time.[3] Such suit, free from limitation, will lie not only against the manager, but also against his "legal representatives or assigns, except assigns for valuable consideration".

(5) Suits subject to Limitation.

2108. This leads to the consideration of the next and the last question as to the excepted persons who remain subject to the ordinary law. Here again, a distinction must be drawn between the law as it obtained before its amendment in 1929 and thereafter.

2109. As already observed, under the previous law, a suit against the manager of a religious endowment was subject to the general law of limitation, while there was no limitation against the beneficiary or any one on his behalf for following up the property alienated by the trustee; with the amendment, all managers of religious endowment have been brought under the same liability. Under the previous law, a suit for declaration of the invalidity of a sale of movable or trust property was subject to Article 120, while a suit for its recovery was subject to 12 years from the date of the purchase;[4] but there was no provision for setting aside such transfers by a plaintiff, who, though interested in an endowment, was not himself entitled to recover possession. These lacunæ in the law have since been rectified by the Act of 1929, which provides for both a suit for possession as well as for setting aside a sale, subject to the limitation of 3 years from the date the sale becomes known to the plaintiff, except where the plaintiff is the manager, suing for recovery of such property sold by his predecessor, when the limitation allowed to him is 12 years, calculated from his removal or death; but where such plaintiff is the succeeding manager, he is given 12 years from the death of, or removal of, his transferring predecessor, at from the date he became *functus officio*, as where disposes of all the beneficiary's property in which case limitation would

(1) *Balwant Rao* v. *Puran Mal*, 6 A. 1 P.C. followed in *Arunachellam* v. *Venkatachalapathi*, 43 M. 253 P.C.

(2) *Dhanpat Singh* v. *Mahesh Nath*, 57 I.C. (C.) 805. As to what accounts can be claimed; *see Peary Mohan* v. *Manohar*, (1924) C. 25.

(3) S. 10 "Notwithstanding anything hereinbefore (*e.g.* in S. 3) contained" which provides for the dismissal of all suits not instituted within the time provided in the first schedule of the Limitation Act.

(4) *Mhd. Habibullah* v. *Safdar Hussain*, 7 A. 25; *Yerukola* v. *Yerukola*, 45 M. 648 (672, 673), F.B.

begin to run against the beneficiary as from the date of the alienation though it will also be the date of his civil death.[1]

There has been no substantial change in a suit for accounts of such property. (§ 2107) Like the manager, his transferees for valuable consideration were not subject to section 10, with the result that they were subject to the ordinary law including Article 133 (repealed by the Amending Act, 1929) and Article 134, both of which allowed 12 years for recovery of such property, whether movable or immovable, from the date of transfer, and as such, the residuary Article 144, not qualified by section 10, as then understood and applied, enabled all comers, including the manager, and his assignees, for or without value, to defeat the trust by the mere act of their adverse possession.

The Amending Act prevents this by widening the scope of section 10 by expressly including therein the manager of a religious endowment, his representatives and assigns, except "assigns for valuable consideration." So far then he is concerned, his transfers are liable to be aside by his successor from the date of his removal from office or death.

And so far as the beneficiary and all persons acting in its interest, they can now sue for recovery of movables within 3 years and immovables within 12 years from the date the transfer complained of becomes known to the plaintiff.

Transferees for valuable consideration.

2110. Turning next to the "assigns for valuable consideration" excepted from the operation of section 10 of the Act, it was held, and has since been legislatively confirmed,[2] that the term "assigns" is used in the section as including all transferees[3] whether by sale, exchange[4] mortgage or lease and all purchasers, whether at a court auction, in execution of a decree against the manager,[5] or by private treaty.

Apart from valuable consideration, neither want of notice of the trust,[6] nor presence of good faith is prerequisite for exemption under this section, not because want of notice and good faith are essential prerequisites of a valid transfer,[7] but because they were not considered necessary for exemption; but having crossed the limitation hurdle, no transferor can feel secure unless he can establish his good faith in which the want of notice of the trust would be material, since a transferee for valuable consideration but without good faith may otherwise find himself surrounded by the provisions of the general law, directed against such transfers, *e.g.*, section 53 of the Transfer of Property Act[8] and sections 44, 53, 55 and 56 of the Presidency[9] and sections 51-55 of the Provincial Insolvency Acts. No trustee can feel secure unless his transfer is for valuable consideration, accompanied by good faith.

(1) *Nawrangilal* v. *Ram Charan*, 9 Pat. 885; *Ramlagan* v. *Nandipat*, (1938) Pat. 143.

(2) *E.g.* in Art. 134 and Arts. 134-A and 134-B (with Art. 134-C), added by Act I of 1929.

(3) *Manik Lal* v. *Manchershi*, 1 B. 269; *Behari Lal* v. *Mhd. Muttaki*, 20 A. 482 (488) F.B.

(4) *Rajagopalam* v. *Kasivasi*, 30 M. 316.

(5) *Charuchandra* v. *Subash Chander*, 50 C. 49; *Prasanna Venkatachella* v. *Collector*, 38 M. 1064.

(6) *Ram Coomar* v. *Mc Queen*, 18 W. R. 166 (168) P.C. "good faith" formed part of the Limitation Act, 1871 (IX of 1871) but was omitted from the later Acts.

(7) Act IV of 1882.

(8) Act III of 1909.

(9) Act (IV of 1920).

But a transfer would still be "for valuable consideration" for the purpose of section 10, though the consideration may afterwards fail, as where, in an exchange of lands by the manager, the latter is deprived of his land by a paramount title.[1]

Exception.

2111. The exception deals with rights already determined before the amendment of the Limitation Act in 1929. The law then in force has already been the subject of discussion elsewhere (§ **2100**). The leading principles of the law may be thus categorized:

(1) In all alienations made by the *shebait* before 1st January, 1929, the possession of the alienee became adverse both to him and the beneficiary from the date of alienation.[2]

(2) The *shebait* himself was competent to implement his title by adverse possession against the beneficiary.

(3) In a suit for setting aside an improper alienation by the *shebait* or for dispossession of him, on the ground of his adverse possession, defalcation or mismanagement, no person could institute a suit other than a suit for a declaration unless he was himself entitled to possession of the endowment.

(4) In all suits against the *shebait*, the plaintiff must establish a cause of action within the scope of the Limitation Act as if section 10 thereof had never existed.

Manager's office how far transferable.

279. The office of the manager is inalienable except to the following extent:—

(1) The manager of a private endowment may transfer it with the consent of the founder or his whole family.[3]

(2) In other cases, it may be relinquished, if allowed by the terms of the foundation or usage, in favour of a member of the family, or failing such member, a stranger eligible to discharge the duties of the office.[4]

(3) Provided that notwithstanding any usage, no transfer can be made for the pecuniary benefit of the transferor or which is incompartible with the interest of the trust.[5]

Illustration.

A bequeaths his shebaitship to *B*. The bequest is invalid for since *A's* office only enures for his life, there remains nothing on *A's* death which he could bequeath.[6]

2112. Analogous Law.—The office of the manager is ordinarily inalienable, both because it is a sacred office and, as such, a *res extra commercium* as because it is of a personal nature and the discharge of its duties

(1) *Rajagopalam* v. *Kasivasi*, 30 M. 316.

(2) *Damodar Das* v. *Lakhan Das*, 37 C. 885 P.C. but death was held to be the starting point in some cases of the same Board—*Vidyavaruthi* v. *Balusami*, 44 M. 831 P.C.; *Abhiram* v. *Shyam Charan*, 36 C. 1003 P.C.

(3) *Khetter* v. *Hari*, 17 C. 557 (562); *Rajeshwar* v. *Gopeshwar*, 34 C. 831, affirmed O.A.; 35 C. 226; *Niral Mohini* v. *Shibdas*, 36 C. 975 (977).

(4) *Raja Ram* v. *Ganesh*, 23 B. 131; *Savitri (Srimati)* v. *Mrs. Savi*, 12 Pat. 359 (388).

(5) *Rajah Vurma* v. *Ravi Vurma*, 1 M. 235 (251, 252) P.C. followed *Gnanasambanda* v. *Velu*, 23 M. 271; *Prasanna Deb* v. *Bengal Duars Bank*, (1936) C. 744, and cases cited in comm.

(6) *Doorga Nath* v. *Ramchander*, 2 C. 341 P.C.; *Rajeshwar* v. *Gopeshwar*, 35 C. 226 (230).

requires personal qualifications. As such, it, was, at one time, held to be wholly inalienable and was exempt from seizure in execution of a decree against the *shebait*.[1] But since such offices are hereditary, the objection on the ground of personal fitness could not be pressed, and with the right of heridity followed the right of partition.[2] The next stage was the qualified right of alienation to a member of the *shebait's* family,[3] and failing him, to a stranger, provided the stranger was fit to discharge the trust.[4] But the right is still such as cannot be attached in execution of a money decree against the *shebait*, since, if such property be subject to attachment and sale, the purchaser might be a Mahomedan or a Christian, who would be both unwilling and incompetent to perform the service of the idol[5] or prepare food for it.[6] Such a devolution would thus be not only destructive of the endowment but wholly inconsistent with the presumed intention of the founder.[7] The present law is thus a compromise between the ordinary rights of property and its special character. It permits sale within limits, and those limits are stated in the section.

2113. Transfer of Manager's Office.—As regards a private endowment, the Privy Council stated that "the consensus of the whole family might give the estate another direction."[8] The founder has, of course, the same right. The public are not interested in such endowment; the only persons interested are the founder and his family, and it is for them to say who shall be its manager. It has been, accordingly, held that, in a case of a private endowment, an alienation of the *shebait's* office, made with the concurrence of the founder or of his whole family and for the benefit of the endowment, is valid.[9] But a consideration of benefit of the endowment was no part of the Privy Council *dictum* and does not appear to be an essential condition to its validity, though any transfer made to its detriment would doubtless be vetoed by the family. But it is their look-out.

Clause (1). When the endowment is private.

2114. In the case of public endowments the alienation of shebaitship can only be permitted if authorized by the deed of foundation or usage. Even if so permitted, the objections which apply to its attachment, equally apply to its transfer by treaty, except to persons otherwise qualified to fill that office. In the case of heritable shebaitship, it may be transferred to one in the line of heirs, but if no such heir exists, its transfer is permitted even to a qualified stranger. But such alienations are in the nature of exceptions,[10] and tolerated on the ground that they are in the end in the interest of the endowment. Strictly speaking, they should be wholly inalienable. As was observed: "The duties to be performed are the protection of this property, devoted by the piety of former ages, to the service of religion, against all invaders and especially against the invasion

Clause (2). When the endowment is public.

(1) *Dube* v. *Srinibas*, (1870) 5 B.L.R. 617; *Juggurnath* v. *Kishen*, 7 W.R. 266.

(2) *Mitta* v. *Neerunjun*, 14 B.L.R. 166.

(3) *Srinivasa* v. *Rangasami*, 2 M. 304.

(4) *Mancharam* v. *Pranshankar*, 6 B. 298.

(5) *Juggernath* v. *Kishen*, 7 W.R. 266; *Kalicharan* v. *Bangshi*, 6 B.L.R. 727; *Mancharam* v. *Pranshankar*, 6 B. 298 (300); *Rajaram* v. *Ganesh*, 23 B. 131; *Manjunath* v. *Shankar*, 16 Bom.L.R. 593; *Durga* v. *Chanchal*, 4 A. 81.

(6) *Dube* v. *Srinibas*, 5 B.L.R. 617.

(7) *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235 P.C.

(8) *Doorga Nath* v. *Ramchunder*, 2 C. 341 P.C.

(9) *Khetter* v. *Hari*, 17 C. 557 (562); *Rajeshwar* v. *Gopeshwar*, 34 C. 831, affirmed O.A.; 35 C. 226; *Nirad Mohini* v. *Shibdas*, 36 C. 975 (977).

(10) *Raja Ram* v. *Ganesh*, 23 B. 131.

of the powerful. The property itself is, by the principles of all law, that of no individual whatever. A trustee cannot, by any act of his own, denude himself of his character of trustee until he has performed his trust. It is manifest that where the trust is one of perpetual obligation, where the *cestui que trusts* are the whole Hindu community, and where the property is *res extra commercium*, in no sense the office can be the subject either of bargain or of sale, and if not of sale, then not of gift, the attempt of trustees to surrender the trust property, and thus throw out their character, would not only be a gross breach of trust, but would be quite powerless to vest any rights in the persons in whose favour they had committed such breach of trust."[1]

2115. This question was considered by the Privy Council in 1877 in an appeal arising out of a suit in which the plaintiff claimed to manage a pagoda by his right of assignment from the authorized trustees. The courts in India dismissed the claim, and in affirming their decision, the Privy Council said that the plaintiff's assignors had no power, under what may be termed the common law of India, to transfer the trust.[2] At the same time, they conceded that such transfer would be possible if sanctioned by usage, adding, however, "that if the custom set up was one to sanction, not merely the transfer of a trusteeship, but, as in this case, the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law."[3] This case narrowed down the scope of alienation by excluding therefrom all alienations not warranted by the foundation or custom.[4] Even the assignor could sue to recover back the trust he had no right to assign.[5] That custom has broken in upon the inalienability of the sacred office, will be clear from the decided cases.[6] So, custom may permit the assignment of a right to receive offerings[7] or a turn of worship,[8] though they are ordinarily unassignable.

2116. But apart from usage and the consensus of opinion, among those interested in the worship of an idol, in favour of such a course, the *shebait* has no power to alter the line of *shebaits* at variance with the wishes of the founder. Nor does a donor to the property already consecrated acquire that right, since he does not, by his benefaction, acquire the status of a joint-founder.[9] Though the office of the *shebait* is untransferable it does not preclude a claimant to shebaitship from abandoning her suit in favour of a man who would succeed to that office after her.[10]

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(1) *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235 (240, 241) P.C.

(2) *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235 (250) P.C., followed in *Gnanasambanda* v. *Velu*, 23 M. 271 P.C.

(3) *Raja Vurmah* v. *Ravi Vurmah*, 1 M. 235 (251, 252) P.C., followed in *Gnanasambanda* v. *Velu*, 23 M. 271; *Prasanna Deb* v. *Bengal Duars Bank*, (1936) C. 744.

(4) *Ayancheri* v. *Acholathil*, 5 M. 89 (Lease for 96 years held void); *Jannan* v. *Nilakandan*, 7 M. 337 (338); *Subbarayudu* v. *Kotayya*, 15 M. 389; *Alagappa* v. *Sivaramasundara*, 19 M. 211; *Gnanasambanda* v. *Velu*, 23 M. 271; *Lakshmanaswami* v. *Rangamma*, 26 M. 31. To the same effect; *Keyake* v. *Yedattil*, 3 M.H. C.R. 380; *Rup Narain* v. *Junko*, 3 C.L. R. 112; *Krishna* v. *Laldhari*, 40 I.C. 276.

(5) *Subharayudu* v. *Kottaya*, 15 M. 389; *Rangasami* v. *Ranga*, 16 M. 146; *Mallika* v. *Ratanmani*, 1 C.W.N. 493.

(6) *Sukhlal* v. *Bishambhar*, 39 A. 196 (199) (Mahabrahmin's right might be mortgaged.)

(7) *Puncha* v. *Bindeshri*, 19 C.W.N. 580; *Jati* v. *Mukunda*, 39 C. 227 (Transfer acted upon for 25 years upheld).

(8) *Rajeshmar* v. *Gopeshwar*, 34 C. 818; *Mohamaya* v. *Haridas*, 42 C. 455 (Assignment of turns of worship upheld).

(9) *Lalit Mohan* v. *Brojendra Nath*, 53 C. 251.

(10) *Savitri* (*Srimati*) v. *Mrs. Savi*, 12 Pat. 359 (388).

2117. Limits of Allowable Custom.—It has already been seen that the courts will not enforce any custom which permits trafficking in sacred offices.[1] It is only in a special case that the alienation of such office is permitted, and he who relies upon it, must make out a case for its validity. A transfer which is a sale of such office,[2] or one which is intended, or will have the effect of altering the form of worship, cannot be permitted.[3]

Clause (3).

2118. Since the manager is entitled to represent the trust in all suits relating to it, a decree obtained against him as representing the trust will bind it in the hands of the successor, unless the decree was obtained by the collusion or fraud of the manager.[4] The binding nature of the decree in such cases is not affected by the fact that it is based on a compromise.

Res judicata.

280. A manager may be removed from his office for any misconduct as is incompartible with the interest of the endowment.[5]

Removal of Manager.

2119. Analogous Law.—The manager of a religious endowment is, sometimes, spoken of as its trustee; and the grounds for his removal are said to be similar. But as the Privy Council observed: "The grounds for removing a *shebait* from his office may not be identical with those upon which a trustee would be removed in this country. The close intermingling of duties and personal interest, which together make up the office of *shebait*, may well prevent the closeness of the analogy, but, as part of the office, it is indisputable that there are duties which must be performed, that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office can no longer be faithfully discharged, that is sufficient ground for his removal."[6]

2120. The removal of the manager from his office depends upon the terms and conditions of the foundation and the nature of the manager's misconduct. Where the foundation is a family temple, members of the family arrange among themselves for its management. Where the foundation is a public trust, the court wields sufficient jurisdiction and control over its management. In such case, it has to examine the principles which should guide it in sanctioning the dismissal of the manager. It has been held that a mere non-feasance is wholly insufficient to justify his removal. The fact that he took no interest in the welfare of the temple or had mistaken the scope of his duties and sanctioned expenditure in payment of fines and costs of trustees of his own sect, or had taken part in faction fights, are not such nonfeasances for which he can be removed,[7] unless his neglect has led the buildings or the institution to fall into decay.[8]

(1) *Rajah Vurmah* v. *Ravi Vurmah*, 1 M. 235 P.C.; *Narsimha* v. *Anantha*, 4 M. 391; *Kuppa* v. *Dorasami*, 6 M. 76; *Phatmabi* v. *Haji Musa*, 38 M. 491 (497); *Sundarambal* v. *Yagavanagurukkal*, 38 M. 850 (854).

(2) *Raja Vurmah* v. *Ravi Vurmah*, 1 M. 235 P.C.

(3) *Venkataraya* v. *Srinivasa*, 7 M.H. C.R. 32.

(4) *Kumari* v. *Golab*, 14 B.L.R. 450 P.C.; *Ranjit Singh* v. *Basanta*, 12 C.W. N. 739: 9 C.L.J. 597; *Sudindra* v. *Budan*, 9 M. 80; *Vidyapurna* v. *Vidyanidhi*, 27 M. 435.

(5) *Peary Mohan Mukerji* v. *Monohar*, 48 C. 1019 P.C.; *Sri Gopal* v. *Radha Binode*, 41 C.L.J. 396: 88 I.C. 616: (1925) C. 996.

(6) *Ib.*

(7) *Tiruvengadath* v. *Srinivasa*, 22 M. 361.

(8) *Ganapati* v. *Savithri*, 21 M. 10 (11, 15).

A manager cannot be punished with dismissal for his mistake or error of judgment, though the court will give directions for better management in future.[1] Nothing short of fraud or dishonesty will move the court to remove him,[2] even though his office be hereditary.[3] Failure on the part of the manager to keep or submit accounts to the committee is a breach of one of the most important duties cast upon him by law and is sufficient to justify his dismissal.[4]

2121. So is the fact that the manager had continuously misused the income of the endowment,[5] or purchased a portion of it *benami*,[6] or denies the public character of the trust and refuses to discharge his duty[7] A manager wrongly dismissed from his office is entitled to damages for his wrongful dismissal. When a temple trustee had been given notice, by the temple committee, of some or all of the charges against him, and one of them drew up a report suggesting the trustee's suspension pending further orders, and the other members except one agreed, it was held that the action of the committee was *ultra vires* and that the trustee was entitled to damages against his corporators who were parties to his wrongful removal from office.[8]

2122. The lunacy of the *mahant* of a *muth* does not, it is said, disqualify him to continue as its head, though it would be a ground for appointing a substitute to carry on his duties during the continuance of his disability.[9] But immorality, marriage[10] and incontinence is quite another matter. It is a misconduct, for which the head of any religious foundation will be thrown out. So, Lord Shaw, referring to the qualifications essential to the *mahant* of a *muth*, said: "The nomination must fall upon one who is competent to hold this important sacred office. For instance, the person chosen may be disqualified by reason of bodily deformity, or bodily disease such as leprosy, or disease of the mind, or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood. In all such cases, the nomination would be void. Among these disqualifications stands the contracting of a marriage and the begetting of children. As already mentioned, initiation of a married man must be preceded by the entire and permanent separation from his wife and by the giving up of all worldly ties." But their Lordships were considering the case of appointment and not one of removal; and the two do not stand on a par. But that immorality would disqualify the manager of a religious endowment from holding office, cannot for a moment be doubted. And it has been so held.[11] But immorality has not the effect of causing forfeiture of the office, though the manager so guilty must be removed.[12]

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(1) *Annaji* v. *Narayan*, 21 B. 556 (559).

(2) *A.-G.* v. *Abdul Kadir*, 18 B. 401, *A.-G.* v. *Punjabai*, 18 B. 551.

(3) *Fakuruddin* v. *Ackeni*, 2 M. 197 (199).

(4) *Ananthanarayana* v. *Kuttalam*, 22 M. 481; *Fakuruddin* v. *Ackeni*, 2 M. 197 (199).

(5) *Sathappayyar* v. *Periasami*, 14 M. 1.

(6) *Peary Mohan Mukherji* v. *Monohar*, 48 C. 1019 P.C.

(7) *Vaithinath* v. *Tyagaraja*, 41 M.L.J. 20; *Nellappa* v. *Punnaivanam*, 50 M. 567.

(8) *Venkata* v. *Ponnusami*, 33 M.L.J. 660: 43 I.C. 205.

(9) *Vidayapurna* v. *Vidyanidhi*, 27 M. 435 (443); *contra* in *Ram Parkash* v. *Anand Das*, 43 C. 707 (719) P.C.

(10) *Ram Parkash* v. *Anand Das*, 43 C. 707 (719) P.C.; *Kartick Chandra* v. *Rudranand*, 25 C.W.N. 908.

(11) *Asaram* v. *Hari Singh*, (1904) P. R. 53; *Tiruvambala v. Pandaram*, 40 M. 177.

(12) *Tiruvambala* v. *Pandaram*, 40 M. 177.

2123. It seems plain that a manager who declared that the trust property is his private property, and when called to book, fabricated accounts, can no longer be trusted to discharge his duties, and the first step towards trustworthiness in administration is to remove him.[1] But the case might perhaps be different, if he had, following in the wake of his predecessors, considered himself as owner of the estate. In this case, the court may find reason to overlook the past and provide against the future by settling a scheme of management.[2] So, again, a party holding land assigned for the support of an idol, subject to the performance of the ceremonies or worship of the idol, who fails to perform the required service cannot be summarily removed without being given the option to continue the worship.[3] A deposition of the *shebait* by a foreign state, *e.g.*, Maharaja of Odaipur, has no effect upon his management of properties situate in British India.[4]

Besides the obvious cases of mismanagement, the manager may be removed for violating some of the rules of the foundation, such, for instance, that a *Gir Gossain* who drinks wine or marries, is incompetent to continue as the head of a *muth*.[5]

2124. Procedure for Removal.—The procedure for the removal of the manager must depend upon the terms and the nature of his appointment. If he was appointed by the brotherhood, those who possess the power of appointment presumably possess also the power of dismissal. But then both the appointment and the dismissal must be in consonance with fair play and justice, decided upon in a meeting convoked for the purpose, in which all members are consulted and the decision arrived at according to the opinions of the majority. Where, therefore, the brotherhood of *Samuha Bhakats* removed their high-priest by convening a meeting in which only those favouring his dismissal were present, it was held that the dismissal was improper in that there had been no convocation of all the brotherhood after sufficient notice and proclamation, in which the opinion of the assembly was taken or considered. To validate the removal of a high-priest from his office by a majority of a religious brotherhood, it is necessary, *first* to ascertain the voters and their qualifications, *secondly to* determine whether steps have been taken to enable the brotherhood to express their decision, and *thirdly* to determine whether a majority have expressed their wish in favour of removal. The qualifications of voters may depend upon membership of the brotherhood, age, sex and residence. A question may also arise whether a member or family is the unit for this purpose. The decision of the majority must be determined by reference to votes given at the meeting and cannot be made to depend upon views indicated subsequently in the course of a suit brought to contest the validity of a removal. Whether a *quorum* is necessary to legalize the decision of the meeting must depend upon the custom of the brotherhood in the absence of statutory provision or express direction in that behalf by the founder.[6]

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(1) *Srinivasa* v. *Evalappa*, 45 M. 565 (584, 585) P.C.; *contra* in *Damodar* v. *Bhat*, (1896) B.P.J. 587.
(2) *Damodar* v. *Bhat*, (1896) B.P.J. 587.
(3) *Mohesh* v. *Moylash*, 11 W.R. 443
(4) *Girdharji* v. *Madhowadass*, 17 B. 600.
(5) *Kartick Chandra* v. *Rudrananda*, 25 C.W.N. 908.
(6) *Juro Ram* v. *Gobind*, 12 C.L.J. 497: 8 I.C. 124; *Sundaresa* v. *Subramania*, 13 M.L.W. 212: 61 I.C. 741.

2125. A *mahant* or manager of an endowment, if properly removed for his incapacity, cannot be heard to complain that the method of his removal was improper. Where a *mahant* had been removed from his office and from the possession of the properties of the endowment on the ground of his unfitness, and he sued his ejectors for a declaration of their incompetency to eject him, the court held the suit itself incompetent unless the *mahant* could show that he was not unfit to continue in office.[1]

Rights and duties of beneficieries.

281. (1) The beneficiary of an endowment may be any religious or charitable object, such as a *math*, temple, or shrine, an idol, public or private, or a charitable object such as a *dharmsala, serai, pinjrapole* (a shed for the protection of cattle) or the like.

(2) In the case of a public endowment all persons directly or indirectly interested therein, whether they be *shebaits*, worshippers[2] or the like,[3] are entitled to take such steps as are necessary to insure that the endowment is maintained and its legitimate functions are preserved.

(3) Worshippers and devotees of a public idol or temple or other sacred object or institution are entitled to resort to it, singly or jointly in procession, at all reasonable hours for the purpose of worship and devotion, and the manager is bound to afford them reasonable facilities for that purpose.

(4) Where the idol, shrine or temple is private only, such persons are entitled to worship and receive its benefits as are members of the family sect or class for whose benefit and worship the founder had installed the image or constructed the temple.[4]

Clauses (1), (5).

2126. **Analogous Law** —Generally speaking, the beneficiaries to an endowment may be an idol, a *muth* or other juristic person or a body of men. In either case, they are the direct beneficiaries. But in the former case, worshippers and devotees are equally regarded as beneficiaries, if they have the right of offering their devotion and worship to the deity.[5] As such, they are interested in its preservation and maintenance, and for that purpose, they are entitled to complain of any improper alienation of property.[6] Again, since the founder and his family are primarily interested in the maintenance of their endowment, they have the same right of worship and protection of the endowed property.[7] The term "founder" comprises not only the sole founder but also a joint contributor to the endowment.[8]

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(1) *Niamat Ali* v. *Yad Ali*, 6 Pat.L.J. 408: 63 I.C. 849.

(2) *Mohiuddin* v. *Soyududdin*, 20 C. 810; *Kasi Hasan* v. *Sagun*, 24 B. 170 (181).

(3) *Ganapathi* v. *Savitri*, 21 M. 10 (Suit by neighbours).

(4) *Vengamuthu* v. *Pandaveshwara*, 6 M. 151.

(5) *Mohiuddin* v. *Soyududdin*, 20 C. 810 (816); *Kasi Hassan* v. *Sagun*, 24 B. 170 (181).

(6) *Krishnaswami* v. *Shamaram*, 30 M. 158 (165); *Lakshmi* v. *Murari*, 56 L. J. 97: 45 I.C. 213; *Radhabai* v. *Chinnaji*, 3 B. 27; *Chintaman* v. *Dhondo*, 15 B. 612; *Chottalal* v. *Mandhar*, 24 B. 50 (54) P.C., affirming O.A., 12 B. 247; *Jowahra* v. *Akbar Hussain*, 7 A. 178 F. B.; *Kaleswara* v. *Nataraja*, 19 M.L.J. 772: 3 I.C. 255; *Oseri* v. *Bawa*, 7 S.L. R. 129: 24 I.C. 712.

(7) *Prosunno* v. *Koonjo*, (1864) W.R. 157; *Brojo Mohun* v. *Hurro Lal*, 5 C. 700 (705); *Greedharjee* v. *Romanlaljee*, 17 C. 3 (20) P.C.

(8) *Thackersey* v. *Hurbhun*, 8 B. 432 (461, 462); *Luchmee* v. *Rookmanee*, (1857) M.S.D.A. 152; *Endowed Schools Act (In re)*, L.R. 10 A. C. 304 (308, 309).

2127. The nature of the benefit accruing from an endowment must depend upon its nature and character. Persons who are residents of the locality in which a *choultry* is situated and are members of the community for whose benefit the *choultry* was founded, are sufficiently interested to be able to maintain a suit under S. 92 of the Code of Civil Procedure.[1] Any person to be benefited by the execution of a trust is a beneficiary entitled to sue for its protection. So, where a *choultry* was founded for the feeding of people, especially Brahmins, a suit by a resident Brahmin was held to be maintainable, though the Brahmins to be fed were ordinarily *japlas* or travellers.[2]

2128. If it is an endowment created for the worship of an idol, the question whether the public are entitled to free access for worship, depends again upon the nature and character of the idol. If it is the idol of a particular sect or caste, only persons belonging to that sect or caste are entitled to free access,[3] and others have no such right. Even a person ordinarily entitled to access may forfeit his right, if he offends against the rules of the caste entailing his suspension or excommunication.[4] So, it is a question of usage whether a dancing girl or a man who has married a widow, should be admitted into a temple.[5]

2129. It has already been stated that the manager has no right to levy a fee for admission, unless it be a small one to prevent over-crowding. All he is entitled to is to make such rules as to the time and order of worship for the sake of orderliness and decency of worship.[6]

The right of access is possessed by each person separately, though it may be possessed by a class of persons conjointly. Such, for instance, would be the right of a sect to proceed to a temple in procession for worship.

2130. **Private Endowments Excepted.**—The public have naturally no right of access to worship private deities. Nor can they complain of any malversation or misconduct on the part of their manager.

282. Idol's right of suit. **(1) Where the subject of an endowment is a religious or a charitable object, existing or to be brought into existence, it is treated as a juridical person in perpetual minority,[7] and enjoys all the rights and immunities of such person, and all its acts must be performed through its accredited manager;[8]**

(2) As such, all suits and proceedings relating to it must be instituted, conducted and defended in its name, through such manager, or the next friend or guardian to be appointed by the court.[9]

Explanation.—**For the purpose of enforcing any right of such object, both spiritual and secular, its manager is deemed to be its legal representative by whatever name he may be called.**

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(1) *Garuda* v. *Narella*, 35 M.L.J. 661.
(2) *Ganapati* v. *Savitri*, 21 M. 10 (13).
(3) *Vengamuthu* v. *Pandaveswara*, 6 M. 151.
(4) *Venkatachalapati* v. *Subharayadu*, 13 M. 293 (299).
(5) *Vengamuthu* v. *Pandaveswara*, 6 M. 151; *Venkatachalapati*, v. *Subharayadu*, 13 M. 293 (299); *Nathu* v. *Keshawaji*, 26 B. 174 (183); *Anandrav* v. *Shankar*, 7 B. 323 (329).
(6) *Dakar Temple Committee*, 28 Bom. L.R. 309: 94 I.C. 47: (1926) B. 179; *Kalidas* v. *Gor*, 15 B. 309.
(7) *Pramatha Nath* v. *Pradyumma*, 52 C. 809 (815) P.C.; approving *Rambrahma* v. *Kedar Nath*, (1923) C. 60: 36 C.L.J. 478 (483).
(8) *Jodhi Bai* v. *Basdeo*, 33 A. 735.
(9) *Pramatha Nath* v. *Pradyumna*, 52 C. 809 (827) P.C.

2131. Idol as a Juristic Entity.—An idol or a temple is regarded in law as a juristic entity, a living person in perpetual minority, competent to sue and be sued as such person through its accredited manager or *shebait*, and if his interest or attitude is hostile to it, it may sue or conduct its proceedings through a next friend or a guardian to be appointed by the court. In as much as a religious beneficiary is immortal and its *shebaits* succeeding one another form a continuing representation of its property, a creditor of the *shebait*, claiming his debt out of the funds of the endowment, is not bound to bring an administrative suit on behalf of himself and all other creditors of the deceased *shebait*.[1] The idol is not to be treated as a chattel that can be carried about from one person to another. Its sanctity demands that it should be treated as a sacred object that cannot be removed from its temple or shrine where it was consecrated which is its permanent abiding place.[2] As a juridical person, an idol may acquire and hold property in its own name, but of course, its management must be entrusted to a living person, such as its manager or *shebait*. As already observed, such manager has customarily acquired an independent *quantum* of interest in its property which he is entitled to treat and dispose of as his separate property. (§ 2102.).

But apart from such property, the manager is bound to protect and preserve all property of the idol as if it were his own. (§ 2093.) But there are reasonable limits to his discretion. For example, the court is not bound to saddle the costs of an infructuous second appeal on the idol but may decree them as payable by the *dharma* karta personally.[3]

Judicial control.

283. The Public, religious and charitable endowments are subject to the following statutory control:—

(1) Any person interested in an endowment may sue alone in a case arising under the Religious Endowments Act, 1863; or

(2) He may, by a petition filed under the provisions of the Charitable and Religious Trusts Act, 1920, obtain information regarding it; or

(3) Any two or more persons interested therein, who intend to maintain a suit for any of the reliefs enumerated in section 92 of the Code of Civil Procedure, 1908, must follow the procedure therein prescribed:

(4) Provided that such suit or petition does not affect a suit otherwise maintainable for any of the reliefs not therein enumerated.

2132. Analogous Law.—Suits relating to religious endowments fall into three classes, namely:—

(1) Those supported by common law and independently of any statutory support;

(2) Those maintainable under Religious Endowments Act;

(3) Those provided by S. 92 of the Civil Procedure Code.

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(1) *Sharatchandra* v. *Dwarkanath*, 58 C. 619.

(2) *Meherbai* v. *Manganchand*, 29 B. 96; *Gulabbhai* v. *Subbaydesji*, 52 B. 431 (433).

(3) *Semble* in *Panchakshari* v. *Venkatratnam*, 58 M. 160.

Religious Endowment Act, 1863.

2133. Statutory Control of Suits.—Turning to the statutory control of suits, it will be seen that two Acts of the Legislature prescribe such control. Of these, the first, the Religious Endowments Act, 1863, is really in three parts. The first (Ss. 1-13) substitutes non-official control for official control, theretofore exercised by the Board of Revenue over public religious endowments under the Regulations,[1] to that extent repealed by it. The second provides a measure of public control over all public religious endowments, (**Ss. 14-21**), and the third retains Government control over all public charitable (as distinct from religious) endowments which remain unaffected by the Act (**Ss. 22, 23**). The old Regulations extended only to the mofussil of Bengal and Madras, the two presidency towns being exempted, because the Supreme courts, and on their abolition, the High Courts had long been exercising their jurisdiction to control all charities in the name of the King who is constitutionally the protector of all charities. As it is, the Regulations had no force in the rest of India, including the Central Provinces[2] or the Bombay Presidency, excluding North Canara[3] where local Acts controlled such endowments,[4] till the enactment of the Act of 1863, which by prohibiting the Government of India or any officer of Government from interfering with the management of a religious trust otherwise than a provided by it[5] generally extended its policy to all India.

This Act does not apply to charitable as distinct from religious endowments which continued and still continue under Government management. As regards the religious endowments, which had been in charge of the Board of Revenue under the provisions of the Regulations, the Act prescribes the appointment of committees to be appointed by the local Governments for life unless removed for unfitness or misconduct. Section 14 of the Act is more general, and provides that any person interested in a public religious endowment, whatever its age or origin,[6] on previously obtaining leave of the court, may sue the manager or any member of the Committee "for any misfeasance, breach of trust or neglect of duty," and the civil court may, thereupon, decree specific performance of any act[7] and direct the removal of such manager or member and award damages or costs.

Charitable and Religious Trusts Act, 1920.

2134. The Act of 1863 is, thus restricted in its operation, since it failed to protect public trusts against the very abuses which had led to their wholesale control by the State. The non-official public opinion conscious of the return of such abuses demanded more effective public control of public trusts, resulting in the enactment of the half-hearted measure, known as the Charitable and Religious Trusts

(1) Beng. Reg. XIX of 1910; Madras Reg. VII of 1817.

(2) *Jaiwanti* v. *Nagridas*, 3 C.P.L. R. 11 (12).

(3) *Hassainmian* v. *Collector*, 21 B. 48.

(4) Act XI of 1852; Act XI of 1863 and Act VII of 1863.

(5) S. 22, Religious Endowments Act (XX of 1863).

(6) *Syed Dilijan* v. *Bila Akhtari*, 4 Pat. 741 (747) *Badar Rahim* v. *Badsha Mia*, (1934) C. 741; *Debrus* v. *Kazee Abdool Rahim*, 23 W.R. 453 O.A. 3 C. 324 P.C.; *Protap Chandra* v. *Brojonath*, 19 C. 275 (285); *Narayana* v. *Chandra*, 15 M. 1 (14); *Muthu* v. *Gangathara*, 17 M. 95; *Jan Ali* v. *Ram Nath*, 8 C. 32 (36-40) *Sivayya* v. *Lami Reddi*, 22 M. 223 (228); *Ganee Singh* v. *Ram Gopal*, 5 B.L.R. (A.C.) 55; *Sheoratan* v. *Ram Pargash*, 18 A. 227 (231); *Dhurrum Singh* v. *Kissen Singh*, 7 C. 767; *Fakruddin* v. *Ackeni*, 2 M. 197.

(7) *E.g.*, to build a temple with funds raised for it.

Act[1] which prescribes a summary remedy to any person interested in such trust, who on a petition to the District Court may obtain particulars, nature and objects of the trust and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, as also a direction that the accounts of the trust shall be examined and audited for a period not exceeding three years next prior to the date of the petition.[2]

2135. If the existence of the trust or the applicability of the Act is denied, the court will stay proceedings, upon the non-applicant undertaking to file a suit, for a declaration to that effect, within three months of the order.[3] "If no such undertaking is given, or if, after the expiry of the three months, no such suit has been instituted" the court shall itself decide the question,[4] and may pass such order as it deems fit,[5] and on the trustee's failure to comply with it, he shall be deemed to have committed a breach of trust, justifying the institution of a suit, by whom it does not say,[6] without sanction, as provided in S. 92 of the Code of Civil Procedure.[7] Such suit need not be limited to the same relief as was claimed in the petition, though it must be necessarily limited to that prescribed in S. 92 of the Code[8] unless the plaintiff is shown to be entitled to other reliefs under the general law.

The Act further enables any such trustee to apply to the court for opinion, advice or direction on any question affecting the management or administration of the trust property.[9] The procedure prescribed in the Act is summary, and the court cannot decide a question of title or any matter not fit for summary disposal. Any specified trust or class of trusts may be exempted from its operation by notification of the Governor-General in Council.[10]

2136. The net result of this Act is that if on a petition made thereunder, and an order passed thereon, the trustee fails to do as directed, he is declared to have committed a breach of trust dispensing with the previous sanction required by S. 92 of the Civil Procedure Code for a suit under that section,[11] but since the procedure under this Act is summary, nothing decided under it is *res judicata*.[12]

S. 92, Civil Procedure Code.

2137. The only section that goes further to correct abuses in the management of public charities is section 92 of the Civil Procedure Code, though the relief prescribed by it is that limited by its seven clauses, added to which it is empowered to grant "such further and other relief as the nature of the case may require"—words which have been held to be construed *ejusdem generis* with the previous clauses describing the nature of the relief permitted.[13] And since some of the reliefs enumerated in this section overlap those mentioned in S. 14 of the Religious Endowments Act, 1863, and since the object of the two Acts is similar, a person

(1) Act XIV of 1920.
(2) *Ib.* S. 3.
(3) *Ib.* S. 5 (3).
(4) *Ib.* S. 5 (4).
(5) *Ib.* S. 5 (5).
(6) Presumably by any person "interested" and not necessarily the petitioner—*Bapiraju* v. *Ramcharandas*, (1933) M. 854.
(7) S. (6) Act XIV of 1920.
(8) *Bapiraju* v. *Ramcharan Das*, (1933) M. 854.
(9) S. 7, Act XIV of 1920.
(10) *Ib.* S. 1 (2).
(11) *Ib.* S. 6.
(12) S. 12, Charitable and Religious Trusts Act (XIV of 1920).
(13) *Abdur Rahim* v. *Mhd. Barket Ali*, 55 C. 519 (527) P.C.; *Budh Singh* v. *Niradharan*, 2 C.L.J. 431 (438); *Budree Das Chaoni Lal*, 33 C. 789 (810); *Dharam Das* v. *Dharam Das*, 40 I.C. (A.) 182.

obtaining sanction under the Act of 1863 has the option of proceeding under this section of the Code.[1]

2138. A comparison of the language of the enactment shows that—

(1) All the three Acts only deal with public endowments and so exclude those not wholly public but are only partially so.

(2) And since neither statute deals with private religious endowments, no suit in respect thereto can be brought under the authority of either statute. Such a suit, when maintainable, is independent of any statutory sanction, and is founded on the right of suit of a subject to vindicate his ordinary civil rights.

(3) Since the Act of 1863 does not apply to charitable endowments, a suit relating thereto can only be brought under S. 92 of the Civil Procedure Code.[2]

(4) While section 14 of that Act deals only with religious endowments, section 92 of the Code deals both with religious and charitable endowments. Further the reliefs under the two are not identical; *e.g.*, a scheme and appointment of new trustees is only possible under the Code.[3]

(5) The only relief claimable under the endowments Act is the removal of the manager, and that too only for "misfeasance, breach of trust or neglect of duty," whereas under the Code he may be removed on any other ground, such as, incompetence, or forsaking the sect of which the idol is the deity, or introducing a new form of ritual or worship, and what is more, a new manager might be appointed in his place.

(6) That is, while the Religious Endowments Act deals with specific suits for a specific remedy, the Code deals with other suits, and though on a point or two it covers the same ground as the Religious Endowments Act, still the purpose and object of the two suits is different. This is implied in the saving clause in the Civil Procedure Code, which saves the precedure prescribed by the Religious Endowments Act for the institution of a suit thereunder.[4]

(7) It has been held that the "interest" which entitles a person to maintain a suit under the Act of 1863 is not the same as would suffice for a suit under the Code for which the "interest" of the plaintiff's must be direct, and closer.[5]

(8) Looking to the reliefs, claimable in the two cases, it is clear that the suits the two statutes contemplate are representative suits and not those limited to personal claims.

284. (1) A suit is maintainable by a person interested in an endowment in respect of a civil right concerning it:[6]

Suit maintainable.

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(1) *Najibuddin* v. *Amir Hasan*, (1934) Pat. 443.

(2) *Abdur Rahim* v. *Mhd. Barket Ali*, 55 C. 519 (527) P.C., *Budh Singh* v. *Niradharan*, 2 C.L.J. 431 (438); *Budree Das* v. *Chooni Lal*, 33 C. 789 (790); *Dharam Das* v. *Dharam Das*, 40 I.C. (A) 182.

(3) *Syed Diljan* v. *Bibi Akhtari*, 4 Pat. 741.

(4) S. 92 (2), Civil Procedure Code.

(5) *Ramchandra* v. *Parmeswaran*, 42 M. 360.

(6) *Budree Das* v. *Choonilal*, 33 C. 789.

Previous sanction when necessary.

(2) Provided that a representative suit respecting a common right[1] in a public religious endowment for a relief specified in section 14 of the Religious Endowment Act, 1863, and that specified in section 92 of the Civil Procedure Code in respect of a public endowment, whether religious or charitable, cannot be instituted without the previous sanction as therein prescribed;

Sanction when dispensed with.

(3) Provided further that no previous sanction as is required for the institution of a suit by section 92 of the Civil Procedure Code shall be necessary where the trustee of such endowment has failed to comply with the directions of the court to furnish particulars thereof, or to have its accounts examined and audited on a petition made by a person interested under section 3 of the Charitable and Religious Endowments Act, 1920.[2]

Illustrations.

(*a*) *A* is the founder's heir. He sues for the ejectment of *B* who claims to be the manager of the temple which *A's* ancestor had founded. He is entitled to eject him.[3]

(*b*) *A* has the right of worship in a public temple of which *B* is the manager. *B* excludes *A* from the worship. *A* may sue *B* for an injunction and damages for his exclusion.[4]

(*c*) *A* has the right to have a special worship performed in a public temple of which *B* is the manager. *B* refuses to receive the money or to perform the worship. *A* may sue *B* for both.[5]

(*d*) *A* and *B* are two priests in a temple entitled to officiate by turns. *B* refuses *A's* turn of worship. *A* may sue *B*.[6]

(*e*) *A* grants land to his spiritual *Guru B*, for offering prayers to him. *A's* descendant *C* sues *B's* descendant *D* for his removal on the ground of misconduct. If the endowment be public no suit would lie for non-compliance with the proviso. But if the endowments be private *C's* suit is maintainable.[7]

(*f*) A worshipper at a temple sues its manager that a permanent lease by him of certain temple lands is void. The suit is neither covered by S. 14 of the Religious Endowments Act or of S. 92 of the Code of Civil Procedure. It is, therefore, maintainable on the general ground stated in clause (1).[8]

(*g*) *A* sues for a declaration that certain property in possession of *B* belongs to an endowment and is not *B's* personal property. Such relief is outside the scope of S. 92 of the Civil Procedure Code, and is, therefore, claimable.[9]

(*h*) A sues *B* for a declaration that the appointment by him of *C* as his successor as the head of a *muth* was illegal. *A* can sue *B* and *C* without having recourse to the procedure prescribed in S. 92 of the Civil Procedure Code, as the relief is not specified in that section.[10]

2139. Analogous Law.—From their very nature religious and charitable endowments cannot be treated like secular property. Consequently, civil law recognizes only limited rights concerning them as fit subjects of

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(1) *Budree Das* v. *Choonilal*, 33 C. 789; *Appanna* v. *Narasinga*, 45 M. 113 F.B.

(2) Act XIV of 1920.

(3) *Vaidyanatha* v. *Swaminatha*, 47 M. 884 P.C.

(4) *Vengamuthu* v. *Pandaveswar*, 6 M. 151.

(5) *Elayalwar* v. *Numberumal*, 23 M. 298; *Amriteshwara* v. *Murugappa*, 27 I.C. (M.) 886.

(6) *Amriteshwara* v. *Murugappa*, 27 I. C. (M.) 886.

(7) *Sathappayyar* v. *Periasami*, 14 M. 1 (7,8).

(8) *Ashraf Ali* v. *Mhd. Nurjjana*, 49 I.C. (C.) 355; *Monohar Das* v. *Tarini Charan*, (1929) C. 612; as to interest of worshipper, see *Oseri* v. *Bawa Balmukund Dass*, 24 I.C. (S.) 712.

(9) *Abdur Rahman* v. *Mhd. Barkat Ali*, 55 C. 519.

(10) *Nataraja* v. *Kailasam*, 44 M. 283 (292, 293).

civil litigation. Such matters are referred to in the preceding sections. Under S. 6 of the Transfer of Property Act a public office or public duties which includes a religious office and religious duties cannot be transferred, though its transfer within limits is permissible.[1] Then again, since endowments are intended to be perpetual, in which the public, or a section of the public are interested, it follows that their corpus is inalienable, though for that very reason, law permits the intervention of the courts to protect and preserve them, and when they cease to be the subject of religious sentiment their alienation is permitted[2] and they then fall into the category of secular property which is held subject to the ordinary rules of civil law in which contractual and customary rights and obligations are recognized and enforced.

The one rule respecting endowments is that all such rights and obligations, when not merely contractual or tortious can only be enforced by a person "interested" therein, thereby keeping out an officious intermeddler on the ground of obvious policy.

Further, in regard to public endowments law has provided a further check by requiring the previous sanction of the court or the Advocate-General before a person can sue for a claim in respect of certain defined rights of management, beyond which law is left free to take its course. The subject will be found set out in the sequel.

2140. Both S. 92 of the Civil Procedure Code and the Charitable and Religious Trusts Act,[3] deal with "public" trusts; and as the Indian Trusts Act[4] excludes all religious and charitable trusts, whether public or private from its purview, it follows that the Hindu endowments are, as such, outside the scope of that Act, and being in the nature of trusts, limited to a section of the community, they partake of the nature of private endowments to which neither S. 92 of the Civil Procedure Code, nor any of the provisions of the Charitable and Religious Trusts Act applies. But such trusts are still not outside the cognizance of the courts who will protect them by preventing abuse and supervising their administration, if a proper case is made out.[5]

And since the statutes not only relate to public trusts[6] but limit themselves to the specific remedies therein specified[7] and since they do not bar other suits[8] it follows that other reliefs in respect of public trusts and all reliefs in respect of private trusts may be claimed *ex debito justitiae* in the exercise of its ordinary jurisdiction.

2141. Right of Suit.—Any person may institute a suit whether he has a legal cause of action or not; but such a plaintiff would be promptly non-suited if he has rushed into the court without a civil right. In the case of an endowment, whether public or private, law has prescribed a minimum safeguard that no one can sue unless he is at least "interested"[9] in the endowment. This

Clause (1).

(1) 1 Law of Transfer (6th Ed.), § 259, p. 177.

(2) *Ramaswamy* v. *Venkata*, 9 M. I. A. 344.

(3) Act XIV of 1920.

(4) S. 1, Savings Act, XI of 1882.

(5) *Cf. Gopal Lal* v. *Purnachandra*, 49 C. 459 (469) P.C.

(6) *Ibid.*

(7) *Abdur Rahim* v. *Syed Abu Mohomed*, 55 C. 519 (530) P.C.

(8) *Ib.*, pp. 526, 527.

(9) This word is defined in the Act of 1863 (1) as a "person having a right of attendance, or having been in the habit of attending at the performance of the worship or service, of any mosque, temple or religious establishment, or of partaking of the benefit of any alms." (*See* S. 15). This definition was framed for the

does not, of course, mean, that others cannot sue, for if they have a civil right they are entitled to enforce it. But such must be acquired *ex contractu* or *ex delicto*. Such cases apart, no plaintiff can sue in respect of an endowment unless he has some "interest" in it. The endowment may be public or private. Whether it is the one or the other, one not "interested" is an intermeddler, and is not permitted to sue, since such suits if permitted would expose an endowment to constant harassment. The "interest" required might be direct or indirect,[1] large or small, but it must be an interest as a guarantee of the suitor's good faith.[2]

What "interest" necessary.

2142. The "interest" required may be neither direct nor measurable in money, since it will suffice if it is such as the civil law would consider as sufficient. (§ **2141.**) In so holding the Privy Council considered the fact that the mere fact that the plaintiff was the descendant of the founder of a public charity, though in the female line was sufficient to entitle her to sue for the removal of a trustee who had been improperly appointed to manage it. In this case it was held that the plaintiff could sue, though she never had occasion to partake of any benefit from the *chatram*.[3] Similarly, in other cases the founder's descendant was held entitled to remove the *mahant* of a *math* who had got married and had children whom he maintained out of its income.[4] It is not easy to define the interest that would qualify a person to maintain a suit, since the interest one possesses must differ according to the object and nature of the endowment and his own relation thereto. But the touchstone of his right is his "interest" in the endowment. If the endowment is a private one, the founder, and his descendants, his heirs,[5] members of the sect or order to which the endowment belongs, and even the worshipper possesses sufficient qualifying interest to start the suit. But if it be a public endowment, the same reason narrows down the circle of those to whom a suit is permitted, and where the relief affects its internal autonomy the statutes prescribe certain formalities as a preliminary to its maintenance.

The question of interest does not depend upon the numerical strength of the persons interested in an endowment, since in a private endowment *e.g.*, a family shrine, the number of members might be conceivably larger than in a public endowment belonging to a small order, the membership of which might be comparatively small, though such must be exceptional cases, since a public endowment is one in which a larger number is ordinarily interested than in a private one. On the other hand, even in such endowments a person interested may claim a relief which does not impugn upon its normal autonomy. In such cases, even the statutory formalities need not be complied with. As already observed, such interest may be great

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limited purpose of that Act, but though a good serviceable definition, it is not exhaustive, since the founder's heir has a sufficient though only an indirect interest in the endowment, *Vaidynath* v. *Swaminatha*, 47 M. 884 (891) P.C. in which it is pointed out that the word "direct" in the section was omitted by the amending Act of 1888 (S. 44 Act VII of 1888) which overruled certain Calcutta cases in which such interest was literally insisted on.

(1) *Ib.*, *Sathappayar* v. *Periasami*, 14 M. 1; *Rabindra* v. *Chandicharan*, (1931) C. 864.

(2) *Barboni Coal Co.* v. *Gokulanand*, 61 C. 313 (317 P.C.; *Cf. Hukumchand* v. *Maharaj*, 12 Pat. 881 P.C.

(3) *Vaidyanatha* v. *Swaminatha*, 47 M. 884 (891) P.C.

(4) *Sattappayyar* v. *Periasami*, 14 M. 1: *Hidait* v. *Afzul*, 4 N.W.P. H.C.R. 420.

(5) *Sathappayar* v. *Periasami*, 14 M. 1; *Rabindra* v. *Chandicharan*, (1931) C. 864.

or small, direct or indirect, still it must be a qualifying interest in the sense of its being sufficient in the eye of the law to entitle him to maintan a suit with or without the pre-requisite sanction. Thus a member of the Hindu Community may sue for a declaration that an institution is a public one to which the entire Hindu community is entitled to go and worship.[1] So it is competent to the founder's descendant to protect the trust by a suit complaining of the misappropriation of its funds by the trustee in collusion with the beneficiaries,[2] or on the ground of their being his private property.[3]

Such is the right of a worshipper complaining of obstruction in the performance of his devotion to an idol or temple,[4] or of the founder to enforce the trusts[5] or a suit by a trustee,[6] or by a committee, appointed under the Act for damages for misappropriation or for an injunction.[7] Such is his right to be a trustee,[8] or a co-trustee,[9] or to his turn of office,[10] or for the removal of an obstruction to his management,[11] or for the removal of the defendant as not entitled to act as the manager.[12] So, again, the plaintiff may sue for performing the customary special form of worship for the plaintiff on payment which the priests cannot refuse;[13] So one priest may restrain another from introducing a new form of worship.[14]

2143. So again, it is perfectly competent to one trustee to sue another for accounts of the trust,[15] or for specific share out of the dedicated property for the benefit of the founder,[16] or for recovery of the entire property by him on the ground that the trust has not been acted upon,[17] or for recovery of possession of the dedicated property from the manager who was claiming it as his private property, without praying for any of the three reliefs contemplated in S. 14 of the Act, *i.e.*, for removal of the manager, specific performance of an act by him, or for damages,[18] or a suit by a trustee for recovery of property from an ex-trustee who had been dismissed from his office by a temple committee,[19] or a suit for recovery of property or damages against the heirs of the deceased manager for property lost by his breach of trust or for negligenae,[20] or a suit against the alienee for the declaration of the invalidity of an alienation made by the manager of trust property,[21]

(1) *Ganpat Pujari* v. *Kanaiyalal*, (1933) Pat. 246.
(2) *Gopinath* v. *Delhi Cloth Mills*, (1932) L. 670.
(3) *Vaidyanatha* v. *Swaminatha*, 47 M. 884 (894) P.C.
(4) *Abdul Rahman* v. *Yar Mahammad*, 3 A, 636; Quare in *Radabai* v. *Chimnaji*, 3 B. 27 (28).
(5) *Hidait* v. *Afzul*, 4 N.W.P.H.C.R. 420; *Sathappayyar* v. *Periasami*, 14 M. 1 (14).
(6) *Singarachari* v. *Krishnaswami*, 19 M.L.J. 513 : 4 I.C. 874. (Judgment gives no reason for its view).
(7) *Puddolabah* v. *Ram Gopal*, 9 C. 133; *Bashikar* v. *Thathachariar*, (1927) M. 551.
(8) *Vishwanath* v. *Rambhat*, 15 B. 152, *Majijan* v. *Dhadeen*, 32 C. 273.
(9) *Miya Valiulla* v. *Sayad Bava*, 22 B. 496 (499).
(10) *Amirteshwar* v. *Murugappa*, 27 I. C. (M.) 886.
(11) *Navroji* v. *Dastur*, 28 B. 20 (54).
(12) *Gyana* v. *Kandasami*, 10 M. 375, *Budree Das* v. *Chunnilal*, 33 C. 789 (807, 808) (Cl. 2 of S. 92 C.P.C. was added two years later in 1908 but it does not affect the main portion of the judgment.) See *Appanna* v. *Narasinga*, 45 M. 113 F.B.
(13) *Elayalwar* v. *Namberumal*, 28 M. 298 followed in *Amirteshwara* v. *Murugappa*, 27 I.C. (M.) 886.
(14) *Ib.*
(15) *Appanna* v. *Narasinga*, 45 M. 113 F.B.
(16) *Kalub Hossein* v. *Meherum*, 4 N. W.P.H.C.R. 155.
(17) *Hidait* v. *Afzul*, 2 N.W.P.H.C. R. 420.
(18) *Mahalinga* v. *Vencoba*, 4 M. 157.
(19) *Virasami* v. *Subba Ram*, 6 M. 54.
(20) *Jeyangarulavaru* v. *Durma*, 4 M. H.C.R. 2; *Manally* v. *Vaidelinga*, 1 M. 343; *Virasami* v. *Subba Ram*, 6 M. 54, *Nellaiyappa* v. *Thangamma*, 21 M. 406.
(21) *Siwayya* v. *Rami*, 22 M. 223.

or a suit to establish a right to share in the management,[1] or a suit by the trustee dismissed from office for a declaration that the dismissal is wrongful or for restoration to office,[2] or a suit by a manager for a declaration of his title as the rightful manager and for recovery of possession as such,[3] or for the appointment of himself or some other person as manager.[4]

Such and similar suits are opposed to no provision of law, and being a violation of one's civil rights, are clearly maintainable.

2144. Case for Sanction.—As already stated, sanction of the Advocate-General or of his substitute, provided in S. 92, is necessary to maintain a suit. It is a condition imposed to prevent the institution of frivolous and vexatious suits.[5] The suit under the Code is a representative suit, in which the plaintiffs represent the interest of the body of beneficiaries. The fact that the plaintiffs are two out of the five trustees does not entitle them to sue the remaining three without sanction.[6] Where two persons start a suit with due sanction, the addition of a third person as co-plaintiff does not necessitate fresh sanction.[7] Where two persons obtain sanction, and one of them afterwards dies, a fresh sanction is required to institute a suit. But when it is once properly instituted by the authorized plaintiffs, the death of one of them does not determine the suit, which may be continued by surviving plaintiff.[8] But where more than two persons have obtained sanction, they must all sue. It is not sufficient that two of them sue without the rest.[9] A sanction given under S. 92 of the Code of Civil Procedure, may be quite general in its terms, though the application for such sanction contains only one specific prayer. Where such general sanction is given and a suit instituted, the reliefs need not be confined to those that are asked for in the application for sanction. Where the person who originally obtained sanction and filed the suit, died during its pendency, the suit would nevertheless continue as a suit not prosecuted by individuals for their own interests but as representatives of the general public.[10]

Clause (2) (a).

2145. Suits requiring No Sanction.—It is a principle of equity that where there is a right there is always a remedy; *ubi jus ibi remedium*. But though this is the general rule, it is subject to the exception that where the injury is common to a large body of men, as an obstruction to a highway, apart from punishing the wrongdoer by indictment, no single person can maintain a civil action against him unless he has suffered some special damage, as if he falls into a pit in the highway. The fact that the wrongdoer is a public trust is no exception to the rule. Any person having a personal right the denial of which has caused him special damage is en-

Clause (3).

(1) *Agri* v. *Vishnu*, 3 M.H.C.R. 198.
(2) *Amin* v. *Ibraim*, 4 M.H.C.R. 112; *Virasami* v. *Subba Ram*, 6 M. 54.
(3) *Agri* v. *Vishnu*, 3 M.H.C.R. 198; *Mahalinga* v. *Vencoba*, 4 M. 157; *Athavulla* v. *Gouse*, 11 M. 283.
(4) *Nellaiyappa* v. *Thangama*, 21 M. 406.
(5) *Sajedur* v. *Gour Mohan*, 24 C. 418.
(6) *Tricumdas* v. *Khimji*, 16 B. 626.
(7) *Ram Churn* v. *Protap*, 2 C.L.J. 448; *Varadayya* v. *Munusamy*, 10 M.L.T. 504 : 13 I.C. 232.
(8) *Parmesari* v. *Girdhari*, 30 I.C. 240.
(9) *Maddala* v. *Vadapalli*, 29 M.L.J. 231 : 30 I.C. 236.
(10) *Anand Rao* v. *Ram Das*, 48 C. 493 P.C.

titled to maintain a suit. This is the substantive law and it remains unaffected by the two processual Acts which prescribe for a previous sanction, in certain cases in which any of the reliefs therein specified is claimed.

Apart from the pecuniary and personal interest so arising a person may be otherwise interested in a public or a private endowment, because his ancestors had founded it, or because he himself as a member of the community, sect or religion was interested in a religious foundation or as a member of the general public in a public charity. Both sections 14 of the Religious Endowments Act, 1863, and 92 of the Code indicate the nature of interest entitling one to sue for the reliefs there specified; but apart from those reliefs a person may claim other reliefs if he is "interested" in the endowment without the prerequisite of a previous sanction.

2146. Charitable Endowments.—By the common law, the Supreme Courts of Judicature were entitled to control public charities. S. 41 of the East India Company Act, 1813,[1] conferred powers on the Advocate-General similar to those of the Attorney-General in England. Similarly, Ss. 8-11 of the Official Trustees Act[2] enables any person to appoint the Official Trustee, with his consent, to be the trustee of any property for a charitable purpose or otherwise, whereupon the property so granted shall vest in him. The Official Trustee shall be paid such remuneration as he may, by the deed of settlement, be declared to be entitled to receive.[3] The Official Trustee may be appointed in place of the other trustees refusing to act, as provided in S. 10, in which case he is entitled to receive the remuneration as fixed by S. 11. The jurisdiction of the Official Trustees is limited to the three presidencies. While these two Acts made some provision for the administration of charities within the jurisdiction of the High Courts, similar charities in the mofussil remained unprovided for. These are now dealt with by the Charitable Endowments Act, 1890,[4] which enables the author of the trust, or the trustees, if already appointed,[5] to apply to the Local Government, which may settle a scheme for the administration of any property[6] and vest the property in a trustee called the Treasurer of Charitable Endowments,[7] on such terms as to the application of the property, or the income thereof, as may be agreed on between the Local Government and the person or persons making the application and the property, shall thereupon so vest accordingly.[8] The scheme so settled may, in a similar manner, be modified or substituted. The Local Government is, in the exercise of its powers under the Act, now no longer subject to the control of the Governor-General in Council.[9]

As previously stated, the Charitable and Religious Trusts Act[10] also enables a person interested in a public charitable trust to obtain information, and the trustee to obtain opinion, advice and direction of the Court. (§ 2135.)

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(1) 53 Geo. III, C. 155.
(2) XVII of 1864.
(3) *Ib.*, S. 9.
(4) VI of 1890.
(5) *Ib.*, S. 6.
(6) *Ib.*, Ss. 4, 5.
(7) VI of 1890, S. 3.
(8) *Ib.*, S. 11.
(9) VI of 1890, S. 16, repealed by the Devolution Act (XXXVIII of 1920), Sch. I.
(10) Act XIV of 1920.

CHAPTER XXI.

LAW OF SURVIVORSHIP.

2147. Topical Introduction.—The Mitakshara view of property is generally the negation of individual rights in property. The unit of ownership is the family. It is the antithesis of modern law where the unit of ownership is the individual. All rights which the individual possesses in a family are by way of exceptions to the general rule that he has no separate rights. This being the primary conception of coparcenership, it will be seen that, strictly speaking, there can be no law of succession or inheritance. Births into the family increase its numbers; deaths diminish them. Subject to this ebb and flow, the family continues. The only check upon its continuance is partition. The law of survivorship is thus the law of increase rather than the law of succession; for since death removes no one with any individual rights there is no occasion for succession, properly so called. This is the orthodox Mitakshara view. It has been to a certain extent, improved upon by the Dayabhag. But in either case, the law of succession is so largely dependent upon the law of partition that the one cannot be understood without the other; and after the latter is mastered, there is little or nothing to understand in the other.

2148. The case of non-coparcenary property is different. For since, it is capable of individual ownership, it is necessarily subject to the law of succession. In other words, devolution by survivorship is applicable, not to all joint property, but only to that which constituted the unobstructed heritage of the deceased. As already said, this property comprises only that in which a coparcenary right is acquired by birth, or which is inherited from the father or other paternal male ancestor, not exceeding three degrees higher than himself, including its accretions. Other property which, though joint if comprised in the obstructed heritage, being inherited, from female ancestors or from maternal male or from separate paternal collateral relation, would be subject to the ordinary law of inheritance and not survivorship. But a person's self-acquired property descends to his male issue, if joint, by survivorship and not by inheritance.[1] This is in accordance with the rule that a man and his male issue are one. It will thus be seen that survivorship is both a rule of property, as it is a rule of succession, and in considering whether it applies, regard must be had not only to the nature of the property, but also to the relationship of those who claim by survivorship to the deceased.

In this chapter, the rules which govern quasi-succession to coparcenary property are alone set out. The next chapter will deal with the law of inheritance.

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(1) *Obiter* in *Nana* v. *Ramchandra*, 44 M. 499 F.B. 32 M. 377; *Vairavan v. Srinivas Chariar*,

Saving of Dayabhag succession.

285. Nothing in this chapter applies to members of a Dayabhag family who take by inheritance, and not by survivorship.

[*Note.—See* Topical Introductions to Chapters XIII XXII and XXIV, *post.* As explained in § **2156**, devolution by survivorship is inapplicable to members of Dayabhag family, who, as stated in this section, take by succession or inheritance, but not by survivorship.]

Survivorship in impartible estate.

286. Survivorship applies to all property, movable or immovable, partible or impartible.[1]

Right of survivorship.

287. (1) When a person, possessed of coparcenary property, dies, his interest therein passes to the other coparceners then living, by right of survivorship, who take it in their own right and not in trust for the heirs of the deceased.[2]

(2) Provided that where he has left sons or grandsons in the male line his interest survives to them to the exclusion of his other coparceners.[3]

(3) Where such property passes to the surviving coparceners, they take *per stirpes* **and not** *per capita.*[4]

2149. Analogous Law.—From what has been said before, it is clear that coparcenary property, held by the joint family, is in the nature of property held by a coparcenary with perpetual existence, the members whereof vary, but the death of a member has no greater effect beyond causing a lapse of his share.[5] Those who are born into the family and those who go out of it, do not affect the joint property beyond varying the shares of the rest. Consequently, when a coparcener dies, his interest survives and passes to his other coparceners who "hold the property, which they take by survivorship legally and equitably for themselves and not in trust for the heirs of the deceased."[6] Of course, the estate acquired by survivorship is subject to defeasance on the coming into existence, by adoption or otherwise, of a new coparcener.[7]

2150. Succession by Survivorship.—Succession by survivorship is said to be limited to two descriptions of property, namely: (*i*) what is taken as un-obstructed heritage (§§ **1003-1005**) and property acquired by means of it, and (*ii*) what forms the joint property of re-united coparceners;[8] but there is authority for the view that it applies equally to *all* joint family property, and not merely to that which is *ancestral* joint property. In other words, it applies equally to all property des-

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(1) *Shibaprasad* v. *Prayag Kumari,* 59 C. 1399 (1413) P.C.

(2) *Sadabart* v. *Foolbash,* 14 W.R. 340 F.B.

(3) Mit., I-V-2; Dayakram Sangrah, I-I-3; *Debi Pershad* v. *Thakur Dial,* 1 A. 105 (115) F.B.

(4) *Debi Prasad* v. *Thakur Dial,* 1 A. 105 (113) F.B.

(5) *Katama Nachiar* v. *Raja of Sivagunga,* 9 M.I.A. 539 (611); *Shyam Lal* v. *Byaj Narain,* (1917) Pat. 121 : 39 I.C. 36.

(6) *Sadabarat* v. *Foolbash,* 14 W.R. 340 F.B.

(7) *Madana* v. *Purushothama,* 38 M. 1105 (1118).

(8) *Jesoda* v. *Sheo Pershad,* 17 C. 33.

cribed in section 109, and not merely to those described in the first two clauses of its sub-section,[1] that is to say, as much to ancestral property and acquisitions made with its aid as to property acquired with joint funds or by the joint labours of the members of the family or to that thrown into the common stock: in one word, to all coparcenary property as distinct from property which is joint but is not held in coparcenership. As a rule, survivorship does not extend to property known as obstructed heritage, which, as before stated, comprises joint property jointly inherited from a collateral or from or through a female, as for example from a maternal grandfather.[2] And there is a radical difference between survivorship and inheritance, since survivorship is an incident of coparcenary right and arises on birth, while a right of inheritance is only acquired on death.[3] One is the incident of a vested right, the other is a mere contingency. A right by survivorship must necessarily vary with the number of coparceners at any time, and with every increase by birth or adoption, the *quantum* of undivided interest of each of the coparceners is correspondingly reduced. If, on the other hand, any of them dies, his share passes to the rest, whose interest is correspondingly increased. As explained before, coparcenership is a joint right which the coparcener cannot devise or alien except in the limited circumstances permitted by law.

The right of survivorship has, therefore, nothing in common with the law of inheritance. As, however, it is a right affected by death, all it needs is a passing reference to its leading principles, by way of comparison with the doctrine of inheritance.

2151. The acquisition of a right by survivorship, on the death of coparcener, depends upon the community of interest and unity of possession between all the members of a united family having common property. On the death of any one of them, the others take by survivorship, that in which they had, during the deceased's lifetime, a common interest and common possession. But as the law of partition shows, as to the separately acquired and separate property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails.[4] Strictly speaking, a coparcenary right must, on the death of a coparcener, pass to all the surviving coparceners. And though this is the theory, practice and usage have sanctioned deviations, the nature and extent of which varies, with the result that, in certain cases, as for example, in the case of coparcenership under the Dayabhag law, the members hold their property in quasi-severalty, so that, on the death of a coparcener, his interest devolvss on his own heirs. This is a case of real inheritance. But between it and strict coparcenership there are various grades. For instance, the share of a coparcener, on his demise,

Clause (1).

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(1) *Gopalsami* v. *Arunachellam*, 27 M. 32; *Karsondas* v. *Gangabai*, 32 B. 479 (492, 493).

(2) *Mhd. Husain* v. *Kisva Nandan*, I. L.R. (1937) A. 655 (664, 665) P.C.; distinguishing *Venkayamma* v. *Venkataramanna*, 25 M. 678 P.C.; *contra* in *Mansingh* v. *Nawlakhwati*, 2 Pat. 607.

(3) *Ghosal* v. *Ghosal*, 31 B. 25.

(4) *Katama Nachiar* v. *Raja of Shivgunga*, 9 M.I.A. 539.

does not pass equally to all his other coparceners, but only to his own sons, grandsons and great-grandsons, to the exclusion of his brothers. In this respect, rules of survivorship and inheritance agree. But the analogy ceases there. In the case of other relations, if the property was joint, the persons taking by survivorship would be different to those who take by inheritance, since survivorship is founded on the theory of joint ownership, while inheritance is founded on that of exclusive ownership. Hence, in a separated family, holding joint family property, brothers would succeed to the property of a deceased brother, excluding a nephew who is not entitled to inherit with a brother of the deceased brother.[1]

2152. As coparcenership is only possible within the circle of one's family, the question of coparcenership is one of family law. A person cannot create coparcenary rights by contract. (**S. 122.**) It must arise by law. Women cannot be coparceners.[2] Hence, on the death of the owner, his coparcenary rights may pass to one set of persons and his separate property to another. Where, for instance, the owner has left a brother and a wife, his coparcenary interest will survive to his brother, while his separate property will devolve on his wife.[3]

Again, if the property be impartible, it devolves not on the coparcener nearest in blood but on the nearest coparcener in the senior line.[4] The succession to an impartible estate follows the rule of survivorship according to the personal law of the owners.[5] This has already been explained. (**S. 214.**)

There may be coparcenary of dancing girls, but in this case it can not be held that their daughters acquire by birth an interest in the ancestral property. Where, however, the partie were dancing girls, and the mother, daughter and grand-daughter all lived together, put their earnings together, and acted in all respects as members of a joint family they were held to constitute a joint family, with rights of survivorship.[6]

2153. This is the general rule but it is subject to one exception stated in clause (2) supported by an express text of Mitakshara.[7]

Clause (2).

This is the right of representation of a person by his sons, grandsons and the great-grandsons, or as it is explained, the father together with his son, grandson and great-grandson forms a single individual, and on the death of the former, the latter take his share to the exclusion of his undivided brothers. The rule, then, that the interest of a coparcener, on his death, passes to the other coparceners is subject to the exception that, where he has left male issue, it passes to them and not to the general body of survivors.[8] The case is the same where the widow of a deceased coparcener takes a son in adoption.

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(1) *Ralla Ram* v. *Malva Ram*, (1911) P.W.R. 123 : 12 I.C. 308.
(2) *Ananda* v. *Nownit*, 9 C. 315.
(3) *Varadaperumal* v. *Ardaneri*, 1 M. H.C.R. 412.
(4) *Ravnehwar* v. *Chandi Prasad*, 38 C. 721.
(5) *Gur Pershad* v. *Dhori*, 38 C. 182; *contra* in *Nachiappa* v. *Sivasubramania*, 29 M. 453.
(6) *Kokilambal* v. *Chandrammal*, 86 I. C. 633 : (1925) M. 902.
(7) Mit., I-V-2; Daya-kram Sangrah, I-I-3.
(8) *Debi Pershad* v. *Thakur Dial*, 1 A. 105 (115) F.B.

2154. Acquisition Per Stirpes.—For the same reason, the rights of other coparceners are enlarged *per stirpes* and not *per capita*, since the rule of representation is equally applicable to all coparceners.[1]

Clause (3).

The variation of an estate by operation of the law of survivorship merely varies its *quantum*: it does not vary its incidents. When, therefore, a joint family constitutes of one tenant, the death of one of its members has not the effect of determining the tenancy, which the survivors are entitled to continue.[2] So, the change of a *vighotia* village into a *bhagdari* village was held to be merely a change for administrative convenience, involving no alteration in the law of succession.[3]

2155. Survivorship when Defeated.—From what has been stated before, it is clear that the right of survivorship will be defeated in the following cases, namely:—

(1) Where a coparcener is disqualified as provided in section 123.

(2) Where a coparcener has lost his interest as provided in section 124.

(3) Where a coparcener has, as provided in section 126 (6), alienated his share.

(4) Where the share of a coparcener is attached during his lifetime in execution of a decree against him, as provided in section 127 (*iv*).

(5) But, if in the last case, the deceased coparcener be the father,[4] then, not only his interest but the entire coparcenary interest inclusive of that of his sons is liable to attachment even after his death, in execution of a decree against him for a debt of his own not illegal or immoral as provided in section 158 (3).

(6) Where on the insolvency of a coparcener, being the father or a junior coparcener, mentioned in section 126, his interest has vested in the Official Assignee or the Receiver as the case may be.[5]

In case (4) if the attachment was made before judgment, followed up by a decree in the coparcener's lifetime, it is a question whether on the subsequent death of the judgment-debtor, his interest would pass to the survivors. According to the Bombay and Patna Courts it does,[6] but according to the Madras court it does not, the reason given being that an attachment before judgment serves the purpose of an attachment in execution of the decree, since no fresh attachment is then necessary.[7] It is submitted that this view is sound since all that the law

(1) *Debi Prasad* v. *Thakur Dial*, 1 A. 105 (113) F.B.

(2) *Mahabir* v. *Bhagwanti*, 38 A. 325.

(3) *Lalu Dayal* v. *Lalu Gopal*, 12 Bom.L.R. 573 : 7 I.C. 659.

(4) Used in the sense defined in S. 112.

(5) S. 52 (2) (*a*) Pres. Towns Insolvency Act (III of 1909), and Ss. 2 (1) and 20 (2) Provincial Insolvency Act (V of 1920) as to father, *see Sat Narain* v. *Behari Lal*, 6 L. 84 P.C.; other coparceners, see S. 126 (6). For U.P. see *Anant Singh* v. *Kalka Singh*, 5 O.L.J. 665 : 48 I.C. 526.

(6) *Subrao* v. *Mahadevi*, 38 B. 105; *Luxman* v. *Vinayak*, 40 B. 329; *Sundarlal* v. *Raghunandan*, 3 Pat. 250 (256) (case *obiter* as court found that there was no attachment; still relied on O. 34, R. 10, C.P.C.).

(7) O. 38, R. 1, Civil Procedure Code: *Baiher Krishna* v. *Lakshmana*, 4 M. 302

requires, is that the share should have been attached, which gives the decree-holder a right to prosecute his remedy against the property attached.

2156. Dayabhag Family Different.—This is, however, the view of the orthodox school, the survival of an ancient institution in which individual, as distinguished from the corporate, rights are totally ignored: The Dayabhag admits the rights of the widow, the daughter, the mother and the paternal grandmother "under express texts."[1] And as will be seen in the sequel, although the Dayabhag places in the forefront the doctrine of spiritual efficacy, it does not subscribe to the orthodox rules of survivorship, but rather treats the coparcener in a joint family as holding his interest in *quasi*-severalty which, on his death, passes to his heirs by descent and not by survivorship.

Survivorship amongst heirs.

288. Members of a joint family inheriting the ancestral or the self-acquired property of their paternal ancestor, take the estate subject to the rule of survivorship.[2]

Illustration.

(*a*) Two joint brothers *A* and *B* inherit an estate from their maternal grandfather. *A* dies, leaving him surviving his widow *C*. *C* would take *A's* share, to the exclusion of *B*.[3]

(*b*) Two joint step-brothers *A* and *B* were the sons of two sisters, to whose father they inherited. *A* dies, leaving him surviving his widow *C*. *A's* share descends to *C*, to the exclusion of *B*.

2157. Analogous Law.—This section deals with two species of property, inherited by a member of a joint family—ancestral property of his paternal ancestor, and his self-acquired property, both of which pass to the heirs as coparceners subject to the rule of survivorship, but the property that constitutes obstructed heritage, as before explained (**S. 114** is not subject to survivorship, being subject to the law of inheritance. The one exception to this rule was understood to be the property that a coparcener took from his maternal grand-father, which though obstructed, was nevertheless, held to be subject to devolution by survivorship. This view proceeded upon a statement of the Privy Council, which was criticised in the last edition of this work and reasons given why it was should not be so treated.[4] This view has since been affirmed by that high Tribunal.[5]

The principle of this section is that members of a joint family inheriting property from a common paternal ancestor acquire it subject to the

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(307); *Muthusami* v. *Chunnammal*, 26 M. L.J. 517 : 24 I.C. (M.) 320; *Thadi Ramamurthi* v. *Moola Kamiah*, 24 I.C. (M.) 667; *Sankaralinga* v. *Official Receiver*, 49 M.L.J. 616 : 92 I.C. 504 : (1924) M. 72; cf. *Raj Chunder* v. *Isser Chunder*, (1865) Bourke (O.C.) 139, followed in *Ganu Singh* v. *Jangi Lal*, 26 C. 531 (535).

(1) Dayabhag, XI-VI-11.

(2) *Venkayyamma* v. *Venkatu*, 25 M. 678 P.C., reversing O.A. *Venkata* v. *Appu*, 20 M. 207, overruling *contra* in *Gopalasami* v. *Chinnasami*, 7 M. 458; *Saminadha* v. *Thangathanni*, 19 M. 70; *Jasoda* v. *Sheo Pershad*, 17 C. 33, following *Chote Lal* v. *Chunnoolal*, 4 C. 744 P. C.; *Mattu* v. *Doraisinga*, 3 M. 290 P.C.; *Vythinathu* v. *Yeggia*, M. 382 (385). *Muhd. Husain* v. *Kishvanandan*, I.L.R. (1937) A. 655 (665) P.C.

(3) *Ib.*

(4) Hindu Code (3rd Ed.), § 2555 p. 1255.

(5) *Mhd. Hussain* v. *Kishva Nandan*, I.L.R. (1937) A. 655 (664, 665) P.C., distinguishing *Venkayamma* v. *Venkata*, 25 M. 678 P.C.

ordinary incidents of such property, one of which is survivorship. In such a case, it is immaterial that the members have sons of their own.[1] But where the sons of different mothers inherit to their common maternal grand-father, the same rule is inapplicable, the reason being that "they belong to different families and there could be no joint property with the right of survivorship between them."[2] It has been held that joint sons succeeding to the *stridhan* of their mother or to her brother take severally without the benefit of survivorship.[3]

When coparcenary property devolves on heirs.

289. Where the deceased was at his death the sole coparcener, his estate devolves upon his heirs in the same manner as if it were his separate property.[4]

2158. Analogous Law.—The right of survivorship postulates the existence of coparceners. If, therefore, the deceased was the sole surviving coparcener, he can give or bequeath his property like any other owner, whether the property be ancestral or self-acquired.[5] A divided coparcener possesses the same right.[6] "By the nature of the case the joint family must commence and also must end, when it *does* end, in an individual, who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, where there are any, and then transfers it to a collateral heir as the origin of a new joint family."[7]

Survivorship amongst sons, daughters and co-widows.

290. (1) Two or more sons, grandsons and great-grandsons inheriting the separate or the self-acquired property of their ancestor take as joint tenants subject to survivorship *inter se*.[8]

(2) In default of the issue, where two or more widows[9] and daughters[10] inherit the estate of their husband or father respectively, they take subject to survivorship *inter se* except that in Bombay, and the territory subject to the Mayukh law, daughters take an absolute interest and are not subject to survivorship.[11]

(3) Save as above, all relations inheriting an estate do so as tenants-in-common.[12]

2159. Analogous Law.—In the absence of any coparceners, the property of the deceased devolves on his widow, or widows, in the latter case, with the right of survivorship *inter se*, with the result that the suc-

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(1) *Karuppai* v. *Sankar*, 27 M. 300 (312, 313) F.B.

(2) *Vythinatha* v. *Yeggia*, 27 M. 382 (385).

(3) *Karuppai* v. *Sankar*, 27 M. 300 F.B.; *Parsan* v. *Somli*, 36 B. 424.

(4) *Vythinatha* v. *Yeggia*, 27 M. 382 (385); *Karuppai* v. *Sankar*, 27 M. 300, F.B.; *Parsan* v. *Somli*, 36 B. 424.

(5) *Venkatanarayana* v. *Subbammal*, 39 M. 107 (112) P.C.

(6) *Venkiah* v. *Guraviah*, 51 M.L.J. 669 : 96 I.C. 290 : (1926) M. 757.

(7) *Ram Narain* v. *Pertum Singh*, 20 W.R. 189 (192); *Nallatambi* v. *Mukunda*, 3 M.H.C.R. 455; *Saminadha* v. *Thangathani*, 19 M. 70 (72).

(8) *Jogendra (Raja)* v. *Nityanand*, 18 C. 151 P.C.

(9) *Bhagwandeen* v. *Myna Baee*, 11 M.I.A. 487.

(10) *Katama Nachiar* v. *Doraisinga*, 6 M.H.C.R. 310 P.C.; *Aumrit Lall* v. *Rajonee Kant*, 15 B.L.R. 10 P.C.

(11) *Vithappa* v. *Savithri*, 34 B. 510.

(12) *Madivalappa* v. *Subbappa*, (1937) B. 458 (461).

cession does not open till the last of them is dead.[1] On demise of the last widow, the daughters inherit, with the similar right of survivorship,[2] unless they are excluded by custom,[3] it being immaterial that they have children of their own.[4] But daughters in Bombay inherit severally and possess no right of survivorship *inter se*.[5]

The conditions as to chastity and other disabilities in each case will be considered in the sequel.

Another case of survivorship *inter se* is possible where the father bequeaths his estate to his undivided sons jointly. The question in this case is one of intention.[6] **(§§ 1015, 1022.)**

291. (1). **Where, on a partition of joint property, some property remains undivided, such property, including all its accretions, will, as regards devolution, continue to be subject to survivorship.**[7]

Devolution of undivided property.

(2) In such cases, it is immaterial whether the property was designedly or accidentally left undivided, or the person in whose possession it remained, and whether the surviving member was or was not a party to the partition.

Illustrations.

(*a*) At a general partition between two brothers *A* and *B*, *A* received lot *C*, and *B* lot *D*, while lot *E* remained undivided. *A* died leaving him surviving his widow *F*. *F* will inherit *C*, while *B* will take *E* by survivorship.[8]

(*b*) Two brothers, *A* and *B*, partitioned all their joint property except an item *C*, which failed to be partitioned and which remained in the exclusive possession of *A*. On *A's* death, it will devolve on *B*.[9]

2160. Analogous Law.—Survivorship is the necessary incident of joint property, and, therefore, that incident remains attached to any property that remains designedly or accidentally undivided. As Turner, L.J., observed: "Where a residue is left undivided upon partition, what is divided goes as separate property, what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In

(1) Smiriti Chandrika, XI-I-47; *Tarachand* v. *Reeb Ram*, 3 M.H.C.R. 51; *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Nilamani* v. *Radhamani*, 1 M. 290 P.C.; *Rumea* v. *Bhagee*, 1 B.H.C.R. 66; *Balakidas* v. *Keshavlal*, 6 B. 85; *contra* in Dayabhag, XI-I, §§ 15, 47, is no longer law.

(2) Mit. II-2; Dayabhag, XI-II, §§ 1-30; *Katama Nachiar* v. *Dorasinga*, 6 M.H.C.R. 310 P.C.; *Aumrito Lall* v. *Rajonee Kant*, 15 B.L.R. 10 P.C.

(3) *Chintaman* v. *Mt. Nowlukho*, 24 W.R. 255 P.C.

(4) *Aumrito Lall* v. *Rajonee Kant*, 15 B.L.R. 10 P.C.; *Bandan* v. *Beharee*, 1 N.W.P.H.C.R. 200; *Baijnath* v. *Mahabir*, 1 A. 608 : *Sant Kumar* v. *Deosaran*, 8 A. 365 : *Sib Chunder* v. *Treepoorah*, Fulton 98; *Jamiatram* v. *Jamna*, 2 B.H.C.R. 13; *Lakshmee* v. *Ganpat*, 5 B.H.C.R. (O.C.) 139 : 1 Mac. 24 : 2 Mac. 44, 57.

(5) *Bulakidas* v. *Keshavlal*, 6 B. 85; *Bindabai* v. *Anacharya*, 15 B. 206; *Gulappa* v. *Tayawa*, 31 B. 453; *Vithappa* v. *Savithri*, 34 B. 510; *Tukaram* v. *Bappu*, 27 Bom.L.R. 670: 89 I.C. 196: (1925) B. 424.

(6) *Yethirajulu* v. *Mukunto*, 28 M. 363.

(7) *Katama Nachiar* v. *Rajah of Shivgunga*, 9 M.I.A. 539; *Chintamun* v. *Nowlukho*, 1 C. 153 (161) P.C.; *Konammal* v. *Annadana*, 51 M. 189 P.C.

(8) *Chintamun* v. *Nowlukho*, 1 C. 153 (161) P.C.

(9) *Konammal* v. *Annadana*, 51 M. 189 (204, 205) P.C.

other words, the law of succession follows the nature of the property and of the interest in it."[1]

2161. In his "Principles of Hindu Law, "Sir William Macnaughten said: "If, at a general partition, any part of the property is left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother.[2] Quoting this passage with approval, their Lordships said: "That authority was in fact one of those upon which this Board, in the *Shivagunga case,*[3] decided the converse of the proposition, *viz.*, that though a family might be undivided, the separate property of any member would nevertheless go according to the law of succession to separate estate. It in fact goes to support the proposition that, whether the general status of the family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession."[4]

2162. The reason of the rule would appear to be this. Since survivorship is the incident of all partible joint property, that incident enures till it is destroyed by partition. Consequently, where the property, though partible, has not been partitioned, nor included in a partition, it remains joint and, as such, retains its incident of survivorship.

Of course, where the character of jointness is otherwise destroyed, *e.g.,* by adverse possession, the incident of survivorship will disappear with the loss of its attribute of jointness.

Clause (2).

2163. It may be that the family has separated and all available property belonging to it, then known, was divided, but if some item failed to be partitioned, it would still remain subject to survivorship, for, so far as that property was concerned, there was no division. The person in possession would continue to hold it on behalf of all his *quondam* coparceners. As against them, his possession is not adverse. He took possession as a coparcener, and as a coparcener, he must be presumed to hold it till he alters its character. If the property was designedly excluded from partition, all it implies is that the partition was partial; if the exclusion was accidental, there can be no change in the character of its possession, which must continue as theretofore. The fact that the person in possession was or was not a party to the partition, is immaterial. So is the fact of its possessor. If he was a coparcener, he continues to be so *pro tanto*; if a stranger, he continues to hold it for the coparcenary, unless, of course, some other facts supervene, which alter the character of its possession and, with it, the mode of its devolution.

Such a case may arise where there is a separation in status, and parties intend to divide all property known and unknown. If, in that case,, some property escapes partition, a question may arise whether this property would still continue to be coparcenary and impressed with

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(1) *Katama Natchiar* v. *Raja of Sivagunga,* 9 M.I.A. 539 (610).
(2) Vol. I, p. 53; (4th Ed.).
(3) *Katama Natchiar* v. *Raja of Sivagunga,* 9 M.I.A. 539, explained in *Surnani (Raja)* v. *Surnani (Raja),* 13 M.I.A. 113 (140); *Yanumula* v. *Yanumula, ib.,* 333 (336); *Chitamun* v. *Nowlukho,* 1 C. 153 (161) P.C.
(4) *Chintamun* v. *Nowlukho,* 1 C. 153 (161) P.C.; *Konammal* v. *Annadana,* 51 M. 189 (204, 205) P.C.

the incident of survivorship. The question depends upon intention and unless it was intended to be held in severalty, there is no reason why it should cease to remain joint, merely because every one concerned had overlooked it.

292. Non-liability of survivors for debts.

The survivors as such are not liable for the debts and other personal obligations of the deceased coparcener, nor are they liable for the gift or devise of his coparcenary interest.

Explanation 1.—**The liability of the son to pay his father's debts, not illegal or immoral, arises from his relationship to the father and not by reason of his coparcenership.**

Explanation 2.—**Nothing herein applies to the debts or other obligations of the deceased coparcener binding on the joint estate as in cases of debts incurred for the family necessity or for its benefit, or for the purposes of the family trade, or where the debt of the deceased coparcener was charged on his coparcenary interest, or his interest attached in his lifetime.**

Illustration.

Three brothers *A*, *B* and *C* are joint. *A* borrows Rs. 1,000 on a bond from *D*. *A* dies and his interest in the estate survives to *B* and *C*. *D* sues them on the bond. They are not liable.

2164. Analogous Law.—The incident of survivorship here set out has already been disussed in the chapter on Debts. (**S. 149.**) This section is intended to summarize the law there explained, and is made a part of this chapter, because it bears on the rights and obligations of survivors.

293. Survivor's right of suit for debt.

Members of a joint family succeeding to the interest of a deceased coparcener by their right of survivorship are entitled to realize all debts and dues due to the joint estate and payable to the deceased member, without having to obtain a succession certificate required by section 214 of the Succession Act.[1]

2165. Analogous Law.—Section 214 (1) (a) of the Succession Act[2] forbids the court to pass a decree against a debtor of a deceased person, for payment of his debt to a person claiming to be entitled to the effects of the deceased person, or any part thereof, or to proceed upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt. As survivorship implies the extinguishment of the interest of the deceased in the property on his death, it follows that the enlargement of the survivor's interest by his death follows as a matter of course. The survivor is, therefore, not a person "claiming to be entitled to the effects of the deceased person," within the meaning of S. 214 (1) (*a*) of the Succession Act,[3] and he is, therefore, not liable to obtain a certificate to realize the debts that the deceased may have had to recover on behalf of the joint family.[4] Of

(1) *Patershuri* v. *Bhagwati*, 17 A. 578; *Mathura* v. *Durgawati*, 36 A. 380 and cases cited below.

(2) Act XXXIX of 1925.

(3) Act XXXIX of 1925 (S. 4 of Act VII of 1889).

(4) *Pateshuri* v. *Bhagwati*, 17 A. 578; *Mathura* v. *Durgawati*, 36 A. 380; *Ram-Ratan* v. *Subhan*, 12 A.L.J. 672 : 24 I. C. 93; *Beejraj* v. *Bhyropersaud*, 23 C. 912; *Nilmoni* v. *Soorendra*, 46 I.C. (C.) 648 (Dayabhag case); *Mathura* v. *Rukh-*

course, a certificate would be required to recover a debt personally due to the deceased.[1] But if the debt was joint, the survivor need not obtain a certificate, even though he was appointed receiver of the deceased's estate.[2]

Since survivorship is an incident of coparcenership, which may be determined by an unequivocal expression of an intention to separate, it follows that a coparcener may, in the same way, equally determine the right of survivorship.[3]

Survivorship determined by contract or conduct.

294. The right of survivorship may be determined by contract or conduct evidencing its discontinuance.

2166. **Analogous Law.**—It has already been seen that while coparcenary relationship cannot be *created* by contract or conduct,[4] it may be so *determined*. Since such relationship may be determined by notice, it follows that what suffices to determine coparcenership, would equally suffice to determine survivorship, which is only one of its incidents."[5]

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mini, 17 C.L.J. 87: 13 I.C. 148; *Subramania* v. *Rakku*, 20 M. 232; *Pallamraju* v. *Bapanna*, 22 M. 380; *Pichai* v. *Ranganadham*, 28 M.L.J. 323 : 28 I.C. 490; *Ahmad* v. *Rahiman*, 27 M.L.J. 236 : 25 I.C. 206; *Ramanathan* v. *Subramanian*, 28 M.L.J. 372 : 28 I.C. 688; *Raghavendra* v. *Bhima*, 16 B. 349; *Jagmohan Das* v. *Allu*, 19 B. 338; *Guraditta* v. *Dharimal*, 31 I.C. (L.) 904; *Ramsewak* v. *Baldeo*, 5 O.L.J. 442 : 47 I. C. 649; *Mukund* v. *Purnia*, 9 C.P.L.R. 65.

(1) *Gur Pershad* v. *Dhobi Rai*, 38 C. 182.

(2) *Harihar* v. *Harendra*, 37 C. 754.

(3) *Anmole Kuer* v. *Kamala Dut*, 95 I. C. 648 : (1926) Pat. 392.

(4) S. 122.

(5) S. 287.

CHAPTER XXII.

GENERAL PRINCIPLES OF INHERITANCE.

2167. Topical Introduction.—The devolution of property of a Hindu, dying intestate, may be by inheritance, or survivorship, according to the nature of his property. If the property was his separate or self-acquired property, then it passes to his heirs by inheritance.[1] The distinction between inheritance and coparcenership is that in the case of inheritance, property devolves on death, while it survives in the case of coparcenership; on inheritance, new rights are acquired; on survivorship, the enjoyment of existing right is increased by the removal of one from the body of co-sharers.[2] As Vidyaneshwar says: "The term 'heritage' signifies that wealth which becomes the property of another solely by relation to the owner. The wealth of the father or of the paternal grandfather becomes the property of his sons or grandsons, by the right of their being sons or grandsons. The property devolves on parents (or uncles), brothers, and the rest, upon the demise of the owner, if there be no male issue, in the right of their being his uncles or brothers. The same holds good in respect of their sons or other (descendants)."[3]

"Therefore it is a settled point that property in paternal or ancestral estate is by birth and not by demise of the last owner."[4] But under the Dayabhag family, with the father as the head, the other coparceners have no vested rights in the estate of their parents which only arise on their death.[5] Their rights do, indeed, arise on the birth, and they are alienable and devisable, but they lack the cardinal incident of forcing a partition. While, then, under the Mitakshara system the rights of all coparceners are co-ordinate, those of the members under the Dayabhag are contingent, and in the nature of *spes successionis*.

2168. The two systems differ radically on the subject of inheritance, though the difference here lies in the process of reasoning rather than in the result. The Mitakshara selects the heirs upon the rational basis of propinquity, but the Dayabhag selects them not so much upon their propinquity as upon the efficacy of their obsequial offerings to the manes of the deceased. But when the Mitakshara professes to consult propinquity, it dissembles, since its conception of heirship is generally tinctured with an under-current of religious thought, and while the Dayabhag places it in the forefront, it equally dissembles, for its idea of heirship is equally tinc-

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(1) *Balwant Singh* v. *Rani Kishori*, 20 A. 267 P.C.; *Vairavan* v. *Srinivasachariar*, 44 M. 499 (504) F.B., overruling *contra* in *Nana* v. *Ramachandra*, 32 M. 377; *Muddan Gopal* v. *Ram Buksh*, (1863) W. R. 71; *Baboo Nund Coomar* v. *Moulvi Razeeuddeen*, 10 B.L.R. 183; *Jagmohun Das* v. *Siv Mangaldas*, 10 A. 272 P. C.; *Raja Chelikani* v. *Raja Chelikani*, 25 M. 678 P.C.

(2) *Ghosal* v. *Ghosal*, 31 B. 25 (30); *Devi Prasad* v. *Thakur Dayal*, 1 A. 105 F.B.

(3) Mit., I-I-2, 3.

(4) Mit., I-II-27.

(5) Dayabhag I-§ 30.

tured with the under-current of affinity and its consequent natural affection. In both systems women enter with apologies. But their number and rights are limited, though curiously, the Dayabhag, with the more conservative ideal of spiritual benefit, admits the nearest females, which the Mitakshara excludes. But both systems are equally defective, and the courts had to struggle for a more rational construction in order to rectify their glaring defects. Take, for instance, the case of the daughter and the sister. The former is directly admitted by the Dayabhag in the list of heirs, but the latter has no place in the system. In Bombay, the court had, however, to assign her a place in response to insistent usage. But usage is naturally of slow growth, and the Legislature had to intervene to correct some of its glaring inequalities. But other inequalities and differences far too numerous to be noticed here still remain. They will be found set out in the sequel.

2169. Both the Mitakshara and the Dayabhag start with designating certain nearest relations as heirs of the deceased. They constitute what the Mitakshara calls the compact series of heirs set out in S. 313.

After these heirs, both systems generally declare that the inheritance shall fall on the nearest *sapinda*. The whole Hindu Law of inheritance may be said to be centred in this single word. What is then a *sapinda?* Unfortunately, it is the one word, upon the import of which the two systems differ. The word *sapinda* comes from two Sanskrit words, *sah* meaning "with," and *pind*, "a ball or body."

2170. The Dayabhag accepts the first, that is a ball and the Mitakshara, the second that is a body as the real meaning. According to the latter, a *sapinda* is a relation who is of the same body, or between whom and the deceased there are the largest number of common particles of the same body. As such, the son, possessing, as he does, the largest number of particles of his father's body, is, therefore, his next heir. But the Dayabhag admits the conclusion, though not the reason. According to it, the son is such an heir because he and his father are allied by the funeral ceremony of "*Pinda Karm.*" This is not clear to the unsophiscated student of law unversed in the religious law of the Hindus.

2171. As has been pointed out in the General Introduction (§ 5), the Hindu Law of Inheritance is an off-shoot of those mysterious religious rites and dogmas, with which the ancient scriptures of all patriarchal people teem. They begin with an assumption that life is permanent and outlives the body after its decay, and as life requires for its sustenance material pabulum, its continuance must depend upon its constant supply, even after life, to all appearances, has vanished. In other words, when a man dies, his body decays, but his spirit survives the body, with all its earthly longings and cravings. After death, the spirit yearns for the food and drink, to which it had become accustomed in its earthly sojourn. Some provision had to be made for its nutrition after death. What is more natural than that he who inherits worldly wealth must also provide for the nutrition of the departed soul. The priests, who are the viceregents of God, know what it wants. What is more natural than that the rice and roots, upon which the man lived while in life, should be dedicated to his soul after his death. He who provides them to the departed soul must take his heritage. And as the son is tied to him by the bond of affection, he is most likely to continue to perform these *post*

obit offices, to prevent the departed soul, wandering about in the vacant void, restless from hunger. As fire is the mouth of the gods, these ethereal bodies require their food to be conveyed through that channel. This is the genesis of sacrifice.

2172. The sacrifice ordained for the dead was called *shradh.* It was to be performed in the dark half of every lunar month. The heir must roll boiled rice with butter and consign it to the fire in the name of the person whom he desires it to reach. It will go to him. This rolled rice of the size of a billiard ball—miscalled a cake—is the *pinda* offering of the living to the dead and he who offers it is the *sapind,* or one connected with the deceased through that offering. If the son is alive, he must offer it. If he is dead, some other relation must perform that pious office. In the remote patriarchal age, its order became soon settled. It is needless to add that all agreed as to who were the nearest heirs. Hence, so far the two systems agree. But as the line of heirs became in time enlarged, other rules had to be invented to regulate succession. The one kept up the fiction of the spiritual repast, the other boldly addressed itself to the natural law of affinity. But, as stated before, neither affinity nor religous thought was wholly eliminated from the two systems. They acted and re-acted upon each other, till they became crystallized by a declaration of the Mahomedan conquerors, and afterwards by the British, that the personal law of the Hindu shall regulate their succession. At that time, neither system had been fully developed. New ideas were creeping in and leavening the inert mass of the Shastric ritual. But the decadence of religion, brought about by the levelling influence of the Western culture, left the religion in a state of neglect, while the law which was dependent upon it, had to be developed and adapted to the rapidly changing social environment. The very unsatisfactory system of having to find the new law in the old age is responsible for the conflicting decisions of the courts on almost every point. What is now required is a secularization of Hindu Law, which alone will ensure its development.

2173. As it is, the test by which the true heirs are known are rapidly vanishing from the daily observance of the people. Mr. Sarkar observes that there is scarcely a Hindu nowadays who performs the *Parvan Shradh,* and that "hence the conferring of spiritual benefit on ancestors by presenting *pindas* to them in the *Parvan Shradh* is a myth in the majority of instances."[1] And yet this is the *raison d'etre* of inheritance.

2174. Apart from the different standpoints from which the two systems view the claims of heirs, the material differences between them may be thus summarized:—

(1) Both the systems recognize the claims of the nearest heirs which they designate as entitled to the heritage, as such. These are called the "compact series of heirs." **(S. 311.)**

(2) In default of these heirs, the order of succession in the two systems differs, though they both quote and profess to follow Manu's aphorism that "to the nearest *sapinda* the inheritance next belongs."

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(1) Sarkar's H. L., (3rd Ed.), 301.

They, however, differ on the meaning of the word *sapinda*. The Mitakshara takes it to comprise only agnates up to the sixth degree, while the Dayabhag limits it to relations up to the third degree, but includes therein both the agnates and cognates, the result, being that cognatic relations, whom the Mitakshara relegates after all agnates, take with the *sapindas*—otherwise, the *sakulyas* and *samanodakas*, being agnatic relations from the fourth to the fourteenth degree, exclude the cognates in both systems. After the *samanodakas*, the *bandhus* of the Mitakshara walk in, but the Dayabhag is silent as to the claims of its cognate *sapindas* from the fourth to the sixth degree. But it is apprehended that in this respect the Dayabhag being silent, the Mitakshara rule would apply.

2175. The law of inheritance of all nations is intended to ensure the passage of the estate of a deceased to those nearest and dearest to him. Both the Christian and Mahomedan laws of succession recognize the claims of the wife and children, but the Hindu law of succession placed the male issue before the wife, and as a sharer she had no place except at a partition, when she was assigned a share in lieu of her right to maintenance. But this textual disqualification has since been removed by the Legislature.[1]

2176. Even as regards the succession of males, there is a sharp cleavage between the Dayabhag and the Mitakshara school. Under the former, all property, whether coparcenary or separate, is heritable, while under the Mitakshara, inheritance is not possible in respect of joint property which, on the death of a member, survives to the other members. This incident it continues to retain even on partition, which merely alters the mode of its enjoyment but does not destroy its essential incident.

In the ensuing chapters this is made apparent by treating of the succession of such property in a separate chapter.

The conflicting claims of remote heirs have not been all yet settled by judicial decisions, but the leading principles regulating their precedence have become well settled and the courts recognize the force of *stare decisis* as essentially applicable to the law of property.

2177. Succession is a generic term and includes devolution of a person's property, whether by survivorship, devise or inheritance. Strictly speaking, succession should be confined only to the latter modes of devolution, since the right by survivorship arises on birth and not upon the death of any of the coparceners. Thus, if *A*, *B* and *C* be three coparceners, they all have a third share in the joint property. If *A* dies, the interest of *B* and *C* is enlarged by reason of their survivorship; but it would not be correct to say that *B* and *C* have succeeded to *A*, though, in popular parlance, that is how the enlargement of their interest is described.[2]

Inheritance is, however, a term of more certain import and is used only to denote devolution of the separate or self-acquired property of

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(1) Hindu Woman's Right of Property Act, 1937.

(2) *Ghosal* v. *Ghosal*, 31 B. 25

one on another as his heir. Such devolution may be by will, or by law. In either case, the successor is the heir of the deceased, to whom he has succeeded. But if the devise was to a person who was not his legal heir, the devisee is not in strictness even his heir, which term is limited to designate a person who takes by reason of his relationship to the deceased, recognized by law.

The subject of coparcenary rights and their devolution has already been examined in the previous chapter.[1] So has also been the subject of wills.[2] This chapter deals only with the devolution of property by inheritance, that is to say, the succession to self-acquired or separate property by the direction of law.

Course of inheritance cannot be altered.

295. No person can alter the course of inheritance prescribed by law[3] except to the extent permitted by it.

Illustrations.

(*a*) The course of inheritance may be altered by will, to the extent law allows it.

(*b*) Heirs may waive or vary their shares, since law allows it.[4]

(*c*) A variation made by contract may ripen into a *kulachar* or a family custom, which law will recognize.[5]

(*d*) The Crown can alter the course of inheritance, since law permits it.[6]

2178. Analogous Law.—A man cannot make his own law of inheritance, since "inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom, recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must, therefore, fail, and the inheritance take place as the law directs.[7] So, Turner, L.J., said: "A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."[8] Citing this, Willes, J., said: "If . . . . the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect,

(1) Ch. VIII.
(2) Ch. XVIII.
(3) *Tagore* v. *Tagore*, 9 B.L.R. 377 (394) P.C.
(4) *See* cases cited in § 2180.
(5) *Ibrahim* v. *Ashanullah*, 39 C. 311 P.C.; *Ambalika* v. *v. Arpana*, 45 C. 835.
(6) S. 3, Crown Grants Act (XIV of 1895); *Rajendra* v. *Raghubans*, 40 A. 470, (480) P.C.; *Panchubala* v. *Jotindranath*, 53 C. 816.
(7) *Per* Willes, J., in *Tagore* v. *Tagore*, 9 B. L. R. 377 (394) P.C.
(8) *Soorjeemoney* v. *Denobandoo*, 6 M.I.A. 555, followed in *Tagore* v. *Tagore*, 9 B.L.R. 377 (395, 396); *Rup Narain* v. *Gopal*, 36 C. 780 P.C.; *Purna Sashi* v. *Kalidhan*, 38 C. 603 P. C.; *Ambalika* v. *Arpana*, 46 C. 835; *Panchubala* v. *Jotindranath*, 53 C. 816; *Rajendra* v. *Rashubans*, 40 A. 470 P.C.; *Bhup-Singh* v. *Jairam*, 16 A.L.J. 459; *Ghisao* v. *Gajraj*, 18 O.C. 289 : 33 I.C. 371.

except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more because the language is inconsistent with his having any different inheritance from which that the gift attempts to confer, and that estate of inheritance which it confers is void."[1] So, in another case, it was observed: "That Crown has in British India power to grant or to transfer lands, and by its grant, or on the transfer, to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case."[2]

2179. It is thus clear that a person cannot direct that his property shall follow a certain course of devolution at variance with his personal law. If he is dissatisfied with that law, the only course open to him is to devise his estate or to abandon the law by becoming a convert to another faith. So where two brothers entered into an agreement that their estate should only descend in the line of the brother having *auras* issue and should not be alienated from the line by the latter by adoption, the Privy Council held the agreement void as "entirely altering the law of descent."[3] This view, of course, follows the exposition of law in the *Tagore case*,[4] since followed in other cases[5] in which attempts were made to alter the course of succession by either excluding females and collaterals,[6] by postponing the latter to lineal descendants,[7] or prescribing a special rule of succession, as for instance, by primogeniture[8] and cases in which a perpetuity has been attempted by the creation of successive life-estates,[9] in all of which cases the courts have ignored the attempts as void. So where the adopted son relinquished his share in his adopted father's estate in consideration of a sum of money, his relinquishment was held to make him a separated son, but had not the effect of extinguishing his right, so that, when the father died, he was entitled to recover the estate from his adoptive mother. As West, J., put it: "The heirship was a legal consequence of Trimbak's status with regard to Gobind casting on him, on Gobind's death, the right correlative to his own obligation under the *Farkat*, and which could not be got rid of by agreement."[10] The course of devolution prescribed by law cannot be altered by private agreement, though, no doubt, Trimbak, like a son by birth, could for adequate reasons, have been disinherited.[11] The rule here

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(1) *Tagore* v. *Tagore*, 9 B.L.R. 377 (395, 396) P.C.; *Tarakesswar* v. *Shoshi*, 9 C. 952 (958) P.C.

(2) S. 3, Crown Grants Act (XV of 1895); *Rajendra* v. *Raghubans*, 40 A. 470 (480) P.C.; *Panchubala* v. *Jotindranath*, 52 C. 816.

(3) *Suriya* v. *Raja of Pittapur*, 9 M. 499 (505) P.C.

(4) *Tagore* v. *Tagore*, 6 M.I.A. 555: 9 B.L.R. 377 P.C.

(5) *Purna Sashi* v. *Kalidhan*, 38 C. 603 P.C.; *Rup Narain* v. *Gopal*, 36 C. 780 P.C.; *Rajendra* v. *Raghubans*, 40 A. 470 P.C.; *Ambalika* v. *Arpana*, 45 C. 885; *Gouri Shanker* v. *Naidor Singh*, 18 C.W.N. 59 : 23 I.C. 287; *Bhup Singh* v. *Jai Ram*, 16 A.L.J. 459: 46 I.C. 387; *Venkatappanayanim* v. *Thimmanayanim*, 27 M.L.J. 656: 27 I. C. 379; *Ghisao* v. *Gajraj Singh*, 18 O. C. 289: 33 I.C. 371; *Atmaram* v. *Lala*, 7 N.L.R. 36: 10 I.C. 733.

(6) *Venkatappanayanim* v. *Thimmanayanim*, 27 M.L.J. 656: 27 I.C. 379.

(7) *Purna Sashi* v. *Kalidhan*, 38 C. 603 P.C.

(8) *Rajendra* v. *Raghubans*, 40 A. 470 P.C.

(9) *Ambalika* v. *Arpana*, 45 C. 835.

(10) *Balakrishna* v. *Savitribai*, 3 B. 54 (57), following *Ruvee* v. *Rupshankar*, 2 Borr. 713 (729).

(11) *Ib.*, p. 57.

stated is one of general application to all schools, including the Dayabhag.[1]

2180. Limits of Departure.—But law only determines the heir. It cannot compel the heir to take what he refuses. He may, for instance, waive his right of succession in favour of another,[2] or agree to take a different share to what he was legally entitled, or relinquish it altogether.[3] Again, a departure from the ordinary law may have been so long acquiesced in and followed as to ripen into a family custom. Such has at times been found to be the history of impartible estate,[4] and other abnormal rules of succession.

2181. Customary Variation.—Though contract cannot,[5] custom may modify the law of succession. As such, custom vests the Jain widow with absolute rights by inheritance.[6] On the other hand, custom is sometimes severe on the daughters, excluding them altogether from succession.[7] Whatever may be its effect, a custom which has the effect of varying the law, must, like all customs, be strictly proved.[8] But sometimes, as in the case of impartible estates, the custom that they are, as regards succession, subject to the rule of primogeniture, has become a fact of sufficient notoriety, to be presumed till the contrary is shown.[9]

Heir's right personal.

296. (1) The heir succeeds in his own right and not in the right derived from another.[10]

(2) On a property descending to a male heir, he becomes a fresh stock of descent and the property passes to his own heir and not to the heir of any previous owner.

(3) But where property descends to a female heir, her heirs are those of the last full owner,[11] except in Bombay, where the female heir born in the family becomes a fresh stock of descent.[12]

Illustrations.

(*a*) *A* and *B* are father and son. *B* predeceased *A*, leaving him surving his daughter *C*. On *A's* death *C* does not inherit, though her father *B* would have, if he were than alive.[13]

(*b*) *A* has two sons, *B* and *C*. *B* predeceased, leaving his widow *D*. On *A's* death, *C* inherits the whole estate. *D* takes nothing, though her husband would have takon a moiety if he were alive at *A's* death.

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(1) *Purna Shashi* v. *Kalidhan*, 38 C. 603 P.C.

(2) *Balkrishna* v. *Savitribai*, 3 B. 54: *Venkata* v. *Venkata*, 9 M. 499 P. C.; *Meherban* v. *Sheo Koonwar*, 1 Agra 105; *Dalchand* v. *Soonder*, 2 Agra 173.

(3) Yad., II-117; Mit., I-II-2; Dayabhag, XL-VI-2; *Lallubhai* v. *Mankuverbhai*, 2 B. 388 (418, 428, 438), affirmed O.A. 5 B. 110 (118) P.C.; *Guru Govind* v. *Anandlal*, 13 W.R. 49 F. B.; *Madhunala* v. *Lakshman*, 20 C.W. N. 627.

(4) *Ibrahim* v. *Ahsanullah*, 39 C. 711 P.C.; *Ambalika* v. *Arpana*, 45 C. 835.

(5) *Tagore* v. *Tagore*, 9 B.L.R. 377 P.C.; *Purna* v. *Kalidhan*, 36 C. 603 P. C.

(6) *Madanji* v. *Tribuvan*, 36 B. 396; *Sheo Singh* v. *Dakho*, 6 N.W.P.H.C. R. 382, affirmed O.A. 1 A. 688 P.C.

(7) *Bajrangi* v. *Manokarnika*, 9 Bom L.R. 1348 P.C.

(8) *Bhagwan Devi* v. *Nihal Chand*, (1879) P.R. No. 73.

(9) *Katama Nachiar* v. *Raja of Shivaganga*, 9 M.I.A. 589; *Sivasubramanya* v. *Subramaniam*, 17 M. 316; *Mallikarjuna* v. *Durga*, 18 M. 406 P.C.; *Muthuvaduganadha* v. *Periasami*, 19 M. 451 P.C.; *Kachi* v. *Kachi*, 25 M. 506 P.C.; *Ram Nundan* v. *Janki*, 29 C. 828 P.C.; *Sartaj Kuari* v. *Deoraj*, 10 A. 272 P. C.; *Jagdish* v. *Sheo Partab*, 23 A. 369 P.C.

(10) *Brojo* v. *Gouree*, 15 W.R. 70; *Balamma* v. *Pullayya*, 18 M. 168; *Peddemuthu* v. *Appu*, 2 M.H.C.R. 117.

(11) *Katama Naichiar* v. *Rajah of Shivganga*, 9 M.I.A. 543 (601), followed in *Moniram* v. *Kerry*, 5 C. 776 (789, 790) P.C.

(12) See S. 364.

(13) *Ananda* v. *Nownit*, 9 C. 315.

2182. Analogous Law.—It is a principle of Hindu Law, that the heir must succeed in his own right, and not in the right of another person. So, a nephew succeeds not as the heir of his father, but as the direct heir of his uncle.[1] So, the widow must take at once at her husband's death, or not at all. No such right can accrue to her as widow in consequence of the subsequent death of any one, to whom her husband would have been heir if he had lived.[2] So, while the sister is no heir under the Mitakshara, her son is a heritable bandhu. The contrary was contended in a case, in which Holloway, J., said: "Heritable blood is a foreign importation from a foreign law, and engrafting it upon the Hindu system can only lead to further confusion and inconsistency."[3]

Clause (1).

A person is not disqualified because the person through whom he is related was either disqualified or ineligible. So, while a person may be himself disqualified, by personal defect, such as congenital blindness, impotency and the like, to inherit, still his son would not be disqualified to inherit, by reason of the disqualification of his father.[4] But, in that case, the son would not inherit as the son of his father but by reason of his own relationship to the deceased. So, the widow of the son,[5] son's son,[6] daughter's son,[7] father,[8] brother,[9] cousin,[10] and uncle,[11] have no right of inheritance, though their husbands were in the line of heirs.

2183. From the fact that the heir must succeed in his own right it follows that the same rule must equally apply to his own heir. He will succeed to the last owner and not to any previous owner; or to put it differently, the heir being the sole owner of the estate by virtue of inheritance, his successor must be his own heir, and not the heir of any one else.

Clause (2).

2184. The only exception to this rule is the case of a female heir, upon whose death succession devolves not upon her own heirs, but upon the heir of the last full owner, as if he had died simultaneously with her. Until her death, it is impossible to say who are the persons who might be entitled to succeed as heirs to her husband. "The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate, the property descends to those who would have been the heirs of the husband, if he had lived up to and died at the moment of her death."[12]

Clause (3).

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(1) *Brojo* v. *Gouree*, 15 W.R. 70.

(2) *Balamma* v. *Pullayya*, 18 M. 168 (170); *Pedamuttu* v. *Appu*, 2 M.H.C.R. 117.

(3) *Rayaningaru* v. *Vencata*, 6 M.H.C.R. 278 (287).

(4) *Pareshmani* v. *Deriantti*, 1 B.L.R. (A.C.) 117.

(5) *Aya Butti* v. *Raj Kishen*, 3 B.S.R. 28; *Raisaham* v. *Prankishen*, 3 B.S.R. 44; *Himulla* v. *Pudoo*, 4 B.S.R. 25; *Anandu* v. *Nownit*, 9 C. 315; *Amrit* v. *Manik*, 12 B.H.C.R. 79.

(6) *Goornee* v. *Oomrao*, 1 Agra 149.

(7) *Veerayya* v. *Gangamma*, 36 M. 570.

(8) *Seethai* v. *Nachiar*, 37 M. 286 (291); *Ramkoowar* v. *Ummur*, 1 Borr. 415; *Bhyrobee* v. *Nubkishen*, 6 B.S.R. 61.

(9) *Jymunee* v. *Ramjoy*, 3 B.S.R. 385; *Jogdamba* v. *Secretary of State*, 16 C. 367; *Choora* v. *Busuntee*, 1 Agra 174; *Peddamuttu* v. *Appu*, 2 M.H.C.R. 117; *Thayammal* v. *Annamalai*, 19 M. 25.

(10) *Soorendranath* v. *Heeramonee*, 12 M.I.A. 81.

(11) *Upendra* v. *Thanda*, 12 W.R. 263; *Gauri* v. *Rukko*, 3 A. 45.

(12) *Katama Nachiar* v. *Raja of Shivganga*, 9 M.I.A. 543 (601), cited and followed in *Moniram* v. *Kerry*, 5 C. 776 (789, 790) P.C.; *Ranika* v. *Janina*, 15 A.L.J. 798; 42 I.C. 846.

But even this rule is subject to an exception in favour of female heirs other than the widow; such as, for instance, the daughters of the family in Bombay, on whose death, their estate is descendible to the heirs of their *stridhan*. Women in Pondicherry and other parts of French India[1] and Jain widows of the Mangrole and Uplata community in Kathiawar, inheriting to their husbands, take an absolute estate with even testamentary powers.[2] But the case of women generally is regarded as exceptional.

Time of vesting.

297. (1) On the death of the owner, the estate vests immediately in the heir then living.

(2) The inheritance cannot be held in abeyance except when the heir is in the womb.

2185. **Analogous Law.**—Under Hindu Law, birth relates back to the moment of conception. Consequently, where a son was *in utero matrix* at the moment of his father's death, the inheritance awaits his birth. If he is born alive, the estate vests in him. If he was still-born, the estate vests in the last owner.[3] Of course, the vesting of an estate may be postponed by the owner by will within the limits allowed by law[4] Since the estate vests immediately on the death of the owner, it follows that a widow can only succeed to property vested in the husband at the time of his death. No fresh right can accrue to her by reason of the subsequent death of a person to whom he would have been heir had he been alive.

Effect of vesting.

298. On the vesting of the inheritance, the heir becomes entitled to all the property which was vested in the deceased in title or in possession, though its enjoyment by the deceased may have been postponed.[5]

2186. **Analogous Law.**—For the purpose of inheritance and representation, the heir is the *alter ego* of the deceased, being in law the continuation of his personality. All rights of the owner vest in him, as he becomes subject to all his liabilities other than those of a purely personal character, which do not survive his death. In an old case, a contention was raised that, under Hindu Law, a widow could only take such property as had been reduced into possession during her husband's lifetime.[6] But this contention was overruled by the Privy Council who said: "We do not think that there is anything in the nature of the disputed property which should except it from a general division."[7] In another case, the same contention was dismissed with the following remarks: "The Judge cites authorities to show that a widow does not represent her husband in respect of succession to an estate which would

(1) *Milathai* v. *Subbaraya*, 24 M. 460.
(2) *Madanji* v. *Tribhuwan*, 36 B. 396.
(3) *Koylasnath* v. *Gyamone*, (1864) W.R. 314; *Goura* v. *Chummun*, (1864) W.R. 340 (342).
(4) *Tagore* v. *Tagore*, 9 B.L.R. 377 (409, 410) P.C.; *Toolseydas* v. *Premji*, 13 B. 61 (69).
(5) *Hurrosoondery* v. *Rajessuree*, 2 W.R. 321 (324); *Rewan Persad* v. *Radha*, 4 M.I.A. 137 (167).
(6) *Rewun Persad* v. *Radha*, 4 M. I. A. 137 (167), citing, for the appellant, *Ayabutee* v. *Raj Krishen*, 1 F. Mac. 1, 2 W. Mac. 104: 3 B.S.D.A.: 28; *Ram Koonwar* v. *Ummur*, 1 Borr. 415; *Pranshunker* v. *Prankoonwar*, 1 Borr. 427.
(7) *Rewan Persad* v. *Radha*, 4 M.I. A. 137 (173).

have devolved upon her husband, had he outlived its owner, but can only take as her husband's heir, such property as he possessed or was entitled to when he died. The rule as stated cannot affect the present case, in which the interest of the adopted son at the time of his death was not merely the expectant interest of an heir, nor an interest contingent on his outliving the mother (as the Judge supposes) but a vested and absolute interest in the property postponed in enjoyment during the lifetime of Wooma Dabea. Whatever may be the precise extent and meaning of the doctrine of the Hindu Law, that a widow succeeding as heir to her husband cannot recover property of which he was not possessed, it is inapplicable when the interest is a vested interest under a will or deed, the actual enjoyment being postponed."[1] The question in such cases is not whether the deceased owner died possessed of any property, but rather whether the interest claimed was his "property" within the meaning of law. A mere contingency is not such property. On the other hand, a vested interest, though not reduced to possession, is "property" and would pass to the heir.[2]

Devested of inheritance.

299. An estate once vested cannot be devested except in the following cases, namely:—

(*a*) Where the widow makes an adoption to her deceased husband, the adopted son takes the estate of his adoptive father, even though it has the effect of devesting another of his estate if it had vested in him by survivorship.[3]

(*b*) Where the widow remarries subject to the provisions of the Hindu Widows' Remarriage Act, 1856.[4]

(*c*) Where a posthumous son is born to the father, who, if he were born when the inheritance opened, would have had a preferential claim to the estate.

2187. Analogous Law.—It is a principle of Hindu Law that an estate once vested cannot be devested by any subsequent event, such as the birth of a preferential heir or co-heir.[5] The rule is a natural corollary of that stated in section 297, *viz.*, that an inheritance can never be in abeyance. So, where the rightful heir was excluded from succession by reason of his insanity, his subsequent recovery did not entitle him to resume property from an heir who had succeeded to it in consequence of his disqualification when the succession opened.[6] So, while unchastity of the wife is a disqualification for inheritance, a widow in whom the estate has once vested on the death of her husband, cannot be devested by reason of her subsequent unchastity.[7] On the same ground, the subsequent conversion of the heir will not devest his estate, even though it might be an effective impediment in the way of his taking it.[8] So,

(1) *Hurrosoondery* v. *Rajessuree*, 2 W.R. 321 (324).

(2) *Rewun Pershad* v. *Radha*, 4 M. I. A. 137 (176), followed in *Hurrosoondery* v. *Rajessuree*, 2 W.R. 321 (324).

(3) *See* S. 49 (2); *Balu* v. *Lahoo Sambhaji*, I.L.R. (1937) B. 508 F.B., following *Chandra* v. *Gojrabai*, 14 B. 463.

(4) *See* S. 316 (4) *post*.

(5) *Narsimha* v. *Veerabhadra*, 17 M. 287 (292).

(6) Virmitrodaya, VIII-4; *Pareshmani* v. *Dinanath*, 1 B.L.R. (A.C.) 117; *Deo Kishen* v. *Budh Prakash*, 5 A. 509 F.B.; *Kali Das* v. *Krishna*, 2 B.L.R. (F.B.) 103.

(7) *Keri Kolitani* v. *Moniram*, 13 B. L.R. 1 F.B.; 19 W.R. 367; O.A. 5 C. 776 P.C.; *Dall Singh* v. *Dini*, 32 A. 155; *Sitaram* v. *Laxman*, 8 N.L.R. 126.

(8) *Kulada* v. *Haripada*, 40 C. 407 (416, 417); *Abraham* v. *Abraham*, 9 M. I.A. 195.

where the heir became *bairagi* or subsequently contracted leprosy[1] it was held that it did not divest him of his inheritance. If he chose to retain his estate, however morally wrong it might be, it created no legal disability which the courts could enforce.[2]

Clause (a).

2188. Exceptions.—The first exception has already been considered. (**S. 48**), it being pointed out that, by the adoption the widow does not divest any one's estate but her own, which she is fully entitled to. But she cannot divest the interest of another, if the inheritance has vested in him before her adoption.

Divesting of Coparcenary Estate.

2189. According to a considered *obiter dictum* of the Privy Council, a widow, subject to the Bombay School, is entitled to make an adoption even where her husband had died a united member of the family and his share had, upon his death, vested in the other members by survivorship.[3] This view is now supported by judicial authority (**S. 49.**) it being held, that the status acquired by an adoption being superior to the law of survivorship suffices to divest any estate, even though it may have become vested in another. In short, adoption revives the coparcenary interest which had ceased to exist on the death of the person to whom the adoption is made. If this view prevails, it will make a vital change in the law of coparcenership, though it would, at the same time, in some measure, improve the lot of the Maharashtra widows.

Clause (3).

2190. The third exception is scarcely an exception at all, if regard is had to the view of law that birth relates back to the moment of conception.[4] (*See* **S. 197.**)

Spes successionis.

300. The right of a person to succeed to another is a mere contingency which cannot be transferred, or devised, or be the subject of a valid contract.

2191. Analogous Law.—The right of a person to succeed to another as his heir is, unlike a coparcenary right,[5] a mere *spes successionis* wholly beyond his control, since it might be defeated any moment by a testamentary disposition by the owner.[6]

It is a mere chance which is not transferable[7] or devisable or capable of being even the subject of a contract. Three persons claiming to be the reversionary heirs of a Hindu widow, and being uncertain as to whether she had an absolute or only a qualified estate, agreed that she should hold the estate as an absolute owner, but that on her death, they should all succeed to her. The widow alienated the property to the defendant, whereupon the three claimants sued for cancellation of the alienation, but the defendant pleaded an estoppel and their agreement against them, but the Privy Council held that there was no estoppel, and even assuming that the arrangement pleaded amounted to a contract between

(1) *Moolchand* v. *Chota Devi*, I.L.R. (1937) A. 825 F.B.

(2) *Teeluck* v. *Shamacharan*, 1 W.R. 209; *Jagannath* v. *Bidyanand*, 10 W.R. 172.

(3) *Yadao* v. *Namdeo*, 49 C. 1 P.C.; *contra* in *Ishwar* v. *Gajabai*, 50 B. 468 F.B.

(4) *Kalidas* v. *Krishna*, 2 B. L. R. 103 (121) F.B.

(5) 1 Gour's Law of Transfer (6th Ed.), § 200.

(6) *Laliteshwar* v. *Rameshwar*, 36 C. 481 (487).

(7) S. 6 (*a*), Transfer of Property Act. 1 Gour's Law of Transfer (6th Ed.) § 200.

the plaintiffs' predecessors and the defendants' alienor, such a contract was not binding on them. The plaintiffs' predecessors were then but expectant heirs with a *spes successionis*. The plaintiffs claimed in their own right as heirs of the widow when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traced his descent.[1]

Preference of the whole blood.

301. As between heirs of equal degree those of the whole blood take before those of the half blood.[2]

2192. **Analogous Law.**—The rule that the whole blood excludes the half blood is specifically mentioned both in the Mitakshara[3] and the Dayabhag[4] in relation to the brothers; but the Mitakshara treats the case of the brothers as falling under Manu's more general textual maxim "to the nearest *sapinda* the inheritance next belongs."[5] It is now so held[6] though the Bombay High Court still clings to the view that the distinction does not extend beyond the brothers and their sons,[7] though it has extended it to the sisters.[8] The rule is one of propinquity and there seems no reason to hold it confined to the special text which itself deduces it from a general principle. As such, it has been held to determine preference between great-grandsons[9] uncles[10] and other *gotrajas* even five, six or seven degrees remote.[11] The rule is not only limited to *sapindas* but extends to *bandhus* also.[12]

Illegitimacy a bar.

302. Illegitimacy creates no legal relationship between the parents and their offspring, and is, therefore, a bar to inheritance, except in the cases hereinafter provided, that is to say:—

(*a*) Illegitimate children of the father inherit to one another in accordance with the rule stated in section 314.[13]

(*b*) Illegitimate children inherit their mother's stridhan in accordance with the rule stated in section 376.

(*c*) The mother inherits the estate of her illegitimate son.[14]

(*d*) The illegitimate son of a Shudra is his heir in accordance with the rule stated in section 314.

1293. **Analogous Law.**—This section is supported by the cases noted in the sequel. The law against illegitimacy has been rather strengthened than weakened with the passage of time. In ancient society,

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(1) *Bahadur* v. *Mohar Singh*, 24 A. 94 (107, 108) P.C.

(2) *Ganga Sahai* v. *Kesri*, 37 A. 545 (556); *Jatindra Nath* v. *Nagendra Nath*, 59 C. 576 (579) P.C.

(3) Mit., II-IV §§ 5, 6.

(4) Dayabhag XI-V §§ 9, 17.

(5) Manu IX-187 cited in Mit. II-IV, § 5.

(6) *Suba* v. *Sarafraz*, 19 A. 216 F. B., approved in *Ganga Sahai* v. *Kesri*, 37 A. 545 (556) P.C.; *Nachiappa* v. *Rangasami*, 28 M.L.J. 1 F.B. : 26 I. C.; 757; *Sham Singh* v. *Kishun Sahai*, 6 C.L.J. 19.

(7) *Samat* v. *Amra*, 6 B. 394; *Vithal Rao* v. *Rama Rao*, 24 B. 317; *Saguna* v. *Sadashiv*, 26 B. 710 (715); *Shankar* v. *Kashi Nath*, 51 B. 194 (203, 204) F.B.

(8) *Jana* v. *Rakhma*, 43 B. 461 (466).

(9) *Nachiappa* v. *Rangasami*, 28 M. L.J. 1 F. B.: 26 I. C. 757 (763).

(10) *Ganga Sahai* v. *Kesri*, 37 A. 545 (556) P.C.; approving *Suba* v. *Sarafraz*, 19 A 215 F.B.; *Sham Singh* v. *Kishun Sahai*, 6 C. L. J. 190; *Narain* v. *Hamraji*, 21 N.L.R. 163.

(11) *Suba* v. *Sarafraz*, 19 A. 215 F.B.

(12) *Jatindra Nath* v. *Nagendra Nath*, 59 C. 576 (579) P.C.

(13) *Subramania* v. *Rathnavelu*, 41 M. 44 F.B.

(14) *Dattatraya* v. *Matha*, 58 B. 119; *Jagannath* v. *Sher Bahadur*, 57 A. 85.

when any connection was regarded as a marriage,[1] and *niyog* was customary, there was little scope for illegitimacy. The Aryan immigrant felt the want of a son to strengthen his household, and he, therefore, devised various subterfuges to legitimatize what would now be considered an illegitimate issue. Manu speaks of twelve kinds of sons, those begotten and received with the bride, or begotten on a married or an unmarried woman, or on one's own wife with or without the husband's knowledge, or on the appointed daughter, or one brought or adopted.[2]

In later times, as the rules of morality became more rigid, the idea of legitimacy became more pronounced, and at the present day, when the law of legitimacy has received a fresh stimulus from the Western school of morality, there is little room for revision of the rights of an illegitimate relation, beyond those recognized in the four exceptions.

2194. Law of Legitimacy.—Two questions arise on the subject of legitimacy: the validity of the mother's marriage and proof of the child as being the issue of such marriage. Now, since marriage and legitimacy is usual and in consonance with the rule of morality, it follows that there would be presumption of marriage from the mere fact of cohabitation and repute,[3] and of legitimacy from the fact that the child was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried.[4]

In denying to the parents and their children the rights springing from natural consanguinity and affection, Hindu law followed the rigid sanctity of the ecclesiastical as well as the civil law, which treated all *illegitimate* issue as *filius nullius*, admitting only such exceptions as became irresistible. But in later times, marriage is treated as only a social contract with the resultant enlargement of the rights of parents and their issue which has found recognition in the four exceptions appended to the section.

Murderous and inimical

303. (1) No heirship to another can be claimed by or through a person who has been a privy to his murder.[5]

(2) A person cannot inherit the estate of another towards whom he has displayed malignant hostility.[6]

2195. Analogous Law.—The rule stated in this section is of wider application, being a rule of public policy, which qualified even the peremptory language of the statute.[7] It has been given effect to by the Privy Council[8] and in other cases cited in the sequel.

2196. Inimical Heir. On the subject of other grounds for exclusion, both the Mitakshara and the Dayabhag exclude a son who is "an enemy to his father."[9] This is explained in *Dayakram Sangrah*[10] to include

(1) General Introduction, §§ 91-94
(2) *Ib.*, §§ 95, 96.
(3) *Moujilal* v. *Chandrabati*, 38 C. 700 P.C.; *Imambandi* v. *Matasaddi*, 45 C. 878 P.C.
(4) S. 112, Ev. Act.
(5) *Kencheva* v. *Grimallappa*, 48 B. 569 (575) P.C., citing Narad, II-13-21 cited in Mit. II-X-3.
(6) *Khettarmoni* v. *Kadambini*, 16 C. W.N. 964; 17 I. C. 83.
(7) *Cleavar* v. *Mutual Reserve Fund Life Assurance*, (1892) 1 Q.B. 147 (157, 158), followed in *Pitts* (*In re*), (1931) 1 Ch. 546 (550).
(8) *Kenchava* v. *Girimallappa*, 48 B. 569 (575) P.C.; citing Narad, II-13-21, cited in Mit., II-X-3.
(9) Narad, II-13, 21 cited in Mit., II X-3; Dayabhag, V-II-13.
(10) Ch. III, § 3.

"one who ill-treats his father during his lifetime or one who is averse to performing his obsequies when dead." But according to the *Vivad Ratnakar*,[1] such hatred must terminate "in compassing the death of the father when he is alive," and according to the *Dayatatwa*, "one who abuses him by beating and the like," would suffice, provided that, in such case, the son refuses to perform his obsequies when he is dead.

Whatever may be the literal value of these virtuous precepts, it has been held[2] that the precepts are not altogether destitute of legal value, and that an heir who has evinced malignant hostility to the deceased, cannot be his heir.[3] But such hostility must be habitual and evidenced by unquestionable evidence. The fact that the son was known to have struck the father once or twice is not sufficient,[4] though the contrary was laid down in earlier cases.[5]

More recently, it has been held that a person who has been a party to the murder of another cannot succeed to his estate.[6] All that he can claim is maintenance.[7] But he ceases to be a stock for a fresh line of descent,[8] so that both he and his direct lineal descendants are excluded from inheritance,[9] unless his act was committed in a state of lunacy in which case his heirs would not be disqualified.[10]

Lunacy or idiocy as a disqualification.

304. (1) A person who is and has been congenitally a lunatic[11] or an idiot, is disqualified from inheritance.[12]

(2) Save as above, no person is so disqualified by reason only of any disease, deformity or physical or mental defect:

(3) Provided, however, that nothing herein shall be deemed to confer upon any person any right in respect of any religious office or service or of the management of any religious or charitable trust, which he would not have had, independently of the Hindu Inheritance (Removal of Disabilities) Act, 1928.[13]

2197. **Analogous Law.**—This section, drawn from a recent enactment passed to modify the Hindu Law,[14] has materially altered that law as regards the disqualifications which disentitled a person to be a coparcener or an heir. The law, drawn from the sacred texts, is contained in section 332, which, before the amending Act, equally applied to persons subject to the Mitakshara law. That Act has, however, limited the disqualifications to congenital lunacy and idiocy, in respect of persons

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(1) Ch. V.

(2) *Khettermoni* v. *Kadambini*, 16 C. W.N. 964: 17 I.C. 83.

(3) *Ib.*, *Mukandi* v. *Jamni*, 73 I. C. 875.

(4) *Kalka* v. *Badree*, 3 N. W. P. H. C.R. 267 (270); see *Vedammal* v. *Vedanayaka*, 31 M. 100 (105).

(5) *Bhola Nath* v. *Sabitra*, 6 B. S. R. 71: 7 I.D. (O. S.) 720.

(6) *Vedanayaga* v. *Vedammal*, 27 M. 597; s.c. after remand *Vedammal* v. *Vedanayaga*, 31 M. 100; *Gangu*, v. *Chandrabhaga*, 32 B. 275; *Nilmadhab* v. *Jotindra*, 17 C.W.N. 341; *Girimallappa* v. *Kanchava*, 45 B. 762, affirmed C.A. *Kanchava* v. *Girimallappa*, 48 B. 569 (575) P.C.

(7) *Nilmadheb* v. *Jotindra*, 17 C.W. N. 341.

(8) *Kenchava* v. *Girimallappa*, 48 B. 569 (575) P.C., distinguishing *Ganga* v. *Chandrabhagabai*, 32 B. 275. Same under English law—*Pitts* (*In re*) [1931] 1 Ch. 546.

(9) *Har Bhagwan* v. *Hukam Singh*, 3 L. 242.

(10) *Pitts* (*In re*), (1931) 1 Ch. 546 (550).

(11) *Dilraj Kuari* v. *Bikeswar*, 12 P. 712.

(12) Hindu Inheritance (Removal of Disabilities) Act, 1928.

(13) Hindu Inheritance (Removal of Disabilities) Act, 1928 (XII of 1928, which came into force on the 20th September, 1928).

(14) *Ib.*

subject to the Mitakshara law. That Act except the Dayabhag law does not affect any rule regarding the management of any religious or charitable trust. To that extent the old rule still holds good. But in other respects, it is modified by the enactment which, so far as the Mitakshara law is concerned, overrules all texts, and cases which disqualified a person from participation in his heritage, whether as a coparcener or an heir, by reason of any disqualification, mental or physical, other than congenital lunacy or idiocy.

The question as to what amounts to congenital lunacy or idiocy is a question of fact dependent upon what degree of cognitive faculty a person possessed when he was born. The subject has been discussed by the writer in another place, to which reference is invited.[1]

As the Hindu Inheritance (Removal of Disabilities) Act only rescinds the rule disqualifying a person from participation or inheritance, by reason of his mental and physical defects, it does not affect the Hindu rule that a person turning an ascetic, and abandoning the world, ceases to be a coparcener and is so disqualified as an heir.

2198. Ascetics.—The texts cited under section 332[2] debar a person who has abandoned the world, from claiming as an heir. So Vashisth says: "Those who have changed the domestic order and entered into another, are debarred from shares."[3] Referring to this, Nilakanth says that this means that the person must have entered the order of perpetual student, hermit or ascetic. The fact that a person is a *bairagi*, has, however, been held to be no ground for exclusion, since *bairagis* still pursue secular occupations.[4] And since a Shudra cannot enter the order of *yati* or *sanyasi*, a Shudra who becomes an ascetic, is not excluded from inheritance to his family estate, unless some usage is proved to the contrary. The texts applicable to the disinheritance of ascetics do not apply to Shudras.[5] There are degrees in asceticism, and it does not follow that a man, by becoming an ascetic, has so completely renounced the world as to make himself incapable of taking an inheritance. It has been held that his becoming a *fakir* entails that disability,[6] and that the burden of proving otherwise is upon him.[7] But it is submitted that he who relies upon the disqualification, must prove it. It has been doubted whether a *gossain* forfeits his secular estate by becoming an ascetic.[8] *gossains* marry, and their marriage had not necessarily the effect of entailing forfeiture of their office and of its appendant property and rights.[9]

Pleading.

2199. Since succession is the rule and exclusion an exception, he who relies upon an exclusion by reason of any disability, must establish it by clear evidence.[10]

(1) Gour's Penal Law, 5th (Ed.), §§ 696-701.

(2) Mit., II-X-3; Dayabhag, V-V- 11; Mayukh, IV-XI-5, (Mandlik), p. 109.

(3) Cited in Mayukh, IV-XI-5, (Mandlik), p. 100.

(4) *Teeluk* v. *Shama Churn*, 1 W.R. 209; *Jagannath* v. *Bidyanand*, 10 W.R. 172.

(5) *Harish* v. *Atir*, 40 C. 545 (547); *Dharmapuram* v. *Virapandiyam*, 22 M. 302; *Somasundaram* v. *Vaithilinga*, 40 M. 846; *Sadhu* v. *Baldeodasji*, 39 B. 168; *Mahant* v. *Khande Rao*, (1922) B. 295; *Sobhaddi* v. *Gobind*, 46 A. 616.

(6) *Teku* v. *Busti*, (1874) P.R.No. 15.

(7) *Badhawa* v. *Sochat*, (1892) P.R. No. 7.

(8) *Mula* v. *Partap*, 32 A. 489; *Asharb* v. *Ishri*, 11 A.L.J. 683 : 20 I.C. 398; *Kailasgir* v. *Kishorgir*, Oudh S.L., Pt. VIII, No. 3.9

(9) *Rambharti* v. *Surabharti*, 5 B. 682.

(10) *Surendra Nath* v. *Ashutosh*, 27 C. W.N. 959: (1923) C. 331.

He must not only prove a disability, but the disability pleaded by him must be shewn to be such as justifies the exclusion. A stranger cannot attack the plaintiff's title, unless he has himself a valid title to the estate. Where the defendant pleaded a will in answer to the plaintiff's suit, based upon his inheritance, it is for him to establish the will, without which he would be a trespasser, and, as such, not entitled to defeat the plaintiff by throwing on him the burden of proving his title free from infirmity at the time when the succession opened.[1] The fact that he was suffering from it at the time of the suit, does not prove his disqualification to inherit, which must be established at the moment the succession opened.[2] It is only a person with a superior right that can disturb another in possession of property.[3] A person with defective title may, however, perfect it by adverse possession.

305. Disqualification of women. **(1) Women are excluded from inheritance unless their claim is supported by special texts[4] or local usage,[5] or legislative enactment.[6]**

(2) And save as provided in section 336, a female heir presumably takes, by inheritance, only a limited interest in her estate which, on her death, reverts to the heir of the last full owner.[7]

2200. Analogous Law.—The following texts bear on the subject of this section:—

Apastamb.—"If there be no male issue, the nearest kinsman inherits; on default of kindred, the protector, or failing him, the disciple."[8]

Baudhayan.—"A woman is not entitled to inherit, for thus says the Veda: 'Females and persons deficient in the organ of senses are deemed incompetent to inherit.'"[9]

Dayabhag.—"Accordingly (since they, *i.e.*, females, are excluded), Baudhayan, after premissing 'A woman is entitled to *proceeds* not to the heritage, for females are persons deficient in an organ of sense or member, are deemed incompetent to inherit.' The construction of this passage is a 'Woman is not entitled to heritage.' But the succession of the widow and certain others (*viz.*, the daughter, the mother and the paternal grandmother) takes effect under express texts, without any contradiction to this maxim."[10]

Virmitroday also interprets the Vedic text to be limited only to those women whose right of inheritance has not been expressly declared.[11]

2201. But this disqualification applies only as between relations and not against a stranger. And even then the disqualification is purely personal, and does not affect their sons, while the sister,[12] uncle's daughter,

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(1) *Jainadi* v. *Kanshi Ram*, (1899) P. R. No. 19; *Lochan* v. *Babai*, 5 N.L.R. 161.

(2) *Murli Singh* v. *Jaisingh*, 5 A.L. J. 115.

(3) *Mangal Das* v. *Raila Ram*, (1912) P.R. No. 83.

(4) *See* § 2200.

(5) *Lallubhai* v. *Cassibai*, 5 B. 110 (118) P.C.

(6) *Cf.*, Hindu Women's Right of Property Act, 1937.

(7) *See* S. 335.

(8) Cited in Mit., II-VII-1. The words in the text are बन्धूनामभावे, *i.e.*, if there be no *Bhandu* or *kindred* of the deceased.

(9) This Vedic text, Vidyaranya (a commentator on the Taititriya Veda) interpreted in a different way, so that it would have no reference to inheritance: *Ananda* v. *Nownit*, 9 C. 315 (322).

(10) Dayabhag, XI-VI-11.

(11) Virmitroday, (Golap Shastri), 175.

(12) *Chelikani* v. *Vencata*, 6 M.H.C. R. 278 (288). But sisters inherit in Bombay; *Annaji* v. *Vasudev*, 38 B. 438.

brother's daughter, nephew's daughter, son's daughter[1] or daughter's daughter[2] are excluded from inheritance, their sons inherit in their own right though not through their mothers. But it is submitted that according to Apastamb, cited with approval in the Mitakshara quoted elsewhere (§ 2334) the kindred are preferential heirs to to the preceptor, and, as such all female relations would inherit as *bandhus* in preference to a stranger. This point was raised but not decided by the Privy Council in the case in which their Lordships limited the range of heritable *bandhus*.[3]

Barrenness.

2202. Barenness does not disqualify a woman from succession.[4] In the case of the wife, the texts empower the husband to supersede but not to disinherit her.[5] But in Bombay, where the daughter would otherwise take an absolute estate, a childless widowed daughter does not, in the absence of custom, inherit absolutely to her father, but takes only a life-estate, which she cannot alienate except for legal necessity.[6]

Clause (2).

2203. Woman's Limited Estate.—The limitation stated in clause (2) now only applies to a female relation, who takes as an heir, and not to one who takes by gift or devise, who are now subject to the general rule, that the grantee presumably acquires all rights of the grantor.[7]

The only exceptions to this rule are those embodied in section 364 and (380), the effect of which is to except the Maharashtra female heirs who take an absolute interest in their heritage as therein provided.

The exceptional case of express texts and local usage will be considered in the sequel.

Unchastity a disqualification.

306. (1) Subject to the provisions of section 299, the widow is disqualified from inheritance if she was unchaste when the succession opened.[8]

(2) But under the Dayabhag law, this disqualification extends generally to all female heirs.[9]

2204. Analogous Law.—The following texts bear on the subject of unchastity as a ground for exclusion:—

Katyayan.—"Let the childless widow, keeping unsullied the bed of her Lord and abiding with her venerable protector, enjoy with moderation the property until her death."

Vridha Manu.—"The widow of childless man, keeping unsullied her husband's bed and persevering in religious observances, shall present his funeral oblation and obtain his entire share."[10]

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(1) *Nanhi* v. *Gauri Shankar*, 28 A. 187; *Koomul* v. *Seetakanth*, W.R. (F. B.) 75; *Nallanna* v. *Ponnal*, 14 M. 149.

(2) *Ramphal* v. *Panmati*, 32 A. 640; *Ajudhia* v. *Ramsumer*, 31 A. 454; *Nanhi* v. *Gauri*, 28 A. 187; *Jagannath* v. *Champa*, 28 A. 307 (*contra* in *Bansidhar* v. *Ganeshi*, 22 A. 338, dissented from); *Ramappa* v. *Arumagath*, 17 M. 172; *Malan* v. *Jewan*, 32 I.C. (L.) 916.

(3) *Ramchandra* v. *Vinayak*, 42 C. 384 (421) P.C.

(4) *Khen Koer* v. *Jai Koer*, (1875) P.R. No. 16.

(5) *Ram* v. *Loorindas*, (1867) P.H. No. 40.

(6) *Bulakhidas* v. *Keshaval*, 6 B. 85.

(7) *Cf.*, S. 8 Transfer of Property Act; S. 95 Succession Act.

(8) *See* the texts cited in the analogous law.

(9) *Ramanath* v. *Durga*, 4 C. 550; *Ramananda* v. *Raikishori*, 22 C. 347 (354); *Sundari* v. *Pitambari*, 32 C. 871; *Rajabala* v. *Shyama*, 22 C.W.N. 566 : 45 I.C. 714; *Trailakya* v. *Radhasundari*, 23 C.W.N. 970: 55 I.C. 704.

(10) Cited in Mit., II-I-6, 18.

Yadnavalkya.—"A woman guilty of unchasity shall be deprived of her position and possession, shall wear dirty clothes, shall live upon starving maintenance, shall be humiliated and made to sleep on bare ground.

"The moon has given them purity, the Gandharvas have given them sweet voice, the Fire-god has given them permanent sanctity; women are, therefore, always pure.

"A woman guilty of adultery is purified by catamenia, but her abandonment is ordained in case of conception by adultery, and in case of causing abortion or killing the husband, as well as in case of committing heinous sins."[1]

Chastity in a woman is generally commended.[2] But in Manu Unchastity is no bar to succession, and as an offence it is regarded as venial. "A woman (committing adultery) is purified by catamenia, provided she did not conceive."[3] But it grew in popular disfavour when Yadnavalkya wrote, for he is severe upon that failing. But neither Yadnavalkya nor his commentator, the author of Mitakshara, expressly mentions unchastity as a disqualification for inheritance; though as leading to degradation in certain cases it is held as comprised in the acts entailing it.

2205. It will be noticed that all the texts dealing with unchastity relate to the wife. They do not refer to other female relations. Other texts, letting in other females, do not refer to their chastity, which only occurs in the case of the widow. It is consequently held that it is a condition applicable only to the widow, and not to all female heirs.[4] But the contrary has been held in Bengal,[5] on the authority of Raghunandan, "a high authority in the Bengal school," which the Madras court refused to follow.[6] But in Bombay, the Bengal view was supported on the ground that since unchastity is either a vice or results in excommunication, the woman is incompetent to inherit in any and every capacity.[7]

2206. Unchastity does not dissolve the marital tie[8] but is a disqualification for the wife's succession to her husband,[9] unless it was condoned by him.[10] Unchastity does not, however, debar a woman from inheriting the *stridhan* property of her female relative.[11] (S. 378.) According to the Bengal school, unchastity is a ground for disinheriting a daughter,[12] but elsewhere the disqualification is stated to be limited to the widow, being inapplicable to other female relations, *e.g.,* the mother.[13] But the Privy Council, in one case, said: "It seems clear, however, that though

(1) Yad., I-70-72.
(2) Manu, IX-29, 30.
(3) Parasar, VII-4.
(4) *Advyapa* v. *Rudrava,* 4 B. 104; *Kojiyadu* v. *Lakshmi,* 5 M. 149; *Angammal* v. *Venkata,* 26 M. 509; *Vedammal* v. *Vedanayaga,* 31 M. 100 (109); *Ganga* v. *Ghasita,* 1 A. 46; *Baldeo* v. *Mathura,* 33 A. 702; *Ram Pargash* v. *Dhan Bibi,* 3 Pat. 152.
(5) *Ramanath* v. *Durga,* 4 C. 550; *Ramananda* v. *Raikishori,* 22 C. 347 (354); *Sundari* v. *Pitambari,* 32 C. 871; *Rajabala* v. *Shyama,* 22 C. W. N. 566: 45 I.C. 714; *Trailakhya* v. *Radhasundari,* 23 C.W.N. 970: 55 I.C. 704.
(6) *Vedammal* v. *Vedanayaga,* 31 M. 100 (110); *Kothandarama* v. *Subbiar,* 52 M.L.J. 514: 102 I.C. 429: (1927) M. 576.
(7) *Gangu* v. *Chandrabhaga,* 32 B. 275 (294).
(8) *Bisheshar* v. *Mata,* (1870) N. W. P.H.C.R. 300; *Gunga* v. *Ghasita,* 1 A. 46 F.B.; *Narayan* v. *Tirlok,* 29 A. 4; *Subharaya* v. *Ramasami,* 23 M. 171; *Chhatukurmi* v. *Rajaram,* 3 I.C. 374; *contra* in *Ram Prasad* v. *Suhu Bai,* 4 N. L.R. 31.
(9) *Khettermoni* v. *Kadambini,* 16 C. W.N. 964: 17 I.C. 83; *Sita Ram* v. *Laxman,* 8 N.L.R. 128.
(10) *Gangadhar* v. *Yelu,* 36 B. 138; *Radhi Lal* v. *Balwant Ram,* 40 A. 178.
(11) *Nogendra* v. *Benoy,* 30 C. 521; *Angammal* v. *Venkata,* 26 M. 506.
(12) *Ramchandra* v. *Raikishori,* 22 C. 347; *Aiti* v. *Aidew,* 24 C.W.N. 173.
(13) *Advyapa* v. *Rudrava,* 4 B. 104; *Kojiyadu* v. *Lakshmi,* 5 M. 149; *Angammal* v. *Venkata,* 26 M. 509; *Vedammal* v. *Vedanayaga,* 31 M. 100 (105); *Baldeo* v. *Mathura,* 33 A. 702.

an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either of the abovementioned texts of Vridha-Manu or Katyayan."[1]

But the rule equally applicable to all is that whatever may be the effect of unchastity as a disqualification for inheritance, it is no ground for divesting an estate after it has once become vested in her. In other words, while unchastity may be a good ground for exclusion from inheritance, it is no ground for disinhersion.[2] Another point to be remembered is that a single lapse does not amount to unchastity. The earlier texts even condone unchastity not followed by conception. But while this view is no longer tenable, still the courts treat unchasity as admitting of degree.

2207. Re-marriage is not unchastity. Consequently, apart from custom or any other law for time being in force, a female heir is not disqualified from inheritance by reason of her re-marriage. For instance, the mother though re-married, is a competent heir to her son[3] and even to her husband, except when her re-marriage, being legalized by the Hindu Widow's Re-marriage Act,[4] is coupled with the disability created by the Act. Apart from such disability, where a re-marriage is permitted by custom, no disability can be imported into the custom, unless it was an integral part of it.

307. Except as provided in section 303 (1), when an heir is disqualified, the next heir of the deceased succeeds, but the disqualified heir is entitled to maintenance for himself and his family.[5]

Succession on exclusion of disqualified heir.

2208. Analogous Law.—The following texts support the rule stated in the section:—

Mitakshara.—"The disinheritance of the persons above described seeming to imply the disinheritance of their sons, the author adds: 'But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects.'"[6]

Dayabhag.—"When the father is dead (as well as in his lifetime), an impotent man, a blind man, etc., are not competent to share the heritage. Food and raiment should be given to them, excepting the outcast. But the sons of such persons, being from similar defects, shall obtain their father's share of the inheritance."[7]

2209. Effect of Exclusion upon Inheritance.—The effect of exclusion of an heir upon inheritance is that the excluded heir receives maintenance charged on the estate, and the succession devolves upon the next heir as if he were dead or had relinquished his right.[8] It is immaterial that the next heir claims through him, since the incapacity being personal, does not taint the blood.[9] Consequently, the wife or widow of a dis-

(1) *Kery* v. *Moneeram*, 13 B.L.R. 1 (45), affirmed O.A. *Moniram* v. *Keri*, 5 C. 776 (787) P.C., explained in *Ramanand* v. *Raikishori*, 22 C. 347 (353). To the same effect, *Ram Nath* v. *Durga*, 4 C. 550; *Sundari* v. *Pitambari*, 32 C. 871.

(2) *Matangini* v. *Jayakali*, 5 B.L.R. 466; *Keri* v. *Moniram*, 13 B.L.R. 1 F. B.: 19 W.R. 367 F.B., O.A.. *Moni Ram* v. *Keri*, 5 C. 776 P.C.

(3) *Akorh* v. *Boreance*, 2 B. L. R. 199 F.B.: 11 W.R. 82; *Basappa* v. *Rayava*, 29 B. 91 F.B., followed in *Har Kishore* v. *Thakur Dhan*, 26 C.W.N. 925.

(4) Act XV of 1856.

(5) *Pareshmani* v. *Dinanath*, 1 B.L.R. (A.C.) 177; *Bodhnarayan* v. *Omrao*, 13 M.I.A. 519; *Budha Kuar* v. *Sahodra*, 11 Pat. 35.

(6) Yad., II-142: Mit., II-X-9.

(7) Dayabhag, V-V-11.

(8) *Pareshmani* v. *Dinanath*, 1 B.L. R. (A.C.) 177; *Bodhnarain* v. *Omrao*, 13 M.I.A. 519; *Budha Kuar* v. *Sahadra*. 11 Pat. 35.

(9) *Gangu* v. *Chandrabhaga*, 32 B. 275 (295).

qualified person is not incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she is herself free from any of the defects which exclude a person from inheritance.[1] But this rule cannot be extended to one excluded for his being guilty of murder, in which case he ceases to be a stock for a fresh line of descent.[2]

2210. Maintenance of Excluded Heir.—The excluded heir and his family are provided with maintenance as a solatium for loss of inheritance. The subject has been already considered in S. 97.

308. No court shall enforce the disqualification of an heir resulting from his renouncing or having been excluded from the communion of any religion, or being deprived of caste.[3]

Outcastes not disqualified.

2211. Analogous Law.—The language of this section is drawn from the provisions of Act XXI of 1850, then misnamed. "The *Lex Loci* Act," and afterwards again misnamed. "The Caste Disabilities Removal Act."[4] Its more appropriate title would have been "The Freedom of Religion Act," since the Act abrogates the rules of both the Hindu and Mahomedan Law, which disqualify an infidel from inheritance.[5]

The texts on the subject have been already set out under the last section. They regard an apostate and an outcast as wholly disqualified from inheritance. That rule enacted to prevent defection from one's ancestral faith, has now been in a great measure abrogated by the Statute which regards freedom of thought as no disqualification for inheritance.

2212. It will be noticed that the language of the Act only removes the disability from the convert but does not extend to his descendants. Consequently, if a Hindu becomes converted to Christianity, his descendants cannot, as reversioners, claim the estate of a deceased Hindu. This view proceeds upon the restricted meaning assigned to the word "renounced" or "excluded" as applicable only to the immediate convert and not to his descendants.[6] The contrary has been held in Allahabad, where these words, read with the preamble, are held to include those who are at any time excluded from their religion.[7] In any

(1) *Ganga* v. *Chandrabhaga*, 22 B. 275 (295) distinguished in *Kenchava* v. *Girimallappa*, 48 B. 569 (576) P. C. contra, *Budha Kuar* v. *Sahodra*, 11 Pat. 35.

(2) *Kenchava* v. *Girimallappa*, 48 B. 569 (576) P.C.

(3) *Cf.*, The Caste Disabilities Removal Act (XXI of 1850); *Mitar Sen* v. *Maqbul Hasan*, 57 I.A. 313: (1930) P. C. 251.

(4) By the Short Titles Act (XIV of 1897).

(5) Under Mahomedan Law, a *Kafir* relation, howmuchsoever near, is wholly excluded.—Amir Ali's Mahomedan Law (Handbook), 35-37; *ib.*, 2 Mahomedan Law (2nd Ed.), 85, 121; *Mitar Sen* v. *Maqbul Hasan*, 57 I.A. 313: (1930) P. C. 251, overruling *Bhagwant Singh* v. *Kallu*, 11 A. 100 (in which the Act was held to extend to the converts' descendants). *Rupa* v. *Sardar Mirza*, 1 L. 376; *Khunni Lal* v. *Gobind*, 33 A. 356 (365, 366) P.C. The Act was first enacted as S. 9 of Beng. Reg. VII of 1832, the principle of which was extended to the whole of British India by Act XXI of 1850.

(6) *Vaithilinga* v. *Ayyathorai*, 40 A. 1118; *Sundarammal* v. *Ameenal*, (1927) M. 72.

(7) *Bhagwant Singh* v. *Kallu*, 11 A. 100, dissented from in *Vaithilinga* v. *Ayyathorai*, 40 A. 1118.

case, if the descendants of a Hindu convert are brought up as Hindus, they re-enter the fold of Hindu Law, and will be subject to its rules regarding succession.[1] A Christian is entitled to succeed to another Christian, though the latter be converted to Islam.[2] The Act protects the convert's right of succession, whether he became a convert before or after the succession had opened.[3]

It will be noted that the Act does not abrogate the law of forfeiture absolutely, but merely enacts that that law "shall cease to be enforced as law," which might mean that the courts, would give effect to it or that they shall do so only otherwise than by enforcing it. In either view, the forfeiture remains—only the courts will not recognize it for certain purposes. Consequently, if the forfeiture is given effect to by an award, it cannot be set aside on the ground of its illegality.

Again, the Act does not apply to all exclusions from inheritance, but only to those resulting from apostacy. Consequently, where a Hindu[4] or a Buddhist[5] became converted to Mahomedanism and married a Mahomedan wife, his Hindu wife would be excluded from inheritance to him, since the law of succession applicable to him would be the Mahomedan Law, and under that law, an infidel is disqualified.

309. **Persons subject to the Succession Act.** **(1) Notwithstanding anything contained herein, succession to the property of any person married under the provisions of the Special Marriage (Amendment) Act, 1923, shall be regulated by the provisions of the Succession Act:[6]**

(2) Provided that his own right of succession to the property of another shall be determined as if he had not contracted such marriage.[7]

2213. **Analogous Law.**—The provisions of this section are drawn from those of the Act therein mentioned. It legalizes intermarriages between Hindus, Buddhists, Sikhs and Jains, and as they have their own law of succession, it was considered expedient to give them the benefit of the most modern law of statutory succession as enacted in the Succession Act. At the same time, their own right to succession is safeguarded.

2214. **Exceptional Cases.**—In liberalizing the Hindu Law of marriage by permitting Hindus, Buddhists, Sikhs and Jains to intermarry without reference to caste or sect, it was apprehended that the issue of such marriage should receive the benefit of the modern law of Succession, which confers no special rights upon agnatic kinsmen to the supersession of cognates and especially the females. At the same time, it was felt that such persons should not be penalised by having to forfeit their right of succession to others. The dual object is achieved in the enactment of two sections added to the Special Marriage Act,[8] which

(1) *Ram Pergash* v. *Dahan*, 3 Pat. 152.
(2) *Rupa* v. *Sardar Mirza*, 1 L. 376.
(3) *Khunni Lal* v. *Gobind*, 33 A. 356 P.C.; *Ram Pergash* v. *Dahan Bibi*, 3 Pat. 152 (179).
(4) *Chedambaram* v. *Ma Nyein*, 6 R. 243 (252).
(5) *Asha Bibi* v. *Ma Kya Yin*, 6 I.C. (R.) 514.
(6) S. 24, Special Marriage Act, as amended by Act XXX of 1923.
(7) *Ib.*, S. 23.
(8) Ss. 23, 24, Special Marriage Act (III of 1872), as amended by Act XXX of 1923.

while safeguarding such persons' right of succession to any property, at the same time removes all agnatic rights and sexual disabilities by placing succession to their own property under the jurisdiction of the Succession Act. The relations of Hindus who marry under this Act, are thus assured of every right to which they would be entitled under the modern law of inheritance embodied in a statutory enactment, free from the archaic notion of property and inferiority of the weaker sex.

CHAPTER XXIII.

THE MITAKSHARA INHERITANCE TO MALES.

2215. Topical Introduction.—The whole Hindu Law of Inheritance is centred in a single word—*sapindas*—who are a man's heirs. That word has varied in meaning as the law of inheritance developed. In the earlier stages of society, when religion was all in all, religious efficacy was, it is said, the sole test and preferred to propinquity, only those persons being selected as heirs who were most capable of exercising those religious rites which were considered to be beneficial to the deceased.[1] But though this is how the ancient Hindu scriptures treat the question of heirship, it is probable that propinquity was even then the real test, and though religion made the offering of oblations as an antecedent prelude to succession to insure their due performance, the two must have at first merely denoted the sequence, though in time they developed into *post hoc ergo propter hoc.* The other view that, in early times, the right of inheritance was dependent on the right to participate in the offerings of funeral oblations[2] must be referred to an intermediate stage when that test did not conflict with propinquity and when an undue emphasis laid on the performance of obsequies, could not divert succession from the nearest natural heirs. And in fact, in the case of near succession, the right depends upon consanguinity under both the systems. It is only in the case of remoter relations that the Dayabhag falls back on the principle of spiritual benefit,[3] while the Mitakshara consistently follows throughout the rule of propinquity.[4]

At any rate, the question of moment to the practical student of law is not to trace the genesis of the rule through its mazes of conflicting and contradictory texts, but to examine its present operation on the law of inheritance.

What property is subject of inheritance.

310. This chapter governs the devolution of the separate property of a male over which he had full disposing power, including property of which he died possessed as the sole surviving coparcener.

'Propositus and 'Last full owner' defined.

311. (1) "Propositus" means the person from whom a descent is traced by the heir for the purpose of connecting him with one whose property he inherits.

(2) "Last full owner" means a male who held the property which is the subject of inheritance, absolutely at the time of his death.

2216. Analogous Law.—The "last full owner" has reference not merely to the nature of the property possessed by a person at the time of his death, but also to the rights possessed by him. For instance, the Bengal father possesses absolute powers of disposal over coparcenary property

(1) *Tagore* v. *Tagore,* 9 B.L.R. 377 (394) P.C.
(2) *Ramchandra* v. *Vinayak,* 42 C. 384 (405) P.C.
(3) *Nagendra* v. *Benoy,* 30 C. 521.
(4) *Suba Singh* v. *Sarafaraz,* 19 A. 215 F.B.

during his lifetime. He is the "last full owner" within the meaning of this clause. But since, under the Mitakshara, full ownership is only possible in respect of property (*i*) which is the self-acquisition of a member of a coparcenary, or (*ii*) which belonged to the sole surviving coparcener, or (*iii*) which was possessed by a separated member of his family, the term must be limited to designate such property. It is obvious that the propositus and the last full owner would in many cases be the same person. It is so when the relationship is to be traced to him.

Sapinda defined.

312. (1) The term "*sapinda*" includes all persons possessing common particles of body with him in the male or female line irrespective of degree.

(2) But the term is now limited in law only to heritable sapindas of the first degree, that is, the agnatic relations of a person in ascent or descent[1] within seven degrees of him, as also his wife, his daughter and his daughter's son and the wives of his six ascendants. These relations are also called "*saman gotra sapindas*".[2]

Samanodakas.

(3) Apart from the relations mentioned in the last clause, agnatic relations more remotely related and standing to him from the eighth to the fourteenth degree both inclusive, both in ascent and descent are also his *sapindas*, but are technically known as "*samanodakas*".

Bandhus.

(4) Cognatic relations of a man are also his sapindas, but are technically known as "*bandhus*" or "*bhinna-gotra sapindas*" and are his heritable heirs if they conform to the provisions of section 324.

(5) Bandhus may be—

(*a*) "*Atma Bandhus*", that is to say, one's own, cognatic relations, including also those one's his father.

(*b*) "*Pitru Bandhus*", that is to say, the cognatic relations of not only the owner's father, but also those of his grandfather, both paternal and maternal.

(*c*) "*Matru Bandhus*", that is to say, the relations of not only the owner's mother, but also those of his mother's grandfather both paternal and maternal.[3]

2217. Analogous Law.—The following texts bear on the subject of *Sapinda* relationship.

Manu (After specifying the nearer relations as heirs continues).—"7. To the nearest Sapinda (male or female)[4] the inheritance next belongs.[5] The relation of the Sapinda ceases with the seventh person."[6]

Yadnavalkya.—"Let him marry an auspicious woman; one not previously married or deflowered, beautiful, unrelated to him as a sapinda.....and who is beyond the fifth and seventh degree on the mother's side and the father's side respectively."[7]

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(1) *Lal Harihar* v. *Bajrang*, (1937) P.C. 242.

(2) *Jadunath* v. *Bishambar*, (1932) P.C. 142 (145).

(3) *Kalimuthu* v. *Ammamuthu*, 58 M. 238 (245); *Rami Reddi* v. *Gangi Reddi*, 48 M. 722. The three-fold classification of Bandhus is neither scientific nor mutually exclusive. It is given here, merely because it is to be found in the texts.

(4) Kalluka Batt's Comm. adopted by Sir Wm. Jones & Cole., *Lallubhai* v. *Cassibai*, 5 B. 111 (117, 118) P.C.

(5) Manu, IX-187.

(6) *Ib.*, V-60.

(7) Yad., I-53.

Mitakshara (commenting on the last).

"(1) Any descendant within the seventh degree reckoned from and inclusive of himself, that is, any of his first six descendants.

"(2) Any ascendant within the seventh degree reckoned from and inclusive of himself in the paternal line, that is, any of his first six ascendants in his paternal line.

"(3) Any collateral descendant within the seventh degree reckoned from and inclusive of the six paternal ascendants, that is, any of the first descendants of any of the first six ascendants in the paternal line.

"(4) Any ascendant within the fifth degree reckoned from and inclusive of himself in the maternal line, that is, any of the four maternal ancestors, namely, the mother, her father, her grandfather and the rest; and

"(5) Any collateral descendants within the fifth degree reckoned from and inclusive of any of the three maternal ancestors, beginning with the mother's father, that is, any of the first four descendants of any of the three maternal ancestors beginning with the mother's father.[1]

2218. The following texts define the *Samanodak*[2] relationship:—

Manu.—"(The relation of) samanodak or those connected by an equal libation of water, ends only when their births and family names are no longer known."[3]

Mitakshara.—"If there be none such, (*i.e.*, sapindas), the succession devolves on kindred connected by libations of water, and they must be understood to reach to the seventh degree beyond the kindred connected by funeral oblations of food, or as far as the limits of knowledge as to birth and name extend. Accordingly, what Manu says: 'The relation of the sapindas or kindred connected by the funeral oblation ceases with the seventh person[4] and that of samanodaks or those connected by a common libation of water extends to the fourteenth degree, or as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra* or the relation of family name."'[5]

Upon these texts, the Privy Council have held that the *samanodak* relationship does not go beyond the Fourteenth degree.

It will be seen in the sequel that *samanodaks* take their place in the line of heirs, though their place is perhaps uncertain. (**§ 323 comm.**)

2219. The Hindu Law of inheritance is subdivided into two main systems, the Dayabhag and the Mitakshara. "By the general Hindu Law of inheritance, where the Mitakshara does not prevail, the heirs are generally selected because of their capability to exercise certain religious rites for the benefit of the deceased. Where, however, the Mitakshara governs, each son, immediately on his birth, takes a share equal to his father in the ancestral immovable estate."[6] In other words, while inheritance under the Mitakshara depends upon consanguinity, that under the Dayabhag, in the case of remoter relations,[7] depends upon spiritual efficacy.

2220. But both deduce these diametrically opposite conclusions from the same texts, ascribing to the term "*sapinda*" the meaning which accords with their conclusions. That term, as already remarked, is somewhat of a doubtful import, since the word "pinda" has a dual meaning and fits in with either deduction.[8] In either view, the material question is not what the word means, but rather what relations it comprises.

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(1) *Babu Lal* v. *Nenku Ram*, 22 C. 339 (342), approved in *Ramchandra* v. *Vinayek*, 42 C. 384 (420) P.C. To the same effect, *Umaid* v. *Udoi*, 6 C. 119 (125) F.B.

(2) Lit. *Saman* alike or common, and *Udak* water, those allied by water, that is, these participating in the same oblation of water; *Devkore* v. *Amritram*, 10 B. 372 (379).

(3) Manu, V-60.

(4) This is incorrect. The word is "man." Held that the words within the brackets is not the view of Vidnyaneshwar.

(5) Mit., II-VI-6, cited in *Devokore* v. *Amritram*, 10 B. 372 (379, 380); *Huchangouda* v. *Kellava*, 30 Bom.L.R. 38: (1928) B. 100.

(6) *Kali Pershad* v. *Anand Koy*, 15 C. 471 (480) P.C.; *Umaid* v. *Uday*, 6 C. 119; *Babu Lal* v. *Nanku Ram*, 22 C. 339.

(7) *Nagendra* v. *Benoy*, 30 C. 521.

(8) Lit., Skr. *sa* with and *pinda* body or ball. According to the Daya-

2221. After mentioning the nearest relations as heirs of a person by name, such as sons, grandsons, great-grandsons, father, brother and others,[1] Manu adds: "To the nearest sapinda the inheritance next belongs,"[2] or more literally translated: "Whoever is near to a sapinda, his property shall belong to him", or in other words, the property of a person must be inherited by his nearest *sapinda*, from which it follows that the deceased proprietor and his heir must be nearly related to each other as *sapindas*, that is to say, (*i*) the two must be related to each other as *sapindas*, and (*ii*) the heir must be his nearest *sapinda*.

Sapinda.

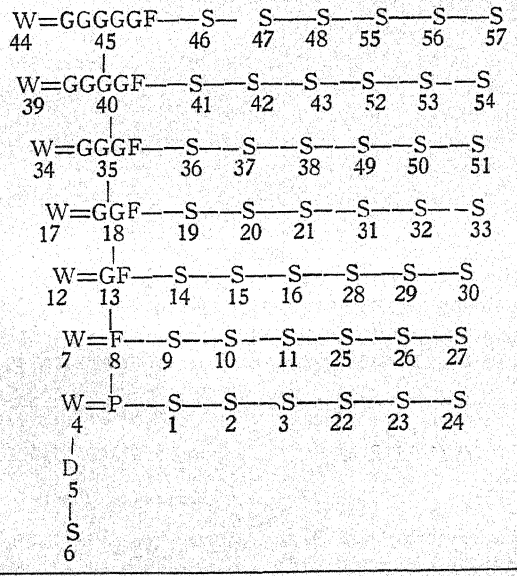
2222. This raises the question: What is a *sapinda?* The earliest law-giver Manu defines it thus: "Now the relationship of the sapindas ceases with the seventh person."[3] This definition is meagre and does not state whether the seven degrees are to be counted both in the line of ascent or descent and whether it includes also collaterals. According to the Mitakshara,[4] 57 relations of a person constitute his sapindas who inherit in the order mentioned in the next section.

They are:

(1) His 6 male descendants in the male line;
(2) **His 6 male ascendants in the male line**, and their wives.
(3) The 6 male descendants in the collateral line of each of his male ascendants.
(4) His wife, daughter and daughter's son.

2223. A complete list of sapindas will be found shown in the following chart:—

MITAKSHARA SAPINDAS.



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bhag, *sapinda* means persons allied by the funeral-ball, according to the Mitakshara, those possessing particles of the same body, see *Lallubhai* v. *Mankuvarbai*, 2 B. 388 (429, 430).

(1) Manu, IX-153-186.

(2) *Ib.*, 187; Sir W. Jones' paraphrase is inaccurate. He translates the passage thus: "To the nearest *sapinda*, male or female, after him in the third degree, the inheritance next belongs."

(3) Manu, V-60.

(4) Mit., II-V.

Bandhus.

2224. Now, *sapindas* may be either *gotraj* or *bhinna gotraja, i.e.*, those who belong to the same *gotra* or those whose *gotras* are different. The first are called *gotraj sapindas*, and the latter *bhinna gotraj sapindas*, otherwise called *bandhus*. The former are agnatic, while the latter are cognatic kinsmen.

Historical retrospect.

2225. The term "*bandhu*" or "*bandhav*"[1] connotes persons bound together by ties of affection. In the Smritis, it is a term of uncertain import, being used by Manu,[2] Vashisth,[3] Vishnu[4] and Yadnavalkya to mean agnatic relations. Of these, Yadnavalkya uses it in no less than 17 places indiscriminately for relatives in general, for agnates, for cognates, and also as a synonym for friends.[5] He reserved the word "*Yoni Sambandha*"[6] for cognatic kinsmen. The term *bandhu* was for the first time used in the Mitakshara to connote only cognatic relations inferior both to the agnatic *sapindas* and *samanodaks*.[7] The term is now so used in legal treatises as meaning a cognate *sapinda*, or a *sapinda* related through a female. The Mitakshara only mentions nine bandhus, as such. Adding to them the daughter's son, as provided by special text, the number of heritable *bandhus*, according to the Mitakshara, did not exceed 10 relations. The sister's son remained outside this list, and he asserted his claim which, though at first rejected even by the Privy Council,[8] could not long be ignored.

2226. A new principle of exposition was discovered. It was held that the list of *bandhus* in the Mitakshara was merely illustrative and not exhaustive,[9] and the sister's son found a place as a heritable *bandhu*.[10] This opened the way to a brother's daughter's son,[11] a son of the sister's daughter,[12] a maternal uncle.[13] "The term *bandhu* applies not only to the maternal kinsmen mentioned above, but also to those kinsmen who are related through females, either of the paternal or the maternal line. The daughter's son, the sister's son, the father's sister's son, the brother's daughter's son and the uncle's daughter's son are all *bandhus* of the paternal line. So, in the maternal line, the mother's sister's son, the maternal uncle's daughter's son and the maternal grandfather's daughter's son are cognate *sapindas* of the deceased. All these persons belong to a different *gotra* and are related by blood to the deceased. They are, therefore, his *bhinna gotra sapindas*, or *sapindas* bearing a different family name."[14] As such, their number would be illimitable, since "relationship of all persons, may in one way or the other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body."[15] Consequently, relying upon the limited meaning assigned to the term in the *Achar Kand* (the chapter dealing with the Rituals) of the Mitakshara, it has been held to

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(1) From Sk. *Bandh* to bind.
(2) Manu, IX-158.
(3) Vashisth, XVII.
(4) Vishnu, XV.
(5) Yad. I-82, 108, 113, 116, 144, 155, 158, 220, 340, II-138, 147, 152, 267, 283; III-11, 239, 294.
(6) Lit. *Yoni* women, and *Sambandha* related through.
(7) Mit., II-VI-1.
(8) *Jowahir* v. *Kailassoo*, 1 W.R. 74; *Tharkoorain* v. *Mohunlal*, 7 W.R. 25 P.C.
(9) *Girdharee Lall* v. *The Bengal Government*, (1868) 12 M.I.A. 448; *Amrit* v. *Lukhee Narain*, 10 W.R. 764 F.B.; *Muthusami* v. *Simambedu*, 19 M. 405 P.C.
(10) *Amrit* v. *Lakhee Narain*, 10 W.R. 76 F.B.
(11) *Doorga* v. *Janiki*, 18 W.R. 331.
(12) *Umaid Bahadur* v. *Udoi Chand*, 6 C. 119 F.B.
(13) *Muthusami* v. *Simambedu*, 19 M. 405 P.C.
(14) Sarv. Inh. 636.
(15) Mit. II-V-§ 7.

be limited in its import only to persons not more than five degrees remote from the common ancestor; but in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are both *sapindas* of each other. In other words, to be an heir, the person must not merely be the *sapinda* of the propositus; but the propositus must equally have been his *sapinda*[1] (**S. 324**).

These two rules being settled, we have first to see what persons are related within five degrees of the propositus in the ascending or descending line.

Taking only the descendants it will be seen that there are 123 such relations as shown in the chart.

Similarly, there are 64 *bandhus ex parte paterna*, 31 *bandhus ex parte materna*, in addition to which there are 36 father's *bandhus* and 17 mother's *bandhus*, or altogether 168 *bandhus*. Taking the two together, there are no less than 381 such cognate relations conforming to the first rule; but a great many of them are ineligible, by virtue of the second rule as to mutuality already explained.

Those that remain are heritable *bandhus* who are eligible as heirs, but of whom the nearest *bandhu* will succeed. This is the subject of another rule.

For further discussion, *see* commentary on Ss. 324, 325.

2227. Mode of Computation.—It will be seen from the annexed chart that in counting the degrees from the propositus in ascent or descent, the degrees are to be counted from and inclusive of the propositus. But in order to ascertain the relationship of the claimant to him, if he is a collateral, the counting must begin from the common ancestor up to the claimant who must be not more than seven degrees distant from him. This is graphically set out in the table. But it has been held in Madras, that such computation should be limited to three and not seven degrees in each branch, after which the three degrees in the next collateral branch must be considered and soon. Hence the great grandson of the propositus is a preferable heir to the son of the great grandson of the grandfather of the propositus.[2]

But the rule for the counting of a *bandhu* is in one respect different. In his case, while the counting in the ascending and descending line is the same, the father's mother is excluded in counting the father's maternal ancestors, but she is included in determining the degree of relationship of his descendants, the object aimed at being to let in by the one rule the father's mother's great grandfather as a *bandhu*, and exclude, by the other, seven of his descendants from the same category. This will be explained more fully in the sequel.

Female Sapindas.

2228. Manu's text, already quoted (§ **2217**) permits all "*sapindas*" as qualified for inheritance. His commentator Kalluka Bhatt added the words "male or female" as explanatory of that term, which were consequently imported into the text by Sir William Jones and Colebrooke and quoted with apparent

(1) *Umaid Bahadur* v. *Udoi Chand*, 6 C. 119 F.B.; *Babulal* v. *Nanku Ram*, 22 C. 339, approved in *Ramchandra* v. *Vinayek*, 42 C. 384 (420) P.C.; *Adit Narayan* v. *Mahabir*, 62 I.C. (Pat.) 251 P.C.

(2) *Soobramiah* v. *Nataraja*, 53 M. 61.

approval by the Privy Council[1] in a case admitting the widow of a collaternal relation to succession as one of the *gotraja sapindas* of that family. Other female relations have also been similarly admitted. (S. 326.) The Mitakshara after enumerating certain heir's states that "on failure of the grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same family and connected by funeral oblations."[2] It does not except females, and consequently, on the authority of Nand Pandit, Mr. Colebrooke opined that the "daughters of the father and other ancestors must be admitted, like the daughter of the man himself, and for the same reason."[3] This was relied on by the Bombay High Court to support the claim of sisters[4] and half-sisters[5] which was on that ground affirmed by the Privy Council in a later case, however, they were not prepared to extend its operation to Bengal and Madras where the courts had felt bound by the overriding text of Baudhayan to the effect that women are incompetent to inherit, unless they are named and specified as heirs by special texts.[6] Consequently, as sisters are not so specified they were excluded as heirs till their exclusion was made good by the Legislature, which has admitted three female relations, namely, a son's daughter; daughter's daughter and sister as heirs:[7] other females can also come in accordance with the provisions of another Act.[8] These two (along with other) Acts will be found annotated in the appendix.

313. (1) Subject to other provisions of the Code in this behalf, the heirs of a man dying intestate, possessed of separate estate, are, in the first instance, the following relations who inherit his property (both movable and immovable) in the order given below, that is to say:—

Compact series of heirs.

(1) The male issue;[9]
(2) The widow;
(3) The daughter;
(4) The daughter's son;
(5) The mother; } **(5) Father;[10]**
(6) The father; } **(6) Mother;[11]**
(7) The brother;
(8) The brother's son;
(9) The brother's grandson;[12]

(2) Failing the above, his heir is the next of kin drawn from the following classes of persons in the order given below, that is to say:—

Other heirs.

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(1) *Lallubhai* v. *Cassibai*, 5 B. 110 (117, 118) P.C.
(2) Mit., II-V-5.
(3) Cole. Note on Mit., II-V-5.
(4) *Vinayak* v. *Lakshmibai*, 1 B.H.C.R. 117 (124) affirmed O.A. 9 M.I.A. 516 (537, 538).
(5) *Kesserbai* v. *Valab Raoji*, 4 B. 188 (199, 200); *Tikaram Purshottam* v. *Natha Daji*, 36 B. 120 (122). The Mitakshara makes no difference between relations of the full-blood and half-blood unless the latter is executed. *Jatindranath* v. *Nagendranath*, 55 C. 1153 (1164, 1165) affirmed O.A. 59 C. 576 P.C., explained in *Krishnabihari* v. *Sarojinee Dasee*, 60 C. 1061 (1064, 1065).
(6) *Lallubhai* v. *Cassibai*, 5 B. 110 (117, 118) P.C.
(7) Act II of 1929.
(8) Act XVII of 1937.
(9) *See* S. 112.
(10) Under the Mayukh, the father takes before the mother—Mayukh IV-VII-13 (Mandlik) 80.
(11) *Ib.*
(12) *Buddha Singh* v. *Raltu Singh*, 37 A. 604 P.C.; *Nilkanth* v. *Narayan*, 28 N.L.R. 58 F.B. But the list ends with the brother's son in Bombay—*Appaji* v. *Mohan Lal*, 54 B. 564 (589, 602) F.B.

(*10*) **The Gotraj Sapinda;**
(*11*) **The Samanodak;**[4]
(*12*) **The Bandhu;**
(*13*) **A pupil;**
(*14*) **A fellow student;**
(*15*) **The Crown.**

2229. Analogous Law.—Both Manu, Yadnyavalkya and his commentator Vidnyaneshwar first enumerate the particular heirs, and then generally lay down the order of succession in the following texts:—

Manu.—"187. To the nearest sapinda, male or female, the inheritance next belongs; then on failure of sapindas and of the issues, the samanodaks or distant kinsmen shall be the heir; or the spiritual preceptor or the pupil or the fellow student deceased.

"188. On failure of all those, the lawful heirs are such Brahmans as have read the three Vedas, as are pure in body and mind, as have subdued their passions, and they must consequently offer the cake, thus the rites of obsequies cannot fail.

"189. The property of a Brahman shall never be taken as an escheat by the king; this is a fixed law; but the wealth of the other classes, on failure of all heirs, the king may take."[2]

Yadnyavalkya (After stating that the son inherits, continues).—"135-136. The wife, daughters, both parents, brothers; and likewise their sons *gotrajas; bandhus;* a pupil and a fellow student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no *putras*. This rule extends to all [males whether belonging or not to the four classes.

"137. The heirs who take the wealth of a hermit (*vanaprasth*), of an ascetic (*yati*) and of a student (*brahmchari*) are, in their order, the preceptor, the virtuous pupil, and one who is a supposed brother and belonging to the same order.

Mitakshara.—"1. That sons, principal and secondary, take the heritage has been shown. The order of succession among all (tribes and classes) on failure of them, is next declared. (Here cites Yad., II-135, 136 quoted *supra*).

"5. In the first place, the wife shares the estate. Wife (*patni*) signifies a woman espoused in lawful wedlock, conformably with the etymology of the term as implying a connection with religious rites.

2230. The Heirs.—Manu mentions the son as the heir *par excellence*, and after him any *sapinda*. Yadnyavalkya was the first to classify heirs by naming (*i*) the son, (*ii*) the wife, (*iii*) daughters, (*iv*) parents, (*v*) brothers, (*vi*) brother's son, (*vii*) gotrajas, (*viii*) bandhus, (*ix*) the pupil, (*x*) a fellow-student, and (*xi*) the king.

Compact series of heirs.

The Mitakshara mentions the following particular heirs: (*i*) son, (*ii*) son's son, (*iii*) son's son's son, (*iv*) widow,[3] (*v*) daughter, (*vi*) daughter's son, (*vii*) mother, (*viii*) father, (*ix*) brother, (*x*), brother's son, which concludes what it calls "the compact series of heirs," *i.e.*, those whose order is "fixed," the rights of the rest being "after the manner of the entry of intruders who are placed at the end."[4] The question whether the list closes with the brother's son or goes a step further and includes the brother's grandson depends upon the extended meaning of the word

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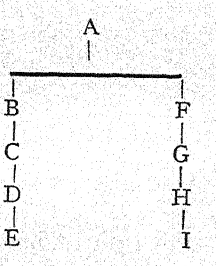
(1) *Atmaram* v. *Bajirao*, (1935) P.C. 57.
(2) Manu, IX-187-189.
(3) Mit., II-V-2.
(4) Mayukh, IV-VIII-17 (Mandlik), p. 81; *Mohan Das* v. *Krishnabai*, 5 B. 597 (602).

"*putra*" in the Mitakshara text where the position of the grandmother is described and which Mr. Colebroke assigns to her after the father's brothers's son, but which the Privy Council have held to belong to her only after the father's brother's grandson, holding the extended meaning of the term "*putra*" as not limited to the direct male issue of a person but equally extending to the issue of his collateral relation, namely, the uncle,[1] but the courts have since held this extended meaning unjustified.[2]

The inclusion of the brother's grandson in the "compact series of heirs" has, therefore, the single authority of the Privy Council, who have conceded that their view is not in consonance with the literal construction of the Mitakshara.[3]

2231. Proof of Title.—A person laying claim to property as the heir has necessarily to prove the particular relationship to the deceased which entitles him to claim it. For this purpose, he must not only prove a relationship but *the* relationship upon which he bases his title. He must further satisfy the court that, to the best of his knowledge, there are no nearer heirs. He cannot be expected to do anything more, and it is for those who claim a closer kinship to prove it.[4] The best evidence to prove such relationship is, of course, the direct evidence of witnesses who can, from their knowledge, testify to the relationship. But this is not always possible, especially where the relationship is distant, in which case, recourse must be had to other facts, such as the preferential right to perform the *shradh*,[5] or any other fact consistent only with relationship. Every link in the genealogical chain connecting the claimant with the propositus must be established.[6]

2232. Hindu Law contains no rules for the proof of relationship, and its scanty provisions on the subject have all been replaced by the Evidence Act,[7] to which reference must be made for the quality and quantity of evidence required in proof of relationship, if in dispute. Where this is the subject of direct proof, nothing more need be said, since it is then a question of its credibility. But in the case of remote relationship, in which the pedigree has to be traced to a common ancestor, direct evidence may not be possible. Take, for instance, the following case. Suppose *H* claims as the heir to *C*, what has he to prove? It will not do if he merely proved that his father was the "cousin" to *G*, or that his father's father *F* was the cousin to *B*. What is required to be proved is that *B* and *F* were the sons of *A*, and *C* was *B's* son, and *G* the son of *F*, and *H* a son of *G*. In other words, each link in the chain of the pedigree must be established by such evidence as law permits and the court considers sufficient. Failing direct evidence, the fact might be established by circumstantial evidence. Such evidence



(1) *Buddha Singh* v. *Laltu Singh*, 37 A. 604 (620, 623) P.C.

(2) *Appaji* v. *Mohan Lal*, 54 B. 564 (589, 602) F.B.; *Nilkanth* v. *Narayan*, 28 N.L.R. 58 F.B.

(3) *Buddha Singh* v. *Laltu Singh*, 37 A. 604 (622) P.C.

(4) *Rama Row* v. *Kuttia*, 40 M. 654, followed in *Pandu* v. *Abdul Kadir*, 65 I. C. (N.) 693.

(5) *Soorendronath* v. *Heeramonee*, 12 M.I.A. 81.

(6) *Kedarnath* v. *Protab Chunder*, 6 C. 626 (629); *Rama Row* v. *Kuttiya*, 40 M. 654; *Mewa Singh* v. *Basant Singh*, 21 Bom.L.R. 232 (235): 48 I.C. 540.

(7) Act I of 1872.

bears on the rites which relations are enjoined to perform on the demise of their *sapindas*. The fact that the two branches bore the same surname, that they observed mourning on the death of the members of the two branches are relevant, but by no means conclusive, though other facts added to them, *e.g.*, the performance of obsequies and their treatment as such relations on religious occasions would suffice to establish their relationship.[1]

2233. Proof of Pedigree.—The proof of pedigree based on hearsay is now subject to the provision of S. 32 of the Evidence Act. Two conditions are prescribed as necessary to admit this evidence. In the first place, the person whose statement is sought to be proved must be dead or one who "cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an auount of delay or expense, which, under the circumstances of the case, appears to the court unreasonable,"[2] and in the second place, the statement must be one of which he had special means of knowledge, and made before the question in dispute was raised.[3] The statement of relationship made by a claimant in a settlement proceeding, not denied by one in whose interest it would be to deny it, was held to suffice to establish the relationship in a case arising between the representatives of the parties.[4] A statement made to a witness by a person since deceased, who had special means of knowledge, would be admissible; but in order to be admissible, the witness must name his informant and state the period of time when he received the information.[5] Under English Law, such statements, to be admissible, must be made by only a relation,[6] but that restriction does not obtain in this country.[7] And a statement by a family priest,[8] members of a *panchayat*,[9] or indeed by any stranger possessing the knowledge, is relevant. So, Bards' books, recording the pedigree of their *clientele*, are relevant, but such pedigree must be something more than a statement of living persons who can themselves be called as witnesses.[10] An ancient family pedigree maintained in a family, and written up from time to time, would be admissible without proof of the entries made therein.[11] A horoscope prepared by a deceased person is admissible to prove the birth of a person, his father's name, his *gotra* and other facts ordinarily recorded therein.[12]

It seems scarcely necessary to add that the admissibility of evidence is one thing, its weight is another.

2234. In order to eject a trespasser, all that the claimant, claiming as an heir, is to show that he is *an* heir; but in a competition between two

(1) *Devkore* v. *Amrit Ram*, 10 B. 372 (378, 379).

(2) S. 32 (1), Evidence Act (I of 1872), which re-enacts S. 47 of Act (II of 1855); *Surjan Singh* v. *Sarda Singh*, 23 A. 72 P.C.

(3) *Ib.*, Cl. 5.

(4) *Bejoy Bahadur* v. *Bhupendra*, 17 A. 456 P.C.

(5) *Shafiqunnisst* v. *Shahan Ali*, 26 A. 581 P.C.; *Baker Ali* v. *Anjuman*, 25 A. 236 P.C.; *Bahadur* v. *Mohar Singh*, 24 A. 94 (105) P.C.

(6) *Johnson* v. *Lawson*, 1 Bing. 86; *Crease* v. *Baratt*, 4 L.J. Ex. 297.

(7) *Garwadhwaja* v. *Suparandhwaja*, 23 A. 37 P.C.

(8) *Sham Lall* v. *Radha*, 4 C.L.R. 173.

(9) *Ajab Singh* v. *Nana*, 25 B. 1 P. C.

(10) *Surjan Singh* v. *Sardar Singh*, 23 A. 72 (77) P.C.; *Jagatpal* v. *Jageshar*, 25 A. 143 (153) P.C.; *Kartic* v. *Protap*, 66 I.C. (C.) 894; *Mohan Singh* v. *Dalpat Singh*, 24 Bom.L.R. 289; *Kalka Prasad* v. *Mathura Prasad*, 30 A. 510 P.C.

(11) *Jagangir* v. *Sheo Raj Singh*, 37 A. 600.

(12) *Har Pershad* v. *Amar Dayal*, 5 Pat.L.J. 605: 58 I.C. 72; *Annamalai* v. *Annamalai*, 10 M.L.W. 67: 52 I.C. 456; *Shyamanand* v. *Ramakanta*, 32 C. 6.

competing heirs, he has further to shew that he is the *preferential* heir. The *quantum* of evidence which the court considers as necessary, must depend upon the circumstances of each case. But one thing is certain that the difficulty of proof is no ground for dispensing with it. Hindu Law is archaic as regards succession, preferring, as it does, agnatic kinsmen, however remote, to cognates who are in other systems regarded as the natural nearer heirs. The position of women is one of abject dependence, and their rights are grudgingly recognized in the few cases in which custom has outgrown the law. And it is only just that before dispossessing the natural heir in favour of a remote kinsman, the court should require evidence which establishes the right, which cannot be assumed, as a matter of course, from the performance of mere rituals which the poor man may ostentatiously practise with an eye to the main chance which he foresees in the demise of his wealthy kinsman.

Righ of issue.

314. The issue of the deceased inherit in accordance with the following rules:—

(1) When there are more than one son, whether by the same or different mothers, they take equal shares.[1]

(2) Sons who were joint with their father at the time of his decease inherit to the exclusion of those who were separate.[2]

(3) Grandsons of a predeceased son inherit in the right of their father, taking *per stirpes* and not *per capita*.

(4) An adopted son of the deceased inherits the whole estate. But where the deceased has left an *auras* son surviving him, the adopted son takes one-fourth of the share of an *auras* son as provided in section 63.

Succession of illegitimate son.

(5) The illegitimate son of a twice-born does not inherit to his putative father.[3] **But the son of a Shudra inherits to the same extent as a legitimate son, provided that he was born of a Shudra continuous concubine, intercourse with whom was neither incestuous nor adulterous:**[4]

Provided further, that where a Shudra father has sons, a legitimate and an illegitimate, the latter takes half the share of a legitimate son, in default of whom he inherits the whole;[5] **but he has otherwise no right to collateral succession.**[6] **He shares equally with the widow and the daughter's son.**

Son.

2235. Analogous Law.—Of all the sapindas, the son is the nearest. He naturally succeeds to his father, and if there are more sons than one, they all take equally, whether they were born of the same or different mothers.[7] The term "son" must, in this connection, be understood to be a loose

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(1) *Ragendra* v. *Raghonath*, (1864) W.R. 20.

(2) *Fakirappa* v. *Yellappa*, 22 B. 101; *Narasimha* v. *Narasimha*, 55 M. 577. *See* § 2236.

(3) *Inderum* v. *Ramaswamy*, 13 M.I.A. 141 (159).

(4) *Vellaiyappa* v. *Natarajan*, 55 M. 1 (15) P.C.

(5) Mit. I-XII-2; Mayukh, IV-IV-32.

(6) S. 308.

(7) *Ragendra* v. *Raghonath*, (1864) W.R. 20.

paraphrase of "*putra,*" which is used in the Mitakshara and its commentary the Subodhini as a generic term for male issue or descendant including the grandson and the great-grandson.[1] Consequently, the son of a deceased son would share equally with a living son the self-acquired property of his grandfather.[2] Sons who were joint or had re-united[3] with their father, exclude those who had separated,[4] on the principle that those who have gone out of the family cannot have the same right as those who have remained within it,[5] who have not received their share and were probably in union with the father at the time of his death[6] (§ 1669).

2236. As *anuloma* marriages, *i.e.*, a marriage of a higher caste Hindu with a woman of a lower caste than himself is valid in Bombay, the share of the son born of such marriage between a Brahmin and a Shudra woman is held to be one-tenth of the estate of his father as well as of his uncle.[7]

Illegitimate Sons.

2237. Illegitimate sons were at one time on a par with legitimate sons,[8] but, except in the case of Shudras, they have now no right beyond a bare right of maintenance.[9] As the Mitakshara puts it, "From the mention of Shudra in this place,[10] it follows that the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance."[11] The son has no greater right because the father was himself illegitimate or belonged to a mixed class between the second and third of the regenerate classes.[12] So, the illegitimate son of a Kshatriya, one of the regenerate castes by a woman of the Shudra[13] or of a Shudra by a Brahmin mistress[14] or any other caste, *e.g.*, a Kshatriya woman,[15] cannot, in the absence of custom,[16] succeed to his putative father;[17] the reason for exclusion being that law does not recognize the *status* of the

(1) Mit., I-IV-4-6; S. 112; *Rutcheputy* v. *Rajundur*, 2 M.I.A. 132 (156); *Ananda* v. *Nownit*, 9 C. 315 (319).

(2) *Luchmun* v. *Debee Pershad*, 1 W. R. 317; *Fakirappa* v. *Yellappa*, 22 B. 101.

(3) *Jenka* v. *Dharma*, 9 N.L.R. 150: 21 I.C. 597.

(4) *Fakirappa* v. *Yellappa*, 22 B. 101. But a mere separation in food and residence is not such separation, which must amount to a partition; *Kunwar Bahadur* v. *Madho*, 17 A.L.J. 151: 49 I.C. 620; *Raghubar Dayal* v. *Ram Dulare*, 6 R. 367: *Narasimham* v. *Narasimham*, 55 M. 577.

(5) Sarv. Inh., 886: 2 Mac.H.L. Sec. 1, Case 12 W. and B.H.L.: (3rd Ed.), 68, followed in *Marudaji* v. *Doraisami*, 30 M. 348 (350); *Nana* v. *Ramachandra*, 32 M. 377 (381), explained in *Narasimham* v. *Narasimham*, 55 M. 577; *Balkrishna* v. *Savitri Bai*, 3 B. 54.

(6) *Ramappa* v. *Sithammal*, 2 M. 182 (185).

(7) *Natha Nathuram* v. *Menta Chotalal*, 55 B. 1 (11).

(8) Manu, IX-159, 160, 180; Mit.; I-II-2; Str. H.L., 194, 211.

(9) *Pandiya* v. *Puli*, 1 M.H.C.R. 478 (482), affirmed O.A. *Inderun* v. *Ramaswamy*, 13 M.I.A. 141 (159); *Ram Kali* v. *Jamna*, 30 A. 508 (509); *Bhaoni* v. *Maharaj Singh*, 3 A. 738; *Mohun Singh* v. *Chumun Rai*, 1 B.S.R. 37; *Pershad Singh* v. *Mahearee*, 3 B.S.R. 176.

(10) Refers to Yad., II-134, 136: "Even a son begotten by a Shudra on a female slave may take a share by the father's choice....."

(11) Mit., I-XII-3.

(12) *Hari* v. *Radhika*, 2 M.H.C.R. 369 (374).

(13) *Jwala Singh* v. *Sardar*, 51 I.C. (A.) 216; *Brandavana* v. *Radamani*, 12 M. 72; *Jwala Singh* v. *Sardar*, 41 A. 629.

(14) *Ramachandra* v. *Hanamnaik*, 60 B. 75.

(15) *Sitla Baksh* v. *Gajraj*, 14 O.C. 227.

(16) *Bhagni* v. *Maharaj Singh*, 3 A. 738 (744).

(17) *Chuoturya* v. *Sahib*, 7 M.I.A. 18 (47, 49); *Fuhoob Singh* v. *Khoaman*, 3 Agra 313.

issue, when the intercourse between its parents was in violation of or forbidden by law.[1] All that he can claim is maintenance.[2]

2238. The contrary was laid down in a case, on the principle of equity and good conscience, in which one Khuman, a Brahmin, was outcasted for co-habiting with a Bania widow. He left his home with the widow, acquired property, which, on his death, passed to the widow and his natural son, from whom Khuman's brothers claimed possession; but their suit was dismissed on the ground that on his excommunication from his caste, Khuman must be deemed to have started a separate family altogether, and that his brothers were, therefore, equitably not entitled to dispossess his son.[3] This reasoning is not convincing for the fact of Khuman's excommunication did not snap the tie of relationship between him and his brothers, who, as his nearest *sapindas*, were entitled to inherit in the absence of a nearer relation. (§ **308**). An illegitimate son of Shudra has no right to collateral succession. His right is limited to succession to his own parent.[4] As between legitimate and illegitimate sons of the father, there is no right of collateral succession.[5] But an illegitimate sister was held entitled to the property of another illegitimate collateral.[6] So the son of a legitimate son cannot inherit to his father's illegitimate brother, nor would his father, if alive, have succeeded to him.[7] So again the illegitimate son of a Shudra is entitled only to a moiety of his father's estate, as long as the widow, daughter or daughter's son of the father exists, and these relations take the other moiety one after the other[8] (§ **2225**).

2239. Dasi-putra.—Two questions arise in this connection: who is a *desi-putra*, and what is his place in his natural family. As to the first, the texts[9] speak of a *dasi-putra* as a son of a female slave, but with the abolition of slavery a *dasi-putra*, as such, has ceased to exist, and that term is now taken to mean a son of a permanent concubine, or a mistress as distinguished from a son of a casual connection, or one of an incestuous[10] or an adulterous intercourse with a married woman[11] even with the consent of her husband,[12] or, it is said, by a Shudra widow whose

(1) Who is a Dasi Putra.

(1) *Venkatachella* v. *Paravatham*, 8 M.H.C.R. 134.

(2) *Ganu Lal* v. *Kashi Ram*, 68 I.C. (N.) 417.

(3) *Radha* v. *Raj Kuar*, 13 A. 573 (575).

(4) *Vellaiyappa* v. *Natarajan*, 55 M. 1 (15) P.C.; *Nissar* v. *Kewar*, (1863) Marsh 609; *Krishnayyan* v. *Muttusami*, 7 M. 407; *Ranoji* v. *Kandoji*, 8 M. 557; *Parvathi* v. *Thirumalai*, 10 M. 334; *Ramalinga* v. *Pavadai*, 25 M. 519; *Meenakshi* v. *Muniandi*, 38 M. 1144; *Subramania* v. *Rathnavelu*, 41 M. 44 F. B.; *Ayiswarya* v. *Sivaji*, 49 M. 116 (136, 137, 152, 153); *Dharma* v. *Sakharam*, 44 B. 185; *Zipru* v. *Bomtya*, 46 B. 424; *Shome Shankar* v. *Rajeswar*, 21 A. 99.

(5) *Vellaiyappa* v. *Natarajan*, 55 M. 1 (15) P.C.; *Dharma* v. *Sarbaran*, 44 B. 185.

(6) *Bacha Singh* v. *Chaterpal*, 9 O.C. 353; *Dattatraya* v. *Matha*, 58 B. 119 (125, 126).

(7) *Zipru* v. *Bomtya*, 46 B. 424, applying *Dharma* v. *Sarbaran*, 44 B. 185.

(8) *Karuppayee* v. *Ramaswami*, 55 M. 856: Manu, IX-179.

(9) Manu IX-179, II-134, 135; Mit. I-XII-1-3; Daya. IX-29; see *Datti* v. *Datti*, 4 M.H.C.R. 204 (208); *Krishnayyan* v. *Muttuswamy*, 7 M. 407 (411).

(10) *Datti* v. *Datti*, 4 M.H.C.R. 204.

(11) *Rahi* v. *Govinda*, 1 B. 97; *Dalip* v. *Ganpat*, 8 A. 387; *Venkatachella* v. *Parvatham*, 8 M.H.C.R. 134; *Annayyan* v. *Chinnan*, 33 M. 366; *Sheonandan* v. *Pran Singh*, 18 N.L.R. 115 (117).

(12) *Vithabai* v. *Pandu*, 28 Bom.L.R. 596: 96 I.C. 358: (1926) B. 301.

re-marriage is forbidden by the caste rules[1] but such prohibition has long since been statutorily overruled, and it can have no effect upon the issue who have been held to inherit to each other *inter se*. It has even been held that a daughter of an adulterous intercourse is entitled to inherit to her brother.[2]

It is sometimes said that such *dasi* must belong to the Shudra caste,[3] and as such a Brahmin mistress living with a shudra cannot be considered to be a *dasi*[4] but there seems no reason for this limitation,[5] and it has been accordingly that a dancing girl belonging to any caste might become a *dasi* so as to transmit to her issue the right of a *dasi-putra*,[6] one thing is certain that the *dasi* must be a Hindu, and not a Mahomedan or a Christian[7] in which case the son would not be a Hindu, and cannot succeed to the property of his father.[8] In such cases, the caste and persuation of the mother determine the rights of her son, if illegitimate.[9]

Rights of a Dasiputra.

2240. The next question is what rights a *dasi-putra* possesses to inherit to his father. It is clear that a *dasi-putra* of the three re-generate classes is entitled to no share beyond maintenance. But such son of a Shudra by a continuous concubine is entitled to a share in accordance with the text of the Mitakshara.[10] This share he takes as of right, and not merely in lieu of maintenance. What share it is must depend upon his father's other relations. Unlike his father's legitimate son, he acquires no right by birth. Such right, as he has, is merely textual, with the result that he cannot compel his father to give him a share, since such son takes a share by the father's choice, and on his death it varies according to the legitimate heirs left by him. If then the father has left an illegitimate son, and no separate property, being joint with his collaterals, he is not entitled to demand a partition of the joint property in their hands, though as a member of the family he is entitled to maintenance out of that property. In this respect his position is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and a share on partition. Such maintenance may not only be future but also past, provided it is not barred by the law of limitation, and it may be charged on the joint family property.[11] So much is settled by the Privy Council, who, however, refrained from deciding whether he would still possess the same right, if the father left separate property, or if such property was not sufficient for his maintenance.[12]

His share.

2241. Being, then, an heir to his father, the *dasi-putra* is a coparcener with his father and his legitimate sons as regards their joint property, with the right of survivor-

(1) Obiter in *Annayyan* v. *Chinnan*, 33 M. 366, following *Datti* v. *Datti*, 4 M.H.C.R. 204 (208), followed in *Sheonandan* v. *Pran Singh*, 18 N.L.R. 115 (117), dissented from in *Subramania* v. *Rathnavelu*, 41 M. 44 (47) F.B.

(2) *Dattatraya* v. *Matha Bala*, 58 B. 119.

(3) Mit., XI-2, Colebrooke note, p. 55; *Rajani Nath* v. *Nitai Chandra*, 48 C. 643 (720, 721) F.B.; *Baji Rao* v. *Paika Patal*, 6 C.P.L.R. 144.

(4) *Ramchandra* v. *Hanmanik*, 60 B. 75.

(5) *Soundarajan* v. *Arunchalam*, 39 M. 136 (150) F.B.

(6) *Ib.*

(7) *Sita Ram* v. *Ganpat*, 25 Bom.L.R. 73: 73 I.C. (B.) 412: (1923) B. 560.

(8) *Lingappa* v. *Esudasan*, 27 M. 13.

(9) *Myna Bayee* v. *Ootaram*, 8 M.I.A. 400 S.C. on remand *sub nom Mayna Bai* v. *Uttaram*, 2 M.H.C.R. 196; *Viswanath* v. *Doraisami*, 48 M. 944 (949, 951).

(10) Mit. I-12; *Karuppayee* v. *Ramaswami*, 55 M. 856 (866, 867).

(11) *Vellaiyappa* v. *Natarajan*, 55 M. 1.

(12) *Ib.*

ship,[1] to the exclusion of the widow,[2] and on partition, he takes half the share of a legitimate son.[3] This is an ambiguous expression,[4] and may mean either half of what the son takes[5] or half of what he would have taken if he were legitimate[6] "In the former case the legitimate and the illegitimate sons would share in the proportion of two to one, while in the latter case they would share in the proportion of three to one."[7] There are two methods of determining the extent of the share. One method is to divide the whole estate in such a way as to give to each of the illegitimate sons exactly half of the share of each of the legitimate sons. The other method is to divide the estate into as many shares as there may be sons, treating the illegitimate sons as legitimate sons, and then from one share to give half to each illegitimate son and give the remainder to the legitimate sons. To take the simplest instance, if there be one legitimate son and one illegitimate son, according to the first method, the whole estate would be divided into three shares, two shares going to the legitimate son and one share to the illegitimate son. According to the other method, the estate would be divided into two shares and the illegitimate son will be given half of one share, that is, one-fourth of the whole, and the remaining portion, that is, three-fourths of the whole, will go to the legitimate son.[8] The second method was favoured by Vidnyaneshwar,[9] but the first method is now adopted by the courts.[10]

Competition with Other Heirs.

2242. He is entitled to the same share in competition with the legitimate daughter.[11] In Madras, he was held entitled to an equal share with the daughter's son,[12] but the remark is casual and opposed to the express texts.[13] His right, as against the widow, is held to be similar,[14] though there are cases in which he is to take to the exclusion of the widow, who is

(1) *Jogendra* v. *Nityanand*, 18 C. 157 P.C., affirming, 11 C. 702; *Vellaiyappa* v. *Natarajan*, 55 M. 1 (15) P.C.; *Soundararajan* v. *Arunachalam*, 39 M. 136; *Karuppa* v. *Kumarasami*, 25 M. 429; *Visvanathaswamy* v. *Rama*, 24 M.L.J. 271 (282): 21 I.C. 724; *contra* in *Nathamuni* v. *Parthasaradi*, 33 M.L.J. 203: 40 I.C. 830, distinguishing, *Jogendra* v. *Nityanand*, 18 C. 151 P.C.; *Sadu* v. *Baiza*, 4 B. 37; *Ganu Lal* v. *Kashi Ram*, 68 I.C. (N.) 417.

(2) *Sadu* v. *Baiza*, 4 B. 37 F.B., followed in *Baji Rao* v. *Paika*, 6 C.P.L.R. 144 (152), approved in *Jogendra* v. *Nityanand*, 18 C. 151 (156) P.C., affirming O. A. 11 C. 706 (711), in which, however, the widow's position had not to be considered; *contra* in *Ramalinga* v. *Pavadai*, 25 M. 519 (522), *Meenakshi* v. *Appakuti*, 33 M. 226 (227); *Karuppayee* v. *Ramaswami*, 55 M. 856, where it was held that since the son takes only a moiety in competition with a daughter, he could not take more in competition with a widow who excludes the daughter.

(3) Mit., I-XII-2; Mayukh, IV-IV-32; Virmitrodaya (Sarkar), 130; *Radi* v. *Gobinda*, 1 B. 97 (104).

(4) In original अर्ध भागिक (*Ardh* half, *Bhagik*, sharer), "half sharer."

(5) *Kesaree* v. *Samardhan*, 5 N.W.P. H.C.R. 95; *Sadu* v. *Baiza*, 4 B. 37 (42); *Gangabai* v. *Bandhu*, 40 B. 369 (373, 374).

(6) Mit., I-VII-7; W. and B.H.L., (2nd Ed.), 40, 41, 108, *Annasamy* v. *Tandavaraya*, (1860) M.S.R. 11, followed in *Kamulammal* v. *Visvanathaswami*, 46 M. 167 (175) P.C.

(7) *Kamulammal* v. *Visvanathswami*, 46 M. 167 (175).

(8) Mit., I-VII-7; W. and B.H.L., (2nd Ed.), 40, 41, 108, 110, 374.

(9) *Ib.* Yad., I-VII-6-10.

(10) *Kamulammal* v. *Visvanathaswami*, 46 M. 167 (175) P.C.; *Dhodyela* v. *Malanaik*, (1874) B.P.J. 43; *Sadu* v. *Baiza*, 4 B. 37; *Gangabai* v. *Bandhu*, 40 B. 369 (375, 376); *Kesaree* v. *Samardhan*, 5 N. W.P.H.C.R. 94; *Chellammal* v. *Ranganatha*, 34 M. 277; *Gopal Rao* v. *Sita Rao*, 64 I.C. (N.) 863; *Maharaja of Kolhapur* v. *Sundaram*, 48 M. 1.

(11) *Gangabai* v. *Bandhu*, 40 B. 369 (374).

(12) *Parvathi* v. *Thirumalai*, 10 M. 334 (344).

(13) Yad., II-133, 134; Mit.; I-XII-2.

(14) *Ambabai* v. *Gogind*, 23 B. 257 (265).

merely entitled to maintenance as in the case of a legitimate son,[1] but it is argued on the other side, that the texts are silent on the point, probably because the widow's right is a later development; but from the fact that in competition with the daughter, who takes after the widow, such son gets only one-half, there is no reason why he should exclude the widow whose right is greater, but in no case less than that of the daughter.[2] And this view has now been affirmed by the Privy Council.[3] In the Dattak Chandrika, her right is stated to exist.[4] Even those who oppose the widow's right, admit the force of this reasoning, but consider it to be "one of those arbitrary arrangements not uncommon in Hindu Law."[5]

But assuming that the illegitimate son cannot exclude the widow, the question still remains as to what share he is entitled to. In Madras, relying on the authority of Dattak Chandrika, he is held to share equally with her[6] and down to the daughter's son, after which he takes the whole to the exclusion of other heirs.[7]

It goes without saying that, in a competition between the adopted and an illegitimate son of a Shudra, it cannot be presumed that the adoption was made after the birth of the legitimate son and so hold it invalid. The proper course is to assume the adopted son to be in the same position as the natural-born son, imagine the illegitimate son to be legitimate, assume that they can co-exist with the legitimate son, see what they would get on that footing, and give the illegitimate son one-half of it.[8]

No inheritance to collaterals.

2243. The illegitimate son inherits only to his parents, and has no right to collateral succession. Manu treated illegitimate issue as no heirs at all, treating them merely as kinsmen.[9] His right to inheritance is provided by an express text, beyond which it cannot be extended.[10] The same rule applies to succession to his estate by a legitimate collateral issue of his father. Hence, where a Shudra died leaving two sons, one legitimate and another illegitimate, on their death the son of the legitimate son could not inherit the property of the illegitimate son.[11] Of course, when he is a coparcener, he will succeed by survivorship,[12] but otherwise he is not a collateral heir.[13] Consequently, as he does not inherit to the legitimate son of a Shudra, it follows that the latter cannot equally

(1) *Rahi* v. *Govinda*, 1 B. 97.

(2) *Ranoji* v. *Kandoji*, 8 M. 557; *Parvati* v. *Thirumalai*, 10 M. 334 (344); *Ramalinga* v. *Pavadai*, 25 M. 519 (521); *Meenakshi* v. *Appakutti*, 33 M. 226 (227); *Ambabai* v. *Govind*, 23 B. 247 (265).

(3) *Kamulammal* v. *Visvanathaswami*, 46 M. 167 (175) P.C.

(4) Datt. Ch., V-30, 31.

(5) *Sadu* v. *Baiza*, 4 B. 37 (56) F. B., citing *Rahi* v. *Govinda*, 1 B. 105.

(6) Datt. Ch., V-30, 31; *Meenakshi* v. *Appakutti*, 33 M. 226 (227, 228); *Kamulammal* v. *Visvanathaswami*, 46 M. 167 (175) P.C., dissenting from *contra* in *Gangabai* v. *Bandu*, 40 B. 369, in which, following the case-law, the son was held to take only one-third, two-thirds going to the widow.

(7) Datt. Ch., V-31; *Sarasuti* v. *Mannu*, 2 A. 134.

(8) *Maharaja of Kolhapur* v. *Sundaram*, 48 M. 1.

(9) Manu, IX-159, 160, cited in Mit.; I-XI-30.

(10) *Shome Shankar* v. *Rajesar*, 21 A. 96 (103); *Nissar* v. *Dhunwant*, Marshall, 609; *Krishnayyan* v. *Muttusami*, 7 M. 407; *Ramalinga* v. *Pavadai*, 25 M. 519 (524); *Fakirappa* v. *Fakirappa*, 4 Bom. L.R. 809; *Dharma* v. *Sakharam*, 44 B. 185.

(11) *Zipru* v. *Bomtya*, 46 B. 424 (428).

(12) *Sadu* v. *Baiza*, 4 B. 37; approved in *Jogendra* v. *Nityanand*, 18 C. 151 P.C., explained in *Shome Shankar* v. *Rajesar*, 21 A. 99 (102); *Shamu* v. *Babu, Aba*, 52 B. 300.

(13) *Ravji* v. *Sakuji*, 34 B. 321; *Dharma* v. *Sakharam*, 44 B. 185; *Shome Shankar* v. *Rajesar*, 21 A. 99; *Ramalinga* v. *Pavadai*, 25 M. 519.

inherit to him.[1] It has already been stated before that, as between two collaterals both illegitimate, there is no reason why one should not inherit to the other. As such, an illegitimate sister even of an adulterous intercourse has been held entitled to inherit to her brother.[2] (§ **2238**.)

Illegitimate v. Adopted Son.

2244. An illegitimate son has not the same position as an adopted son. As compared with the adopted son, the illegitimate son's position is certainly inferior. The adopted son has a co-ordinate interest with his father in ancestral property. He can claim partition from his father. He represents his father as against the father's coparceners. He excludes the widow, the daughter and the daughter's son. In ancient law, he was one of the twelve descriptions of sons, whereas the illegitimate son, as the son of a female slave, had no place amongst them.[3] If the adopted son takes a smaller share in competition with the legitimate son, it is because he is a mere substitute provided by a fiction of law, whilst in the case of the "*auras*" there is actual blood relationship consecrated by a legal marriage. In default of a legal marriage, the fiction operated as a special rule of law to give the adopted son the same status in the family as against every one of its members. On the other hand, save as to taking an inferior share, there is no analogy between him and the illegitimate son.[4]

2245. Son's Son and Son's Son's Son.—The right of divided sons, grandsons, and great-grandsons of the last male owner, to succeed to his separate property, is the same as in the case of undivided family property. The right of representation exists equally in the former as in the latter case, and the divided son will not, on the principle of the exclusion of remoter by nearer *sapindas*, exclude the divided grandson in the succession to divide property of the ancestor.[5] It has already been seen that the Hindu Law regards the son, the grandson and the great-grandson as really a single person in different bodies (§ **112**), and this theory applied as regards their share both on partition and on inheritance. Consequently, if the father dies leaving a son of his predeceased son and the son's son of a predeceased son, that is a son of a son's son of a grandson and a great-grandson by his two predeceased sons, it has been seen that on a partition of his estate they will take one-third each (§ **1543**). They will take the same share on inheritance. The rule that the nearest heir excluded the one more remote does not apply where the heirs are the owner's own issue who take *per stirpes* and not *per capita* as stated in section 184. Consequently, it has been held that the rule in the Mayukh that a brother's son takes equally with the brother, when the inheritance to another deceased brother opens, cannot be extended by analogy to the distant *sapindas*, in whose case, preference is determined by the only test of propinquity. Thus, in a competition between the uncle and the nephew as reversionary heirs, the uncle, being nearest, excludes the nephew, whereas if the analogy of sons and grandsons were extended, both the uncle and the nephew would have shared equally.[6] From the rule last stated, it follows that the legitimate son of an illegitimate son has the same right of inheritance as his father had against his father and his other sons. So, where *A* and *B* were two Shudra brothers and one of them *B* had an illegitimate son *C* by his

(1) *Zipru* v. *Bomtya*, 23 Bom.L.R. 1195.
(2) *Dattatraya* v. *Matha Bala*, 58 B. 119 (125, 126).
(3) Mit., I-XI.
(4) *Parvati* v. *Thirumalai*, 10 M. 334 (345).
(5) *Gangadhar* v. *Ibrahim*, 47 B. 556 (558); *Marudayi* v. *Doraisamy*, 30 M. 348; *Muttuvaduganatha* v. *Periasami*, 16 M. 11 (15).
(6) *Haribhai* v. *Mathur*, 47 B. 940.

permanent concubine who had a legitimate son *D*, *C* predeceased *B*, on whose death *A* claimed the estate against *D*, but his claim was thrown out on the ground that *D* represented *C*, and as *C* would have excluded *A*, so will his son *D* who represented his father.[1] The case would not have been different if *D* had himself been illegitimate.[2]

Statutory right of widow son's widow and son's son's widow.

315. Notwithstanding the provisions of the Hindu Law or custom to the contrary, the widow and the daughter-in-law of a man dying intestate, on or after the 14th day of April, 1937, shall inherit alongside of a man's descendants in the following manner and to the following extent, namely:—

(1) If the man dies leaving him surviving his widow and his lineal descendants, his estate shall devolve upon them in equal shares;

(2) Provided that if a man dies leaving him surviving his widow and his predeceased son's widow but no son of such son, his daughter-in-law will share equally with his widow;

(3) Provided further that if a man dies leaving him surviving his widow and his daughter-in-law, being the widow of his predeceased son, then she will take the share of his son's son, if there was surviving to him a son or grandson of such predeceased son;

(4) If a man dies leaving him surviving his widow, his daughter-in-law and a grand daughter-in-law, being the widow of his predeceased grandson, then such grand daughter-in-law will take the share of his predeceased grandson, if his father survives him or if her husband survives his father and the latter predeceases the owner.

Illustrations.

(*a*) *To Clause* (1).—*A*, the owner, leaves his widow and two sons and three daughters. All of them get 1|6.

(*b*) *To Clause* (2).—*A*, leaves *W*, and *W*1, being the widow of a predeceased son *B*. *W*1 will get nothing if *B* also survives *A*; but if *B* has predeceased *A* and left no son of his own, then *W*1 will share 1|2 each.

(*c*) *To Clause* (3).—*A* leaves *W* and *W*1 and *W*2, being his widow, his son's widow, and his grandson's widow respectively. Now, *W*1*'s* share will be equal to that of a grandson *not* of a son, if the deceased had left him surviving *W*1*'s* son or grandson by her predeceased husband.

(*d*) *To Clause* (4).—*A* leaves him surviving his widow, his daughter-in-law *W*1, and grand daughter-in-law *W*2, being widows of his predeceased son *B* and predeceased grandson *C*. Now, *W*, *W*1, *W*2 will each count as a son and share equally with his widow and his remaining descendants.

For Commentary, see the Act in the Appendix.

(4) The Mitakshara widow.

316 (1) In a succession opening before the 14th day of April, 1937, the widow inherits the estate of her deceased husband in default of male issue,[3] provided she be chaste when the succession opens.[4]

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(1) *Ramalinga* v. *Pavadai*, 25 M. 519 (523, 524).

(2) *Fakirappa* v. *Fakirappa*, 4 Bom. L.R. 809 (811).

(3) *Keerut Singh* v. *Khoolahul*, 2 M. I.A. 331; *Katama Natchiar* v. *Raja of Shivgunga*, 9 M.I.A. 543 (611); *Venkata* v. *Lakshman*, 13 M.I.A. 113; *Radhika* v. *Nilamani*, *Ib.*, p. 497; *Periasami* v. *Periasami*, 1 M. 312 P.C.; *Sheo Singh* v. *Dakho*, 1 A. 688 P.C.; O.A. from 6 N.W.P.H.C.R. 382; *Patnimal* v. *Manoharlal*, 5 B.S.R. 410; *Narayan* v. *Lakshmi*, 3 M.H.C.R. 289; *Gulab* v. *Phool*, 1 Borr. 154; *Govinddass* v. *Muta*, 1 Borr. 241; *Sitaram* v. *Laxman*, 8 N.L.R. 128: 17 I.C. 133.

(4) *Moniram* v. *Keri Kolitani*, 5 C. 776 (792) P.C.; *Lakshmi Chand* v. *Anandi*, 57 A. 672 (677) P.C. (*a fortiori*

(2) Where there are several widows all of them inherit the estate jointly with the right of partition for convenience of enjoyment and survivorship *inter se*.[1]

(3) The widow inheriting to her husband or other relation takes only a limited estate.[2]

(4) The question whether the widow upon her remarriage is devested of the estate of her husband and his lineal successor that had become vested in her before her remarriage is the subject of judicial conflict between the Allahabad[3] and several other High Courts, the former holding that section 2 of the Hindu Widows' Remarriage Act, 1856 only entails forfeiture of her heritage in the case of remarriage legalized under that Act, whereas the other High Courts hold the words "any widow" in section 2 thereof to include even those who could customarily remarry independently of the Act[4] and that, by their remarriage on conversion to another faith, they cannot evade the forfeiture of their estate.[5]

2246. Analogous Law.—After the great-grandson, comes the widow, whose right to inherit is expressly provided by all the Smritikars.[6] with the following refrain: "The widow of a childless man preserving unsullied the bed of her lord and persevering in religious observances shall present his funeral oblation and obtain his entire share."[7] Two outstanding conditions are required to qualify her for the heirship to her husband: In the first place, she must have been chaste,[8] and in the second place, she must not be malignantly hostile to her husband—each disqualification being in itself sufficient to disinherit her, and the second being sufficient even to disinherit *any* heir, including the son.[9] These conditions have been evolved out of the texts which mention the "*sadhwi patni*" as her husband's heir.[10] The fact that the wife had refused to live with her husband is, however, no evidence of her "malignant hostility," which alone disqualifies her from inheritance.[11] Then, again, the unchastity, which equally disqualifies her, must be physical incontinence and must have occurred during the life time of the husband. Her subsequent unchastity is no disqualification,[12] though her remarriage is; and so is her conversion to an alien faith.[13]

2247. On marriage the wife assumes the *gotra* of her husband and is called his *Sagotra sapinda*[14] though the term *sagotra*

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where the widow gets the estate by an instrument in lieu of her maintenance, in which case, there can be no forfeiture for unchastity unless the instrument provides for it.)

(1) *See* Ss. 181, 288, 337.

(2) *Bhagwandeen* v. *Myna Baee*, 11 M. I.A. 487; *See* Ss. 305, 335.

(3) *Bhola Umar* v. *Kausilla*, 55 A. 24 F.B.

(4) *Matungini* v. *Ram Rutton*, 19 C. 289 F.B.; *Vitta Tayaramma* v. *Chalakondu*, 41 M. 1078 F.B.; *Vithu* v. *Govinda*, 22 B. 221 F.B.; *Raghunath* v. *Lakshmi Bai*, 59 B. 417.

(5) *Matungini* v. *Rum Rutton*, 19 C. 289 (Princep J. *dissentient*); *Vitta Tayaramma* v. *Chalakondu*, 41 M. 1078 F.B. (Seshagiri Ayyar, J. *dissentient*.).

(6) Manu, cited in Mit., II-I; 6; Katyayan cited *Ib.*, Vishnu, XVII-4-7; Yad., II-136, 137.

(7) Vrihat Manu, cited in Mit., II-1, 6.

(8) Manu, V-165; Katyayan, quoted in Harvit (2 Cole. Dig., 536); Mayukh, Pt.; II, § 8; Narad, XIII-26; Dayabhag, XI-1, § 43; 2 Cole. Dig., 528.

(9) *Narad*, XIII-21; Saraswati Vilas, § 152; Daya Kram Sangrah, III-3; Vivad Ratnakar, Ch. 5; *Khettermoni* v. *Kadombini*, 16 C.W.N. 964: 17 I.C. 83 (85).

(10) Texts discussed in *Khettermoni* v. *Kadambini*, 16 C.W.N. 964: 17 I.C. 83; *Keri Kolitani* v. *Moneeram*, 13 B.L.R. 1 F.B.: 19 W.R. 367.

(11) *Khettermoni* v. *Kadambini*, 16 C.W.N. 964: 17 I.C. 83.

(12) *Keri Kolitani* v. *Moneeram*, 13 B.L.R. 1 F.B.: 19 W.R. 367; *Mukandi* v. *Jamni*, 73 I.C. 875.

(13) S. 2, Hindu Widow's Remarriage Act (XV of 1856); *Suraj Jote* v. *Attar*, 67 I.C. 550: (1922) P. 378.

(14) Steele's Law of Caste, 27 *note*; 1 W. and B., H.L., 233, Q. 3; p. 231-*note*; *Lallubai* v. *Mankuvarbai*, 2 B. 388 (420).

is, strictly speaking, confined only to the agnatic kinsman.[1] When there is more than one widow, all take jointly as a single heir, with the right of partition and survivorship[2] which each widow may, however, relinquish in favour of the co-widow, but such relinquishment cannot extend beyond her life-interest.[3] Among castes which allow *Karao* marriage, that is, remarriage with the deceased husband's brother, the widow inherits the properties of both the brothers.[4] It has already been stated that the interest which the widow acquires is liable to be divested by the birth or adoption of a son (S. 299).

Forfeiture on remarriage Clause (4).

2248. The clause relating to the forfeiture of inheritance on re-marriage by a Hindu widow under the enabling provisions of the Hindu Widows' Remarriage Act[5] has given rise to judicial conflict between the Allahabad and the other High Courts, the former holding that S. 2 thereof only applies to widows who could not otherwise remarry,[6] which the other High Courts incline to the view that the term "any woman" in that section must include even those whose re-marriage was customary.[7]

The difference between the courts arises from the reading of S. 2 of the Hindu Widows' Remarriage Act, 1856, independently of the preamble, by which that section is, according to the Allahabad High Court, controlled,[8] while the other courts read the words of S. 2 as applying to "any widow" as therein mentioned. These courts hold that even in cases of a remarriage legalized by custom, Hindu law regards the widow as the surviving half of himself which she ceases to be upon her remarriage, whereas the Allahabad High court leaves the question of retention or forfeiture of the estate to be solely determined by the custom that legalizes that marriage.

It is submitted that the Hindu Widows' Remarriage Act, 1856, was intended to insure freedom of conscience on the part of those to whom their religious injunction had barred from remarriage, and that the Act, being an *ad hoc* Act could not be read as rescinding rights that widows possessed under their customary Law[9] which, while legalizing a remarriage, may or may not prescribe for its consequential forfeiture of her husband's heritage. But in such case, the determining authority is custom and not the Act.

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(1) *Lallubhai* v. *Mankuvarbai*, 2 B. 388 (440).

(2) *Bhagwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Nilmani* v. *Radhamani*, 1 M. 290 P.C.; *Venkayamma* v. *Venkataramanayamma*, 25 M. 678 (687) P.C.; *Rumea* v. *Bhagee*, 1 B.H.C.R. 66; *Jijiamba* v. *Kamakshi*, 3 M.H.C.R. 424; *Dilipati Singh* v. *Kashinath*, 17 O. C. 108: 24 I.C. 542; *Man Singh* v. *Nawlakhbati*, 2 Pat. 607 (642, 643).

(3) *Ramakkal* v. *Ramaswami*, 22 M. 522 (524).

(4) *Nagar* v. *Khare*, 86 I.C. 893: (1925) A. 440.

(5) XV of 1856.

(6) *Bhola Umar* v. *Kaunsilla*, 55 A. 24 F.B.

(7) *Matungini* v. *Ram Rutton*, 19 C. 289 F.B.; *Vitta Tayamma* v. *Chata-Kondu*, 41 M. 1078 F. B.

(8) *Swraj Jote* v. *Attar Kumari*, 1 Pat. 706.

(9) *Mula* v. *Partab*, 32 A. 489; *Ramkishen* v. *Medh Singh*, 1 I.C. (A.) 141; *Sohan Lal* v. *Durga*, 24 I.C. (A.) 691; *Nihali* v. *Kanak Singh*, 25 I.C. (A.) 617; but *contra* in *Rusul Jehan* v. *Ram Sarun*, 22 C. 589; *Gouri Churn* v. *Sita*, 14 C. W.N. 346; *Nitya Madhav* v. *Srinath*, 8 C.L.J. 542; *Santala* v. *Badaswari*, 50 C. 727 (736); *Murugayi* v. *Viramakali*, 1 M. 226; *Vithu* v. *Govinda*, 22 B. 321; *Panchappa* v. *Sanjanbasawa*, 24 B. 89. It should be noted that the Act was merely intended to create a new right and not to take away an old one.

2249. The Allahabad High Court has consistently taken this view. Thus the widows of a Sweeper,[1] Ahir,[2] Kurmi,[3] Halwai,[4] or a Tagh Brahman,[5] have been held to be entitled to re-marry by the custom of their caste, and as such, they do not forfeit their inheritance unless there is a custom to that effect. This fact was overlooked by the Bombay High Court in a case[6] in which the widow of the paternal uncle, who was entitled to succeed as *sagotra sapinda* of her late husband,[7] in preference to the father's sister, was held to have forfeited her right by the sole reason of her re-marriage, and by virtue of S. 2 of the Hindu Widows' Remarriage Act, 1856.[8] The parties belonged to the *Kachi* (*green grocer*) caste, and as such, the widow might have succeeded in spite of her re-marriage, if the caste permitted re-marriage independently of the Act, which presumably it did, unless custom entailed the forfeiture of her right. But this point was overlooked. Reference was made in the case to S. 5 of the Hindu Widows' Re-marriage Act, and it was held that, being passed in 1856, it could not have legislated with reference to a right which was not recognized in Bombay till 1876, whence the wife's position as the *sagotra sapinda* of her husband became first established,[9] but that fact would appear to make no difference in view of the fact that S. 5 defines the rights which the re-married widow forfeits. Even apart from the Act, a widow, upon her re-marriage, customarily, though not invariably[10] forfeits the property which she has inherited from her husband,[11] but the question is one of custom, and must not be treated as an inflexible rule.

2250. Where the widow forfeits her estate in law, but still continues in possession with the result that on expiration of the statutory period, she will acquire not an absolute but only a widow's estate.[12]

As regards her remarriage upon conversion to another faith, the courts are equally divided, the Allahabad High Court holding that the *Lex Loci* Act[13] safeguards her right of property and her re-marriage is legalized by her new faith unaffected by later Act[14] legalizing marriages of certain Hindu widows, while the other courts rely upon the words "any widow", as including even a convert.

317. Daughter's right. Statutory

(1) In a succession, opening on or after the 14th day of April, 1937, to a person dying with a widow surviving him, his daughter will share equally with his son and widow in accordance with the provisions of the Hindu Women's Right of Property Act, 1937.[15]

Daughter's under the Mitakshara.

(2) In a succession opening before the 14th day of April, 1937, the daughter succeeds to the estate of her father in default of the widow[16] subject to the following rules, namely,

(1) *Har Saran* v. *Nandi*, 11 A. 330.
(2) *Dharam Das* v. *Nandlal*, (1889) A.W.N. 78.
(3) *Ranjit* v. *Radha*, 20 A. 476.
(4) *Gajadhar* v. *Kausilla*, 31 A. 161.
(5) *Simmani* v. *Mutammal*, 3 M. 265.
(6) *Pranjiwan* v. *Bhikhi*, 45 B. 1247 but see *Kora* v. *Boreani*, 2 B. L. R. 199 F.B.; *Chamar* v. *Kashi*, 26 B. 388; *Basappa* v. *Rayava*, 29 B. 91 F.B.; *Lakshmana* v. *Siva*, 28 M. 425.
(7) *Lallubhai* v. *Mankuvarbai*, 2 B. 388.
(8) XV of 1856.
(9) (1876) *Lallubhai* v. *Mankurarbai*, 2 B. 388.
(10) Jat widows do not forfeit their inheritance; *Mangal* v. *Varto*, 49 A. 203.
(11) *Suraj* v. *Attar Kumari*, 1 P. 706 (713).
(12) *Parbati* v. *Ram Prasad*, 7 Luck. 320.
(13) Act (XXI of 1850).
(14) Act (XV of 1856).
(15) Act (XVIII of 1937).
(16) Mit. II-I-2.

(*a*) **As between two or more daughters, the daughter unmarried excludes the one married.**[1]

(*b*) **As between daughters both or all married, the one indigent excludes the one opulent,**[2] **provided that this rule does not apply to an estate, the succession to which is subject to the Mithila Law.**

(*c*) **Except in Bombay, all daughters take jointly to the same extent as the widows subject to the same right of partition and survivorship.**[3]

(*d*) **The daughter's right to succeed does not depend upon her chastity,**[4] **nor does her subsequent unchastity entail forfeiture of her inheritance.**[5]

(*e*) **Except in Bombay, the daughter like the widow takes only a limited estate.**[6]

2251. Daughters (5).—The daughter ranks next to the widow as provided in the following text:—

Mitakshara.—"1. On failure of her (*i.e.*, the wife), the daughters inherit. They are named in the plural number,[7] to suggest the equal or unequal participation of daughters alike or dissimilar by class.

"2. Thus Katyayan says: 'Let the widow succeed to her husband's wealth, provided she be chaste, and in default of her, let the daughters inherit, if unmarried.' Also Brihaspati: 'The wife is pronounced successor to the wealth of her husband, and in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth.'

"3. If there be competition between a married and unmarried daughter, the unmarried one takes the succession, under the special provisions of the text above cited ('in default of her, let the daughter inherit, if unmarried').

"4. If the competition be between the unprovided and the enriched daughter, the unprovided one inherits, but on the failure of such, the enriched one succeeds, for the text of Gautam is equally applicable to the paternal as to the maternal estate: 'A woman's separate property goes to her daughters unmarried or unprovided.'"[8]

2252. It is clear from these texts that though daughters as a class rank after the widow[9] the grounds of preference between them *inter se* are that the unmarried excludes the married,[10] and the poor daughter the rich, that is to say the competition is only as between the married and unmarried, and the rich and the poor. Consequently, the unmarried daughter excludes the married daughter, whether she be rich or poor.[11] In default of unmarried daughters, the married daughters succeed and amongst them the poor excludes the rich,[12] whatever may have been the source of her wealth, whether from her husband or from her father or otherwise.[13] Now, what is the test of poverty? It has been held that comparative poverty is the sole test for settling the claims of daughters amongst themselves,

(1) Mit. II-I-3.
(2) Mit. II-I-4.
(3) *See* Ss. 181, 288, 377.
(4) *Adayappa* v. *Rudrava*, 4 B. 104.
(5) *Moniram* v. *Keri Kolitani*, 5 C. 776 P.C.
(6) *Chotaylal* v. *Chunno*, 4 C. 744 P. C.
(7) Mit., II-I-2.
(8) Mit., II-II, 1-4. To the same effect, Mayukh, V-VIII-10, 11.
(9) *Kattama* v. *Dorasinga*, 6 M.H.C. R. 310; *Narayan* v. *Manohar*, 7 B.H.C. R. 153; *Narayan* v. *Govind*, 1 N.L.R. 154 (156).
(10) *Hemanchull* v. *Maharaj Singh*, 1 Agra 210 (211); *Golab* v. *Hunsee*, 2 Agra 166; *Binode* v. *Purdhan*, 2 W.R. 176 (177).
(11) *Dowlat* v. *Burma*, 22 W.R. 54; *Jamnabai* v. *Khimji*, 14 B. 1 (13).
(12) In original, साधन (*Sadhan*) with wealth and निर्धन (*Nirdhan*) *without* wealth; in Gautam, अप्रतिष्टित (*Apratishthit*) unprovided for; *Manki Kunwar* v. *Kundan Kunwar*, 47 A. 403.
(13) *Danuo* v. *Darbo*, 4 A. 243 (245); *Totawa* v. *Basawa*, 23 B. 229 (233); *Audh Kumari* v. *Chandra*, 2 A. 561; *Manki* v. *Kundan*, 47 A. 403.

but the court should not go into minute details, since all that it has to enquire is whether there is such marked difference between the wealths of the two that one should be called poor in comparison with the other.[1] Under the Dayabhag law, the capacity to produce a sapinda is the sole cause of the daughter's succession.[2] Hence, a barren daughter, or one who is not likely to have male issue,[3] or who is already a childless widow, is not entitled to succeed, but no such distinction exists in the Mitakshara.[4] But though the poor sister excludes the rich, she does not become a fresh stock of descent, and on her death, the rich sister succeeds to her in preference to the poor sister's son.[5] In Bengal, the latter would exclude the sister,[6] and in Bombay, the same rule prevails, since the daughter there takes absolutely and on her death her own heirs will succeed,[7] and the same rule extends to Berar which is a disciple of the Bombay school[8] and Sindh.[9]

Illegitimate Daughters.

2253. Illegitimate daughters, whether of a twice-born or of a Shudra, have no right of inheritance.[10] The illegitimate son of a Shudra succeeds, because his case is covered by a special text.[11] There is no text in favour of an illegitimate daughter. In one case it was contended that the texts applicable to the son applied equally to the daughter, since the word "son" included the daughter, but this contention was, of course, not acceded to.[12] The texts do not favour the claims of females generally, and they now only allow the claims of those expressly named. As such, the texts mention the daughter, but while they expressly allude to an illegitimate son, they nowhere mention an illegitimate daughter, which implies that illegitimate daughters were conceded no right. But illegitimate daughters are entitled to inherit to their mothers.[13]

Unchaste and Prostitute.

2254. Unchastity is no bar to a daughter's inheritance,[14] but a prostitute cannot be regarded as an "unprovided maiden" entitled to inherit in preference to her

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(1) *Tinumoni* v. *Nibarun*, 9 C. 154 (159) F.B.

(2) *Binode* v. *Purdhan*, 2 W.R. 176; *Radha Kishen* v. *Rajah Ram*, 6 W.R. 147; *Mukunda* v. *Manmohini*, 19 C.W.N. 472: 26 I.C. 903, followed in *Pramila* v. *Chandra Shekhar*, 43 A. 450 (Dayabhag succession—certificate case).

(3) This does not include issue of a remarriage legalized by the Hindu Widow's Remarriage Act (XV of 1856), S. 4, (*Mukunda* v. *Manmohini*, 19 C.W.N. 472: 26 I.C. 903), or otherwise, unless the custom which permits remarriage also entitled the remarried daughter to inherit equally with the married daughter—*Binodini* v. *Susthes*, 48 C. 300.

(4) *Simmani* v. *Muttummal*, 3 M. 265 (267, 268).

(5) *Ramdhan* v. *Beharee*, 1 N.W.P. H.C.R. 114; *Dulari* v. *Mulchand*, 32 A. 314 (316); *Dowlat* v. *Burma*, 22 W.R. 54; *Mula* v. *Maharaj*, 2 C.P.L.R. 166.

(6) *Dowlut* v. *Burma*, 22 W.R. 54 (56); *Kattamma* v. *Dorasinga*, 6 M.H.C.R. 310 (332).

(7) *Bhagirathi Bai* v. *Raya*, (1881) 5 B. 264.

(8) *Dowlut Rao* v. *Govinda Rao*, 5 N.L.R. 13 (Berar case).

(9) *Dowlut* v. *Govind*, 2 S.L.R. 59: 1 I.C. 243.

(10) *Ram Singh* v. *Bhani*, 38 A. 117 (121).

(11) Manu, IX-179; Yad., II-133, 134; Mit., I-XII-2.

(12) *Bhikya* v. *Babu*, 32 B. 562 (566); *Chuoturya* v. *Sahub*, 7 M.I.A. 18 (50); the statement in *Inderun* v. *Ramaswamy*, 13 M.I.A. 131 (159); *Sarasuti* v. *Manu*, 2 A. 134; *Rahi* v. *Govinda*, 1 B. 97, that illegitimate *children* or offspring of the Shudra inherit is a *lapsus calamai* for a *"son."*

(13) *Arunagiri* v. *Ranganayaki*, 21 M. 40; *Dundappa* v. *Bhimava*, 22 Bom.L.R. 1306: 59 I.C. 561; *Kasturi* v. *Lote*, 16 N.L.R. 221: 56 I.C. 952.

(14) *Adayapa* v. *Rudrava*, 4 B. 104; *Tara* v. *Krishna*, 31 B. 495 (502); *Kojiyadu* v. *Lakshmi*, 5 M. 149; *Annapurnamma* v. *Venkamma*, 51 M.L.J. 387: 97 I.C. 664: (1926) M. 1017.

married sister.[1] Being neither maiden nor married, she will inherit only in default of either unmarried or married sisters.[2] But it is submitted that there is no textual support for this view, and that the conclusion reached is the result of reasoning which can only be justified on the ground of equity.

Excluded by Custom.

2255. A daughter may be excluded by custom. Such a custom has been successfully pleaded in several cases relating to several races, such as the Bhale Sultan tribe of Kshatriyas[3] and the Jangra Chauhans[4] of Oudh. In the latter case, it was contended that the evidence of custom as to impartible estate was inadmissible to prove it as regards the ordinary partible property. But the Privy Council held the distinction untenable. Similar customs excluding daughters have been successfully proved in the case of Utpat families of Pandharpur,[5] Chudasama Gamati Garasias[6] and the Bhagars in the Broach Collectorate.[7] In the case of Gobel Girasias, the custom was held proved by the trial Judge, but the High Court reversed his finding, holding that the District Judge was wrong in holding the custom proved from the absence of a single instance in which the daughter had inherited; whereas the real issue was, were there sufficiently numerous instances of her exclusion?[8] In another case, the case for exclusion was held rebutted by proof of a large number of instances of daughters inheriting.[9]

It will be seen in the sequel that, except in Bombay, the daughter takes a limited estate, and on her death the estate devolves on the next heir of the father.[10]

(6) His daughter's son.

318. (1) In default of the daughter, the daughter's son succeeds subject to the following rules, namely,

(*a*) The daughter's son inherits on the death of the daughter or where there are several on the death of last of them.[11]

(*b*) The estate inherited by him is not his ancestral property, but is treated as his self-acquired property, with the result that two or more of such sons by the same mother do not take jointly with the right of partition or survivorship *inter se*.[12]

(*c*) Where there are several daughter's sons by different daughters, they take *per capita* and not *per stirpes*.[13]

(*d*) He takes as a full owner like any other male owner and becomes a new stock of descent.[14]

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(1) *Sivasanga* v. *Minal*, 12 M. 277; *Tara* v. *Krishna*, 31 B. 495 (502); *Saraswati* v. *Kathirama*, 4 C.P.L.R. 43; *Bhayalal* v. *Churaman*, 9 C.P.L.R. 38.

(2) *Obiter* in *Tara* v. *Krishna*, 31 B. 495 (510).

(3) *Bajrangi* v. *Manokarnika*, 30 A. 1 (15) P.C.

(4) *Parbati* v. *Chandarpal*, 31 A. 457 (461, 474) P.C.

(5) *Nanaji* v. *Sundrabai*, 11 B.H.C. R. 249.

(6) *Verabhai* v. *Hiraba*, 27 B. 492 (498).

(7) *Pranjivan* v. *Reva*, 5 B. 482.

(8) *Ranchoddas* v. *Rawal*, 21 B. 110 (117).

(9) *Nadri* v. *Kura*, 13 M.L.J. 91: 27 I.C. 707.

(10) *Chotay Lal* v. *Chunno*, 4 C. 744 P.C.; *Vaduganadha* v. *Dorasinga*, 3 M. 290 (P.C.).

(11) *Baijnath* v. *Mahabir*, 1 A. 608.

(12) *Mhd. Husain* v. *Kishva Nandan*, I.L.R. (1937) A. 655 P.C.

(13) *Narasappa* v. *Bharmappa*, 45 B. 209; *Dana* v. *Mohesh*, 30 C. 89.

(14) *Muttuvaduganadha* v. *Periasami*, 19 M. 451 P.C.

(2) Since the Hindu Women's Right of Property Act only extends to lineal descendants and the daughter's son is not such descendant, his succession remains unaffected by that Act.

Illustration.

A died leaving two daughters *B* and *C*. *B* has one son, *C* three sons. *B* being maiden first inherits the estate, on her death, her married sister *C* takes the estate and on her death the four sons of *B* and *C* inherit it in equal shares.

2256. Analogous Law.—The following text supports the succession of the daughter's son:—

Vishnu.—"On failure of sons, and of their male issue, the sons of daughters shall obtain the property; for the male offspring of a son of a daughter are equally qualified to perform obsequies for men of all classes."[1]

2257. Daughter's son.—The daughter's son is a *bandhu* and not a *gotraj sapinda*, though he ranks before the parents of the deceased for the purpose of succession. But this is so by special texts[2] due to history. Under the old law, failing a son a daughter might be appointed by the father to raise up issue to him and the son born is called a "*putrika-putra*" or the son of the (appointed) daughter. In early times, such son was treated as an *auras* or self-begotten son. In course of time the practice of appointment fell into desuetude, but the special position which he had attained remained. The daughter's son is competent to perform the *Shradh* of his maternal grandfather,[3] and Yadnyavalkya mentions him as an heir.[4] Vishnu regards him as equal to a son's son and supports his claim in the text before cited. The daughter's son has no right of inheritance in his maternal grandfather's estate so long as the estate vests in his mother.[5] He is the reversioner whose estate comes into being on the daughter's death.[6] But they are, nevertheless, entitled to protect their reversionary rights against an improper alienation made by their mother,[7] the cause of action arising on the date of alienation,[8] and except under the Mayukh, they take *per capita* and not *per stirpes*.[9] The same right extends to first cousins who all share equally, without reference to the shares which their respective fathers would have taken, had they been alive.[10]

2258. A daughter's son may succeed, though the daughter be disqualified.[11] But if the daughter's son predeceases his maternal grandfather, his son cannot inherit in the right of his father,[12] though he will succeed in his own right as a *bandhu*. "A daughter's son, on whom the inheritance has actually fallen, takes it as full owner, and thereupon he

(1) Vishnu, cited in Mit., II-II-6.

(2) Manu, IX-132; Yad., II-136; Mit., II-II-6; Mayukh, IV-VIII-13; Sm. Ch., XI-II-28; Vivad. Chint. (Tagore), 294; Nirnai Sindhu, 315; Dayakram Sangrah and Nand Pandit's Vaijyanti, cited Sarv. Inh., 479, 492, 2 Dig. 498.

(3) Vishnu, cited in Mitak., II-II-6; Mayukh V-III-13.

(4) Yad., II-136, 137.

(5) *Baijnath* v. *Mahabir*, 1 A. 608; *Sant* v. *Geo Saran*, 8 A. 365.

(6) *Amritolal* v. *Rajooneekant*, 15 B.L.R. 10 P.C.

(7) *Krishnier* v. *Lakshmiammal*, 18 M. L.J. 275.

(8) *Chiruvelu* v. *Chiruvelu*, 29 M. 390, explained in *Veerayya* v. *Gangamma*, 36 M. 570 (573, 574).

(9) *Nagesh* v. *Gururao*, 17 B. 303; *Narsappa* v. *Bharmappa*, 45 B. 296; *Ram Swarup* v. *Basdeo*, 2 Agra 68; *Sheo Sahai* v. *Omed*, 6 B.S.R. 378; *Ranidhun* v. *Kishen*, 3 B.S.R. 133; *Laloo* v. *Laloo*, 10 I.C. 448; *Ram* v. *Basdeo*, 2 Agra 168; *Dan* v. *Mohesh*, 30 C. 89; *Birj* v. *Sheoraj*, 10 C. 159.

(10) *Narasappa* v. *Bharmappa*, 45 B. 296, following *Nagesh* v. *Guru Rao*, 17 B. 303.

(11) *Venkayamma* v. *Venkataramanayyamma*, 20 M. 207, affirmed O.A. 25 M. 678 P.C.; *Bansi Dhar* v. *Lachmi*, 8 A. L.J. 849.

(12) *Srinivasa* v. *Dandayudapani*, 12 M. 411 (413, 420); *Dhanrup* v. *Gobind*, 8 A. 614 (621).

becomes a new stock of descent, and on his death the succession passes to his heir, and not back again to the heir of his grandfather.[1] But until the death of the last daughter capable of being an heiress, he takes no interest whatever and, therefore, can transmit none. Therefore, if he should die before the last of such daughters, leaving a son, that son would not succeed, because he belonged to a different family and he would offer no oblation to the maternal grandfather of his own father.''[2]

An impartible property will pass on the death of all daughters to the eldest surviving son.[3]

319. In default of the daughter's son, the mother succeeds, but under the Mayukh school the father precedes mother.[4]

(7) His mother.

Explanation.—**The term mother in this section includes the adoptive mother[5] but not the step mother.[6]**

2259. **Analogous Law.**—The following texts bear on the subject of the mother's right:

Mitakshara.—''Besides, the father is the common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text: 'To the nearest sapinda, the inheritance next belongs.' ''[7]

Mayukh.—''In default of daughter's son comes the father, in default of him, the mother.''[8]

Mother.

It will be seen that while the Mitakshara places the mother before the father, the Mayukh reverses the order, and this preference for the father has been given effect to in Guzerat on the ground ''that the majority of eminent Hindu writers give the preference to the father over the mother.''[9] But in the Ratnagiri and the Kanara[10] districts, where the Mitakshara is pre-eminent, the mother was held to inherit before the father,[11] the term 'mother' including both the natural as well as the adoptive mother.[12] The mother, like all females, will take only a limited estate,[13] and on her death, the estate will devolve on the son's heir.[14] On this point, there is no difference between the Mitakshara and the Mithila School.[15] The remarriage of the mother does not disqualify her from inheritance. Even if her remarriage was legal only under the Hindu Widows' Remarriage Act,[16] it has no effect upon her right to inherit to her son, since the statutory disqualification is

(1) *Muttuvaduganadha* v. *Periasami*, 16 M. 11, affirmed O.A. 19 M. 451 P.C.; *Muttu* v. *Dora*, 3 M. 290 P.C.

(2) Mayne, cited in *Dhanrup* v. *Gobind*, 8 A. 615 (621).

(3) *Kattama Nachiar* v. *Dorasingha*, 6 M.H.C.R. 310 (333); *Muttu* v. *Dorasinga*, 3 M. 290.

(4) *Khodabai* v. *Bahadar*, 6 B. 541, (546).

(5) *Anandi* v. *Hari*, 33 B. 404.

(6) Mit. II-3 and cases cited *infra*.

(7) Mit., II-III-3. To the same effect, Dayabagh, XI-1-5, XI-IV-1-6; Vivad Chint. (Tagore), 293-295; Dayakram Sangrah, XI-1-5, XI-IV-1-6, I-V-1—2; Virmitroday (Sarkar), 190, 191; *Vellanki* v. *Venkata*, 1 M. 174 P.C.

(8) Mayukh, IV-VII-13 (Mandlik) 80.

(9) *Khodabhai* v. *Bahdhar*, 6 B. 541 (546).

(10) *Anandi* v. *Hari*, 33 B. 404.

(11) *Balakrishna* v. *Lakshman*, 14 B. 605 (612). For the territorial extent of the Mayukh, see, *per* Sir M. Westropp, C.J., in *Sakharam* v. *Sitabai*, 3 B. 353 (365).

(12) *Anandi* v. *Hari*, 33 B. 404.

(13) *Ratan* v. *Umar Bai*, 9 I.C. 997.

(14) *Sakharam* v. *Sita Bai*, 3 B. 353 (368); *Narsappa* v. *Sakharam*, 6 B.H.C.R. (A.C.) 215; *Bachiraju* v. *Venkatapadu*, 2 M.H.C.R. 402 (406).

(15) *Totan* v. *Ballabhaji*, 48 I.C. (N.) 956.

(16) Act XV of 1856.

limited to disinherison of the husband's estate.[1] The mother can inherit to her illegitimate son, a rule not opposed to the Mitakshara and in consonance with natural justice.[2] As already stated, both the natural as well as the adoptive mothers inherit to a son adopted in the *Dvamushayan* form. (**S. 75.**).

Stepmother.

2260. On the general principle that females are excluded from succession unless expressly mentioned in the text, the stepmother has no place in the table of succession. She cannot, therefore, succeed to her stepson.[3] And for the same reason, a step-grandmother is not the heir of her step grandson.[4]

2261. But though the step-mother cannot succeed as mother, she may still succeed in Bombay as a widow of her husband and, as such, his gotraj sapinda.[5] As such, she is held to be preferable to the widow of the half brother,[6] and the widow of a first cousin *ex parte paterna* of the deceased propositus was preferred to a fifth male cousin,[7] and in another case she was held to succeed to her stepson in preference to her stepson's paternal uncle's son,[8] on the principle that the widows of gotraj sapindas, in the case of collaterals, are to be preferred to the male gotrajas in a more remote line, and *a fortiori*, the widow of a male gotraj in the ascending line should be preferred to such collateral.[9] As West and Buhler put it: "The step-mother ought to be placed, on account of her near relationship to the deceased, immediately after the paternal grandmother, up to whom only the succession is settled by special texts."[10]

(8) His father.

320. In default of the mother, the father succeeds;[11] but under Mayukh, he precedes the mother.[12]

Explanation.—**The term father in this section includes the adoptive father, but not the step-father or the natural father of one adopted by another.**

2262. Analogous Law.—It has already been stated before that the father takes before the mother, under the Mayukh. Otherwise, he follows her.[13] The stepfather has, of course, no place in the Hindu table of succession. Even the wife who re-marries, forfeits her husband's inheritance, so that her son by such marriage cannot lay any claim to his

(1) *Akoral* v. *Boreanee*, 2 B.L.R. 199 F.B.; *Basappa* v. *Rayava*, 29 B. 91 F.B.; *Hari Kishore* v. *Thakur Dhan*, 26 C.W.N. 925: (1922) C. 140; *Hussainbhai* v. *Bansilal*, (1924) N. 338.

(2) *Basappa* v. *Gurulingawa*, 57 B. 74; *Jaganath Gir* v. *Sher Bahadur Singh*, 57 A. 85.

(3) Mit., II-3; *Jotilal* v. *Durani*, W. R. (F.B.) 173; *Tahalai* v. *Gaya Pershad*, 37 C. 214, followed in *Sundar Moni* v. *Bangsidhar*, 16 I.C. 900 (902); *Sundar* v. *Bansidhar*, 18 C.W.N. 150: 16 I.C. 900; *Kumaravelu* v. *Virana*, 5 M. 22; *Muttammal* v. *Vengalakshmi*, 5 M. 32; *Ramasami* v. *Narasamma*, 8 M. 133; *Seethai* v. *Nachiar*, 37 M. 286; *Keeserbai* v. *Valab*, 4 B. 188 (208); *Ramanand* v. *Surgiani*, 16 A. 221; *Nanki* v. *Gauri Shankar*, 28 A. 187; *Ram Prasad* v. *Babu Lal*, 86 I. C. 849: (1925) A. 417; *Kirpi* v. *Ramjas*, (1889) P.R. No. 153.

(4) *Jotilal* v. *Durani*, W.R. (F.B.) 173.

(5) *Lallubhai* v. *Mankuvarbai*, 2 B. 388; O.A. 5 B. 110 P.C.; *Keser Bai* v. *Valab*, 4 B. 188 (208); *Basangowda* v. *Rudrappa*, 30 Bom.L.R. 591: (1928) B. 291.

(6) *Rakhmabai* v. *Tukaram*, 11 B. 47.

(7) *Lallubhai* v. *Mankuvarbai*, 2 B. 388, affirmed O.A. 5 B. 110 P.C.

(8) *Russoobai* v. *Zoolekha Bai*, 19 B. 707.

(9) *Rachava* v. *Kalingapa*, 16 B. 718, explaining *Lallubhai* v. *Mankuverbai*, 2 B. 388.

(10) W. and B., H.L. (3rd Ed.), 472; cited with approval in *Russoobai* v. *Zoolekhabai*, 19 B. 707 (710).

(11) Mit.; II-III-2.

(12) Mayukh, IV-VII-13 (Mandlik) 80; *Khodabai* v. *Bahadur*, 6 B. 541 (546).

(13) Mit., II-III-2.

father's estate. The putative father of a Shudra succeeds to his illegitimate son by reason of propinquity, in the absence of nearer heirs.[1]

321. (1) In default of the father, the estate descends to the brother[2] or those of the whole blood succeeding before those of the half blood,[3] except that where the former were divided and the latter undivided, they all share equally;

(9) His brother.

Provided that in the territory subject to the Mayukh Law, in the absence of a brother of the whole blood, a nephew of the whole blood is preferred to a brother of the half blood.[4]

(2) The succession of brothers divided and undivided, reunited and divided and of the whole blood and the half blood is subject to the rules stated in section 202.

2263. **Analogous Law.**—After the father, come the brothers, those of the whole blood being preferred to those of the half blood, and an undivided brother to a divided one.[5] The following texts support him:—

(9) Brother.

Mitakshara.—"On failure of the father, the brothers share the estate. Accordingly, Manu says: Of him who leaves no son, the father shall take the inheritance or the brothers."[6]

"5. Among brothers, such as are of the whole blood take the inheritance in the first instance under the text before cited: 'To the nearest sapinda, the inheritance next belongs,'[7] since those of the half blood are remote through the difference of the mothers."[8]

It will be noted that except in the case of brothers and sons of brothers, neither the Mitakshara nor the Mayukh makes any distinction between persons of the whole blood and those of the half blood. Legitimate sons by different mothers take equally the property of their father. The Mitakshara, in the succession of brothers, places uterine brother, *i.e.*, brothers of the whole blood before brothers of the half blood. It then brings in brothers of the half blood and places the sons of brothers respectively in the same order as their respective fathers.[9] The Mayukh also prefers brothers of the whole blood to brothers of the half blood, but next to the brothers of the whole blood brings in their sons.[10] It names, as next in succession, the paternal grandmother, and after her the sister, and after the sister introduces together the paternal grandfather and the half brother, and after them the paternal great-grandfather, the father's brother and the sons of brothers of the half-blood.[11] But so far as brothers of the full and half-blood are concerned, both the Mitakshara and the Mayukh agree,[12] it being, of course, clear that the term brothers of "half-blood" means brothers born of the same father and different mothers. Sons of the same mother by different fathers belong to different families and are not includ-

(1) *Subramania* v. *Rathnavelu*, 41 M. 44 F.B.
(2) Mit., II-IV-1.
(3) Mit., II-IV-5; to the same effect, Mayukh, IV-VIII-16. *Anant Singh* v. *Durga Singh*, 32 A. 363.
(4) Mayukh, IV-VIII-16.
(5) *Devi Bhai* v. *Dayaboy*, 89 I.C. (S.) 164.
(6) Manu, IX-185; Mit., II-IV-1.
(7) *Ib.*, IX-187.
(8) Mit., II-VI-1, 5. To the same effect, Mayukh, IV-VIII-16.
(9) Mit., II-IV-7; *Haribhai* v. *Mathur*, 47 B. 940; *Har Bhagwan* v. *Hukam Singh*, 3 L. 242.
(10) Mayukh, IV-VIII-16.
(11) *Ib.*, IV-VIII-18-20.
(12) *Krishnaji* v. *Pandurang*, 12 B.H.C.R. 65; *Samat* v. *Amra*, 6 B. 394; *Parmappa* v. *Shidappa*, 30 B. 607 (610).

ed in the term.[1] Of course, custom may eliminate the textual difference between brothers of the whole and brothers of the half-blood, and in one case such custom was sought to be supported upon the strength of an entry in the *wajib-ul-arz*, which the Privy Council ruled out as connoting "the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom."[2] But in the Punjab such a custom is presumed in the case of certain tribes.[3]

2264. It has already been seen that there is no relation between the sons of the mother by her first marriage and those by her second marriage after death or divorce of her first husband. The later Smritis abhor a woman's re-marriage, and it would be a far cry to expect them to suffer any relationship between the offspring of a sacramental and those of a sinful union.[4]

As regards the right of the illegitimate brothers to inherit *inter se*, the question was answered in the affirmative by the Madras High Court in a case of a Shudra,[5] and in one case it was held to be the rule applicable to all castes.[6]

Effect of Re-union.

2265. As between brothers of the whole blood and those of the half-blood, those re-united take in preference to those not re-united. But a re-united half-brother takes equally with the separated whole brother. In other words—

(1) A whole brother re-united excludes a whole separated brother. Here, the relationship being equal, the succession is regulated by union.

(2) A whole brother re-united excludes a half-brother re-united. Here, the union being equal, superior relationship rules the succession.

(3) A whole brother separated and a half-brother re-united share equally. Here, superior relationship without union and union with inferior relationship are equal.[7]

(4) A whole brother though separated excludes the father though re-united.

This subject has been already considered elsewhere (**S. 202.**).

(10) Nephew.

322. (1) In default of all brothers of the whole blood and the half blood, the sons of brothers or nephews succeed.

(2) The succession of nephews divided and undivided, reunited and divided and of the whole and half blood follows the rules applicable to brothers stated in section 202.

(3) Where the nephews succeed on the death of their father, after the estate had vested in him, they take *per stirpes*; otherwise they take *per capita*.[8]

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(1) *Ekoba* v. *Kashiram*, 46 B. 716 (718).

(2) *Anant Singh* v. *Durga Singh*, 32 A. 363 (373) P.C.

(3) *Jafar* v. *Mhd. Khan*, (1906) P.L.R. 29; *Eoda* v. *Amar*, (1873) P.R. No. 75; *Devi* v. *Mangal*, (1874) P.R. No. 84; *Tekhu* v. *Waliah*, (1876) P.R. No. 6; *Phaggan* v. *Buta*, (1877) P.R. No. 9; *Hazara* v. *Samita*, (1876) P.R. No. 76; *Ram* v. *Bishen*, (1879) P.R. No. 123; *Albela* v. *Pat*, (1881) P.R. No. 21; *Mahtaba* v. *Jaimal*, (1883) P.R. No. 187; *Maya* v. *Bishen*, (1884) P.R. No. 23; *Gopal* v. *Nainu*, (1887) P.R. No. 71.

(4) *Ekoba* v. *Kashi Ram*, 46 B. 716.

(5) *Myna Bai* v. *Uttar Ram*, 2 M.H.C.R. 197; *Shome Shankar* v. *Rajesar*, 21 A. 99 (104, 105).

(6) *Sitta Baksh* v. *Gajraj Singh*, (1911) 14 O.C. 227: 12 I.C. 767.

(7) *Sham Narain* v. *Court of Wards*, 20 W.R. 197 (202).

(8) *Brojo Kishore* v. *Srinath*, 9 W.R. 463; *Brojo Mohun* v. *Gouree*, 15 W.R. 70.

(10) Brother's Son.

2266. Analogous Law.—The sub-division of brothers into those of the whole blood and those of the half blood extends to their sons, both the Mitakshara and the Mayukh placing sons of brothers of the whole blood before the sons of brothers of the half blood.[1] On this subject the Mitakshara says:—

Mitakshara.—"7. On failure of brothers also, their sons share the heritage in the order of the respective fathers.

"8. In case of competition between brothers and nephews, the nephews have no title to the succession, for their right of inheritance is declared to be on a failure of brothers.

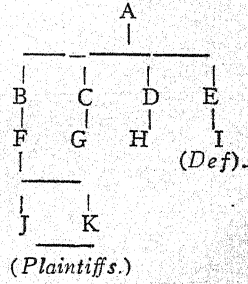
"9. However, when a brother has died leaving no male issue (nor other nearer heir), and the estate has consequently devolved on his brothers indifferently, if any one of them died before a partition of their father's estate takes place, his sons do in that case acquire a title through their father, and it is fit, therefore, that a share should be allotted to them in their father's right, at a subsequent distribution of the property between them and the surviving brother."[2]

Shrikrishna.—"In default of brothers, the brother's son is the successor. Here also a nephew of the whole blood inherits in the first instance, and on failure of such, the nephew of the half-blood, but in case of re-union of co-heirs and on the supposition of all being of whole blood, the associated son of the whole brother is in the first place heir; and on failure of him, the unassociated nephew of the whole blood, or on the supposition of all being of the half-blood, the associated nephew of the half-blood is the first heir, and on failure of him, the unassociated nephew. But if the son of the whole brother be separate, and the son of the half-brother associated, both inherit together, like brothers in similar circumstances."[3]

2267. According to the Mitakshara, the nephews do not share with their uncles, but take a share which had vested in their father.[4] According to the Mayukh, the sons of a deceased brother succeed along with the surviving brothers,[5] as tenants-in-common but not as joint-tenants.[6] The rule is held to extend even to sons of cousins.[7] But this rule cannot be extended to the Mitakshara country without proof of custom. In one case of the Ahban Thakers of Oudh, such a custom was pleaded, but the Privy Council held the four instances adduced in proof of it to be of a comparatively modern date and insufficient to prove a family custom pleaded in derogation of the ordinary law.[8]

Even in Bombay, the rules does not go beyond the brothers and their children.[9]

2268. In an undivided family, a brother's son takes his own share as well as the lapsed share of a brother's son, in preference to the grandson of another brother.[10] Where, for instance, *A* had four grandsons *F*, *G*, *H* and *I*, of whom *I* alone was alive at the date of the suit by *F's* two sons *J* and *K*, who claimed to divide *A's* estate in two equal shares, claiming a share by survivorship, to which *I* replied that, being a nearer *sapinda* of *G* and *H*, he was entitled to inherit their share, to the exclusion of *J* and *K*, the court held that inasmuch as *F* had predeceased both *G* and *H*, their share devolved on *I*, to the exclusion of the plaintiffs.[11] In other words,



(1) Mit., II-IV-57; Mayukh, IV-VIII-17; *Samat* v. *Amra*, 6 B. 394 (397); *Hari Bhai* v. *Mathur*, 47 B. 940; *Har Bhugwan* v. *Hakam Singh*, 3 L. 242.

(2) Mit., II-IV-7-9.

(3) Cited in Sarv. Inh., 927, 928.

(4) Sarv. Inh., 928.

(5) Mayukh, IV-VIII-17; *Keshar Lal* v. *Jagu Bhai*, 49 B. 282; *contra* in *Hari Bhai* v. *Mathur*, 47 B. 940.

(6) *Jadav Bhai* v. *Multan Chand*, 27 Bom.L.R. 426: 87 I.C. 926: (1925) B. 350.

(7) 1 W. & B., H.L., (3rd Ed.), p. 108.

(8) *Chandika* v. *Muna*, 24 A. 273 P.C.

(9) *Ib.*, *Shankar* v. *Kasinath*, 51 B. 194 F.B.

(10) *Madho* v. *Bindessury*, 3 Agra 101.

(11) *Ib.*

under the Mitakshara, the nephew succeeds not as the heir of his father, but as the direct heir of his uncle.[1] As such, brother's sons take *per capita* and not *per stirpes*.[2]

The brother's son is the last of what Mitakshara calls the "compact series of heirs."[3]

(11) **Brother's Son's Son.**

2269. On the assumption that the Mitakshara passage relating to a brother's son[4] includes also a grandson, it was held, and is now settled, that the brother's son's son's place is next after the brother's son[5]

This raises the question whether the distinction between the whole and the half blood should equally apply to brother's grandson and in fact relations other than the brothers and their sons.

Except for some cases of the Bombay High Court,[6] it is now generally agreed that the distinction extends to all agnatic kinsmen even upto the fourteenth degree.[7] For instance, it extends to the sisters,[8] and paternal uncles.[9]

(12) **Paternal Grandmother.**

2270. The paternal grandmother comes in next. After the brother's son, the Mitakshara summarily dismisses the remaining heirs, with the following texts:—

Mitakshara.—"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"2. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same general family who are sapindas."[10]

Mayukh.—"In default of brother's sons [come] the Gotraj Sapindas [gentile relations].[11] Among them, first is the paternal grandmother, according to the text of Manu,[12] which says: 'And the mother also being dead, the father's mother shall take the heritage.'[13] And although she is to be entered at the end after the brother's sons, after the manner of the entry of intruders who are placed at the end, because she is not mentioned among those whose order [of succession] is fixed ending with brother's sons."

2271. It has been held in Bombay, that a paternal grandmother in Gujerat inheriting property, whether movable or immovable, from her maiden grand-daughter, takes an absolute interest therein, and on her death, the property goes to her heir, and not to the heir of the grand-daughter, and that the grandmother is entitled to dispose of such property by will.[14]

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(1) *Brojo Kisore* v. *Srinath*, 9 W.R. 463; *Brojo Muhun* v. *Gouree*, 15 W.R. 70.

(2) *Brojo Kishore* v. *Srinath*, 9 W. R. 463.

(3) Mit., II-V-2; *Mohan Das* v. *Krishna Bai*, 5 B. 597 (602).

(4) Mit. II-IV-7, II-V-1. The word in the original is '*Santan*', which means the "issue"; see *Buddha Singh* v. *Laltoo Singh*, 34 A. 663, affirmed O.A. 37 A. 604 (616) P.C.

(5) *Buddha Singh* v. *Laltoo Singh*, 34 A. 663, affirmed O.A. 37 A. 604 (612) P.C.; *Kalian* v. *Ramachander*, 24 A. 128 *Kureem Chand* v. *Odung*, 6 W.R. 158; *Oorhya* v. *Rajoo*, 14 W.R. 208; *Chinnaswami* v. *Kunju*, 35 M. 152; *contra* in *Suraya* v. *Lakshminarasamma*, 5 M. 291.

(6) *Samat* v. *Amrao*, 6 B. 304; Vithal *Rao* v. *Ram Rao*, 24 B. 317; *Shankar* v. *Kashinath*, 51 B. 194 (203, 204) F.B.

(7) *Ganga Sahai* v. *Kesri*, 37 A. 545 P.C., approving *Suba* v. *Sarafraz*, 19 A. 215 F.B.; *Nachiappa* v. *Rangasami*, 28 M.L.J. 1 F.B.: 26 I.C. 757.

(8) *Jana* v. *Rakhma*, 43 B. 461 (466).

(9) *Sham Singh* v. *Kishun Sahai*, 6 C.L.J. 190; *Narain* v. *Hamraji*, 21 N. L.R. 163.

(10) Mit, II-V-4.

(11) Mayukh, IV-VIII-19.

(12) Manu, IX-217.

(13) Mit., II-I-60; Mayukh, IV-VIII-16 (Mandlik), 81.

(14) *Gandhi* v. *Jadah*, 24 B. 193 (214, 218).

The paternal grandmother inherits in her own right, and not as a widow.[1]

(12-A) Sister in Mayukh.

2272. Under the express text of the Mayukh, the sister has a place between the grandmother and the grandfather,[2] while in Madras she came in only as a *bandhu*, and elsewhere she was wholly excluded. This omission has now been made good by the Hindu Inheritance (Amendment) Act 1929[3] which allots her a place after the father's father and two added statutory heirs, namely, the son's daughter and the daughter's daughter, (§ 2285) but her higher place in Bombay, after the father's mother but before the father's father, has been held to remain unaffected by this Act, which was enacted to raise her status, and by no means to lower it, as it would have been, if the Mayukh rule had been held superseded by the Act.

Under the Hindu Inheritance (Amendment) Act, 1929, which applies only to persons subject to the Mitakshara law, the sister ranks in the order of succession along with other statutory heirs next to the paternal grandfather and before the paternal uncle. Before the passing of this Act, although she was not classed as an heir, still even under the orthodox Mitakshara school, she was held, entitled to receive a share of the ancestral property, equal to one-fourth of what she would have got, had she been a male, as her marriage portion, the *quantum* being fixed upon whether she was married or unmarried, and whether the expenses of her marriage had already been met by other relations.[4]

(13) Paternal Grandfather.

2273. According to the Mitakshara,[5] the paternal grandfather comes immediately after the paternal grandmother. But as already stated, the Mayukh postpones him in favour of the sister, who intervenes between himself and the paternal grandmother. According to the Mayukh, again, he takes equally with the half-brother, "because their propinquity is equal."[6]

Intervention of statutory heirs.

2274. Under the Mitakshara, immediately after the paternal grandfather comes the paternal uncle. But the Legislature[7] has interposed the following heirs between them, namely:—

(14) Son's daughter.
(15) Daughter's daughter.
(16) Sister (including a half sister).
(17) Sister's son.

The first three female near relations, the Mitakshara naturally excluded, because they were females, though both in Bombay and in Madras, the son's daughter[8] and the daughter's daughter[9] were regarded as heritable bandhus, while in Bombay, the sister was assigned a comparatively high place next to the paternal grandmother,[10] and in Madras, he was

(1) *Ib.*, p. 201.
(2) Mayukh, IV-VIII-17 (Mandlik), 81, citing manu, IX-187.
(3) Act II of 1929.
(4) Mit., II-7; Manu, IX-118 (25 S.B.E. 348); Yad., II-124 (Mandlik), p. 217; Brihaspati, XXV-64 (23 S.B.E. 379); *Lachan Bai* v. *Babai*, 5 N.L.R. 161: 4 I.C. 786.
(5) *Ib.*, II-IV-4, 5.
(6) Mayukh, IV-VII-20.
(7) Hindu Inheritance (Amendment) Act, II of 1929.
(8) *Venalal* v. *Parjaram*, 20 B. 173; *Nallanna* v. *Ponnal*, 14 M. 149.
(9) *Gungaram* v. *Ballia*, (1876) B.P.J. 31; *Lallubhai* v. *Mankuwarbai*, 2 B. 388 (446); *Tuljaram* v. *Mathuradas*, 5 B. 662 (672); *Madhavram* v. *Dave*, 21 B. 739; *Ramappa* v. *Arumugath*, 17 M. 182.
(10) Mayukh, IV-VIII-19.

merely a *bandhu*,[1] which she was not elsewhere except when allowed by custom.[2] Bht in Madras, being a female, she ranked next to her own son who, being a male, was entitled to preference over her.[3] Both according to the Allahabad and Punjab Courts a son's daughter and a daughter's daughter were no heirs because, being females, they were excluded, not being expressly named.[4] These inequities and uncertainties of the textual and case-law have now been set at rest by the Legislature which assigns to the four relations an assured high place in the catena of heirs. To this extent all the texts and cases to the contrary are now overruled.[5]

Half Sister.

2275. The question whether the relations such as sister and son as used in the Hindu Law of Inheritance (Amendment) Act, 1929[6] are used in the sense ascribed to them in Hindu law,[7] has been the subject of some (it is submitted) unjustified judicial conflict, since the Act, being an amendment of Hindu Law, the terms therein used must be used as understood in that law and not in their lexicon sense which would exclude an adopted son included there; and by parity of reasoning the term "sister" should include a half sister, since the Mitakshara uses that term as meaning the father's daughter, as Mr. Colebrooke has pointed out in his note on the Mitakshara text that mentions the father's "issue" as entitled to inherit in the absence of certain relations therein named. This interpretation of the word "sister" was adopted in Bombay, and has received the approval of the Privy Council.[8] As such, half sisters have been held to inherit in Bombay[9] though following another principle in favour of the propinquity of blood,[10] in a competition between persons of equal degree half-sisters are excluded by full sisters, not because they are not the father's daughters but rather because they do not possess equal degree of propinquity. Even Manu's text provides for the inheritance of all *sapindas*, male and female, a text that has been so interpreted by the Privy Council,[11] the result being that, under the Mitakshara, the father's daughters are comprised in the term sister, an interpretation not disputed in the North where sisters have been held to be excluded by reason of the overriding text of Baudhayan who had declared women not expressly named in the texts as ineligible for inheritance.[12]

This text and the exclusion based thereon has now been set right by the Legislature, with the result that sisters in the sense of the Mitakshara, as including both sisters and half sisters must be deemed to be made legislatively eligible for inheritance. And it has been so held.[13]

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(1) *Raghunath* v. *Munnam Missar*, 20 A. 191; *Kutti* v. *Radhakrishna*, 8 M.H. C.R. 88; *Lakshmanamma* v. *Tiruvengada*, 5 M. 241; *Mari* v. *Chinnammal*, 8 M. 107 (130) F.B.; *Nallanna* v. *Ponnal*, 14 M. 149; *Mullani* v. *Lalamal*, (1889) P.R. 180; *Nanak Gir* v. *Kishan Kaur*, (1919) P.R. 161: 53 I.C. 815.

(2) *Bhadia* v. *Bhagi*, 10 N.L.R. 24; *Madho* v. *Janki*, 12 N.L.R. 148 (149).

(3) *Kutti* v. *Radhakrishnan*, 8 M.H. C.R. 88 (93); *Lakshmanammal* v. *Tiruvengada*, 5 M. 141; In *Vellanki* v. *Venkata*, 1 M. 174 (186) P.C., the question was raised but not decided.

(4) *Nanhi* v. *Gouri*, 28 A. 187; *Jagannath* v. *Champa*, *ib.*, *Malan* v. *Jewan*, (1916) P.W.R. 47: 32 I.C. 916.

(5) S. 2 (*c*), Hindu Inheritance (Amendment) Act, 1929.

(6) Act II of 1929.

(7) *Pokhan Dusadh* v. *Mt. Mano*, 16 Pat. 215 (221) F.B.; *Cf. Collector of Thana* v. *Krishnanath*, 5 B. 322 (328, 329).

(8) Cole—Note on Mit. II-V-5 approved in *Vinayak* v. *Lakshibai* in 1 B.H.C. R. 117 (124), affirmed O.A. 9 M.I.A. 516 (537, 538).

(9) *Kesserbai* v. *Valab Raoji*, 4 B. 188 (199, 200); *Trikam Purshottam* v. *Natha Daji*, 36 B. 120 (122).

(10) *Jotindranath* v. *Nagendranath*, 59 C. 576 (579) P.C.

(11) *Budha Singh* v. *Laltu Singh*, 37 A. 604 (613) P.C.

(12) *Lallubhai* v. *Cassibai*, 5 B. 110 (118) P.C.

(13) *Rameshwar* v. *Ganpati*, 18 L. 525: *Amrut* v. *Thagan*, I.L.R. (1938) N. 115

The Hindu law of testate succession is now subject to selected sections of the Succession Act under which the term sister includes half-sister,[1] and it would be anomalous if the same word bears a different meaning according to whether on succession was testate or intestate.

The result of the amending law is to remove the disability from which they had been suffering in provinces like Madras where they only stole in as *bandhus*[2] or in the United Provinces and elsewhere, where they did not come in at all.[3] And since the Act was intended to amend the law with a view to restore the principle of propinquity in the line of inheritance so far as the relations therein named were concerned, it follows that the sister, who, in Bombay, had been allotted higher place before the grandfather would still retain her place there.[4]

2276. The Act does not affect the quantum of interest which the first three female heirs will take, which must be decided with reference to their personal law. For instance, since the sister in Bombay is held to take an absolute interest, she will continue to do so, whereas the rule that females only inherit a limited interest will apply elsewhere. But the Act has necessarily abrogated another rule of Hindu Law enunciated in section 306, namely, that their inheritance depends upon their chastity. It is apprehended that the owner may insure it by executing a will, but that qualification cannot be read into the Act.

In this connection it should be added that the term "son" includes an adopted son, provided that, in the case of the adoption of a son by a sister's husband, the adoption was made with the consent of the sister during her life-time. This would insure the right of the sister and would prevent an adoption by her husband merely to secure her brother's estate.

The Act expressly excludes the Dayabhag law, not because the Dayabhag law of succession is any better but because some Bengal members were averse to a change. The position of these relations under the Dayabhag law is that neither a son's daughter nor a daughter's daughter nor a sister is there an heir, though the sister's son is an heir.[5]

(18) Paternal Uncle.
(a) of full blood,
(b) of half blood.

2277. The paternal uncle takes next, an uncle of the full blood being preferred to an uncle of the half blood,[6] and the latter to his cousins.[7] According to the Mayukh, the paternal uncle shares the inheritance equally with paternal great-grandfather, and sons of the half brother.[8]

The distinction between an uncle of the whole blood and one of the half blood only applies where the two are related to the deceased in the same degree. That distinction cannot apply when there is a difference in degrees. Consequently, after the sister's son, the order of succession will

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F.B.: (1938) N. 184 F.B.; *Shanker* v. *Raghoba*, *Ib.*, 97; *Guranditta* v. *Mt. Diwani*, (1937) L. 11 (14), *contra Ram Adhar* v. *Sudesra*, 55 A. 725 F.B.: (1937) A.L.J. 767: 11 Luck. 148 (case of sister's son).

(1) S. 27 (*b*), Succession Act.

(2) *Rajab Venkata* v. *Rajab Venkata*, 31 M. 321.

(3) *Gaurisahai* v. *Rukko*, 3 A. 45; *Jagat Narain* v. *Sheodas*, 5 A. 311 F. B.; *Bindeshwari* v. *Baij Nath*, (1937) O. 402; *Gangoo* v *Beni*, 14 N. 82 (92).

(4) *Shidramappa* v. *Nilambai*, 57 B. 377.

(5) *See* next chapter.

(6) *Vithal Rao* v. *Ram Rao*, 24 B. 317; *Sham* v. *Kishun*, 6 C.L.J. 190.

(7) *Ganga Sahai* v. *Kesari*, 37 A. 545 (556, 557) P.C.

(8) Mayukh, IV-VIII-20.

be as follows: paternal uncle of full blood,[1] paternal uncle of half blood[2] paternal uncle's son of full blood, paternal uncle's son of half blood.[3]

(19) Paternal Uncle's Son.

2278. On the ground that the "son" includes also the "grandson," a view now confirmed by the Privy Council,[4] a paternal uncle's son cannot succeed in preference to a brother's grandson. The contrary was held in Madras in a case[5] which has been overruled by the Privy Council.[6] A paternal uncle's son is preferable to the daughter of a brother,[7] for the obvious reason that a *gotraj* is always preferable to a *bandhu*.

(20) Paternal Uncle's Son's Son.

2279. On the ground that the term "son" (*putra*) is used in its generic sense as comprising the grandson, the place of the paternal uncle's grandson is the same as the paternal uncle's son.[8] In this view, the great-grandson of the grandfather will succeed in preference to the grandson of the great-grandfather, on the ground that the propinquity of *gotraj* is to be determined by lines of descent, that is to say, the inheritance is to go first to the *santan* or line of the paternal grandfather, then in default of any one in that line, to the line of the paternal great-grandfather and so forth; that is to say, the line of the grandfather must be first exhausted before the great-grandfather and his line come in.[9] In this view, the three immediate descendants of the grandfather succeed in preference to the great-grandfather and his descendants, and consequently, the great-grandson of the grandfather is a preferential heir as against the grandson of the great-grandfather. Similarly, the father's brother's grandson has preference over the brother's great-grandson.[10]

2280. Two remaining heirs, though categorized by the Smritikars, are seldom alive to be present to take the succession. They are:—

(21) Father's father's mother,[11]
(22) Father's father's father,
(23) Father's father's brother,
(24) Father's father's brother's son,
(25) Father's father's brother's son's son.

The above order is supported by the following text:—

Mitakshara.—"5. On failure of the paternal grandfather's line, the paternal grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same Gotra and Sapindas.[12]

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(1) *Kesari* v. *Ganga Sahai*, 32 A. 541 F.B., affirmed on review *Ganga Sahai* v. *Kesri*, 33 A. 563; affirmed O.A. *Ganga Sahai* v. *Kesri*, 37 A. 545 (556) P.C.; *Muthusami* v. *Simambedu*, 19 M. 408 (410) P.C.; *contra* in *Suba* v. *Sorafraz*, 19 A. 215.

(2) *Kalian* v. *Ram Chander*, 24 A. 128, approved in *Buddha Singh* v. *Laltu Singh*, 37 A. 604 (621) P.C.

(3) *Surya* v. *Lakshminarayana*, 5 M. 291, overruled in *Buddha Singh* v. *Laltu Singh*, 37 A. 604 (622, 623) P.C. approving *Chinnasami* v. *Kunju*, 34 M. 152.

(4) *Buddha Singh* v. *Laltu Singh*, 37 A. 604 P.C.

(5) *Surya* v. *Lakshminarayana*, 5 M. 291.

(6) *Buddha Singh* v. *Laltu Singh*, 37 A. 604 (622, 623) P.C.

(7) *Monekbai* v. *Naranji*, 12 Bom. L.R. 454.

(8) *Buddha Singh* v. *Laltu Singh*, 34 A. 663, affirmed O.A. 37 A. 604 P.C.; *Kashi Bai* v. *Moreshwar*, 35 B. 389.

(9) *Ranchara* v. *Kalingapa*, 16 B. 716, followed in *Buddha Singh* v. *Laltu Singh*, 34 A. 663 (675), affirmed O.A. 37 A. 604 P.C. To the same effect, *Kashi Bai* v. *Moreshwar*, 35 B. 389; *Chinnasami* v. *Kunju*, 35 M. 152.

(10) *Venkateswara* v. *Adinarayana*, 58 M. 323.

(11) Mit., II-V-5.

(12) II-VI-5.

2281. The Subodhini carries the enumeration of gotraj sapindas a little further adding the following:—

(26) Paternal great-grandfather's mother;
(27) Great-grandfather's father.
(28) Great-grandfather's brothers and their sons.
(29) Paternal great-grandfather's grandmother;
(30) Great-grandfather's grandfather.
(31) Great-grandfather's uncles and their sons;

adding, "the same analogy holds in the succession of Samanodaks."

2282. The Mayukh contends for a different series of heirs after the brother's sons:—

(11) Paternal grandmother.
(12) Sister.
(13) Paternal grandfather and brothers of half blood.
(14) Paternal great-grandfather.
(15) Paternal uncle and sons of a brother of half blood.

It does not pursue the enumeration further, and the principle stated by it, *viz.*, nearness of kin, does not clearly indicate the rule of continuation of this series.[1]

2283. Under the Hindu Law prevailing in the Bombay Presidency, the grandson of the paternal great-grandfather of the propositus is entitled to succeed in preference to the paternal aunt,[2] on the ground that, being a *gotraj*, he is preferred to a bandhu. So, a great-grandson of the great-grandfather comes in before the widow of a son of the great-grandfather, since she is not expressly mentioned or provided for in the text.[3]

2284. Remote Sapinda Heirs.—Grandsons in the fourth and fifth removed are *sapindas* and heirs to their common ancestors.[4] The text of the Mitakshara is in such cases decisive, unless it can be shown that its plain language has received qualification or judicial construction.[5] Such are descendants of the deceased from the fourth to the sixth degree:—

(26) Great great-grandson.
(27) Great great great-grandson.
(28) Great great great great-grandson.

Descendants of father of deceased from fourth to the sixth degree:—

(29) Brother's great-grandson.
(30) Brother's great great-grandson.
(31) Brother's great great great-grandson.

Descendants of grandfather of deceased from fourth to sixth degree:—

(32) Father's brother's son's son's son.
(33) Father's brother's son's son's son's son.
(34) Father's brother's son's son's son's son's son.

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(1) Colebrooke's note to Mit., II-VI-5.
(2) *Ganesh* v. *Woghu*, 27 B. 610.
(3) *Bayana* v. *Dinkar*, 6 N.L.R. 39.
(4) *Ram Singh* v. *Ugur Singh*, 13 M. I.A. 373.
(5) *Ram Singh* v. *Ugur Singh*, 13 M. I.A. 373 (399.)

Descendants of great-grandfather of deceased from fourth to sixth degree:—

(35) Father's father's brother's son's son's son.

(36) Father's father's brother's son's son's son's son.

(37) Father's father's brother's son's son's son's son's son.

Ancestors of deceased in the fourth degree and their descendants to the third degree:—

(38) Father's father's father's mother.

(39) Father's father's father's father.

(40) Father's father's father's father's son.

(41) Father's father's father's father's son's son.

(42) Father's father's father's father's son's son's son.

Ancestors of deceased in fifth degree and their discendants to the third degree:—

(43) Father's father's father's father's mother.

(44) Father's father's father's father's father.

(45) Father's father's father's father's father's son.

(46) Father's father's father's father's father's son's son.

(47) Father's father's father's father's father's son's son's son.

Ancestors of deceased in sixth degree and their descendants to the third degree:—

(48) Father's father's father's father's father's mother.

(49) Father's father's father's father's father's father.

(50) Father's father's father's father's father's father's son.

(51) Father's father's father's father's father's father's son's son.

(52) Father's father's father's father's father's father's son's son's son.

Descendants from fourth to sixth degree of ancestors in fourth degree:—

(53) Father's father's father's father's son's son's son's son.

(54) Father's father's father's father's son's son's son's son's son.

(55) Father's father's father's father's son's son's son's son's son's son.

Descendants from fourth to sixth degree of ancestors in fifth degree:—

(56) Father's father's father's father's father's son's son's son's son.

(57) Father's father's father's father's father's son's son's son's son's son.

(58) Father's father's father's father's father's son's son's son's son's son's son.

Descendants from fourth to sixth degree of ancestors in sixth degree:—

(59) Father's father's father's father's father's father's son's son's son's son.

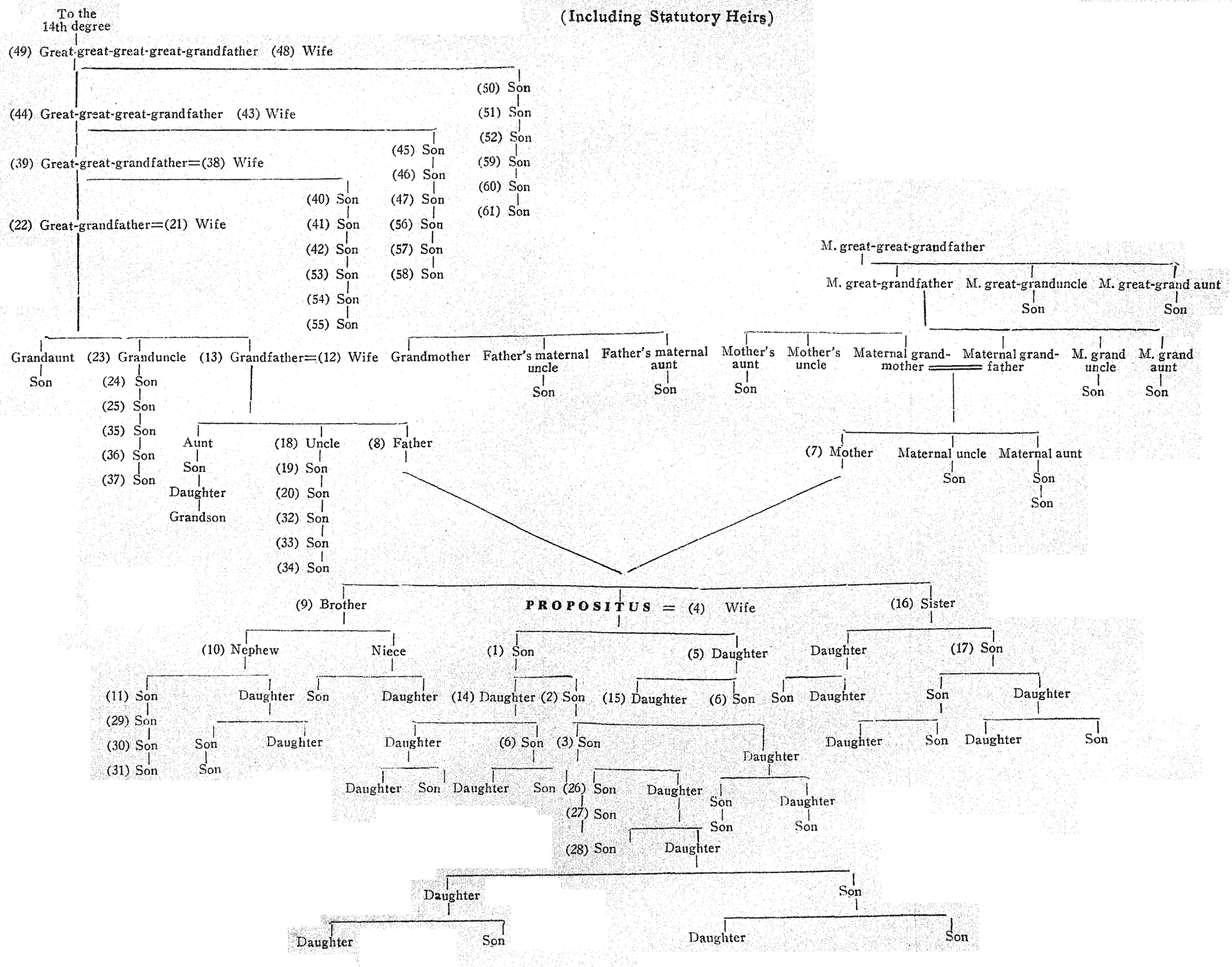
(60) Father's father's father's father's father's father's son's son's son's son's son.

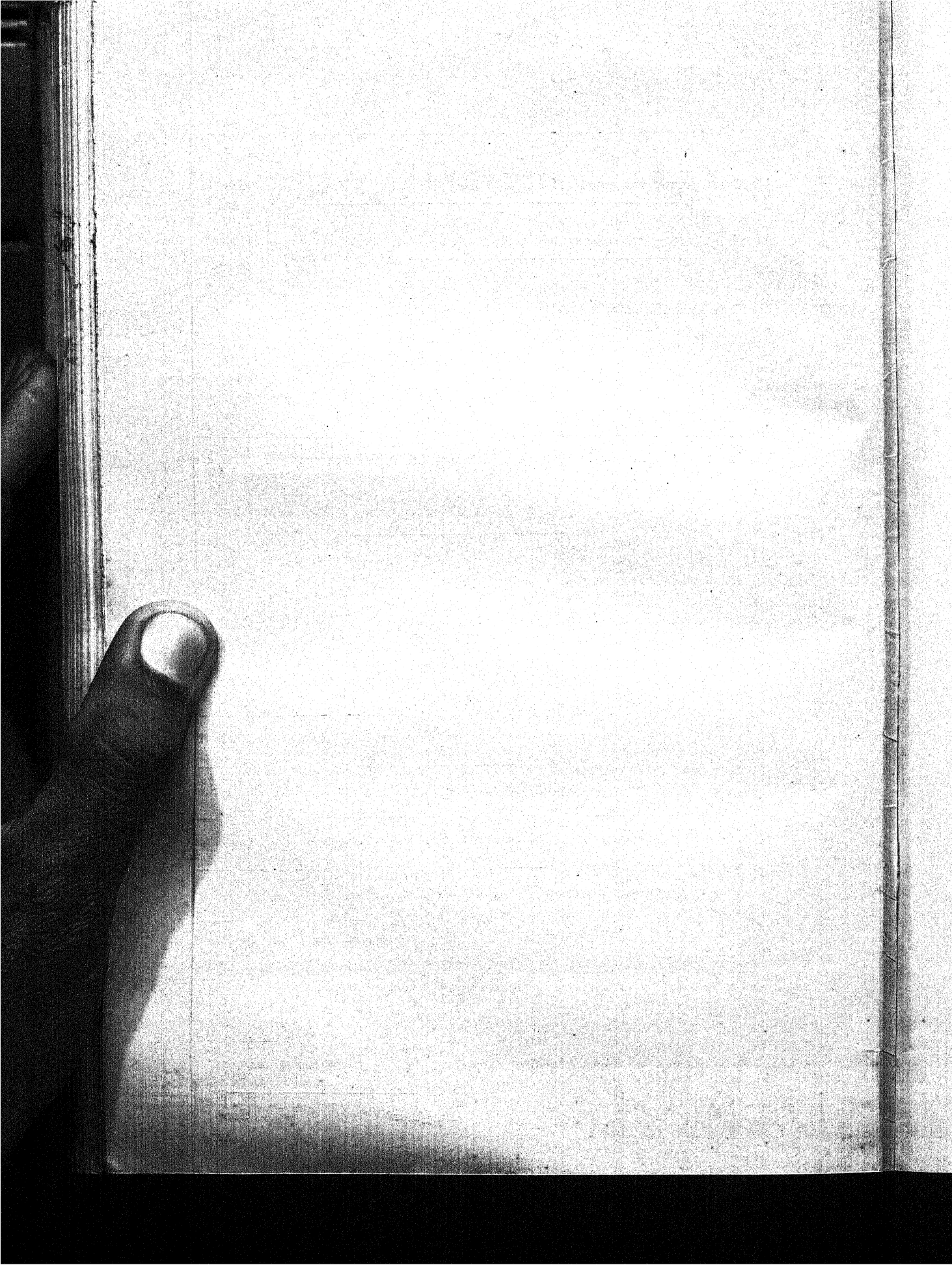
(61) Father's father's father's father's father's father's son's son's son's son's son's son.

MITAKSHARA SAPINDAS

(Including Statutory Heirs)

[To Face Page 954.





According to the Mitakshara, 57 relations of a person constitute his sapindas, as follows:—

Mitakshara.—1. His 6 male descendants in the male line.

2. His 6 male ascendants in the male line, and their wives.

3. The 6 male descendants in the collateral male line of each of his male ascendants.

4. His wife, daughter and daughter's son. After the sapindas come the samanodaks comprising 147 relations, *i.e.*, all his agnates from the eighth to the fourteenth degree, and even beyond, so long as the pedigree can be traced.[1]

5. Among brothers such as are of the whole blood take the inheritance in the first instance under the text before cited: "To the nearest sapinda the inheritance next belongs," since those of the half blood are remote through the difference of the mothers.[2]

6. If there be no uterine (or whole) brothers those by different mother inherit the estate.

7. On failure of brother's also, their sons share the heritage in the order of their respective fathers.

2285. Summary of Mitakshara Sapinda succession.—The order of Mitakshara succession is as follows:—

(1) Son.[3]
(2) Son's son.
(3) Son's son's son.
(4) Widows.
(5) Daughter.
(6) Daughter's son.
(7) Mother.[4] } Father. } under Mayukh.
(8) Father. } Mother. }
(9) Brother.
(10) Brother's son.
(11) Brother's son's son.
(12) Father's mother.
(12-A) Sister (in Bombay).[5]
(13) Father's father.
(14) Son's daughter.[6] } Added by Act II of 1929.
(15) Daughter's daughter.[6] }
(16) Sister[6] including half-sister.[7] }
(17) Sister's son.
(18) Father's brother.
(19) Father's brother's son.
(20) Father's brother's son's son.
(21) Father's father's mother.
(22) Father's father's father.
(23) Father's father's brother.
(24) Father's father's brother's son.
(25) Father's father's brother's son's son.
(26) Son's son's son's son.
(27) Son's son's son's son's son.
(28) Son's son's son's son's son's son.
(29) Brother's son's son's son.
(30) Brother's son's son's son's son.
(31) Brother's son's son's son's son's son.
(32) Father's brother's son's son's son.
(33) Father's brother's son's son's son's son.

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(1) *Kalka* v. *Mathura,* 30 A. 510 P.C. *Ram-Baran* v. *Kamla,* 32 A. 594; *Devkore* v. *Amritram* 10 B. 372.

(2) Mit., Ch. II-VI §§ 5-7; Dayabhag, Ch. XI, Sect. V, § 9; Smriti Chandrika, Ch. XI, Sect. IV, § 25.

(3) This, of course, includes a posthumous son; *Kusum Kumari* v. *Dasarathi,* 34 C.L.J. 323: 67 I.C. 210.

(4) The mother is a preferential heir to the father; *Subedar* v. *Bhikam,* (1922) Oudh 277: 9 O.L.J. 435.

(5) *Shidramappa* v. *Neelawa Bai,* 57 B. 377, *see* § 2272.

(6) The son's daughter, daughter's daughter, sister and sister's son have been introduced as heirs (between "father's father" and "father's brother") by Hindu Inheritance (Amendment) Act, II of 1929.

(7) *See* § 2274.

(34) Father's brother's son's son's son's son's son.
(35) Father's father's brother's son's son's son.
(36) Father's father's brother's son's son's son's son.
(37) Father's father's brother's son's son's son's son's son.
(38) Father's father's father's mother.
(39) Father's father's father's father.
(40) Father's father's father's father's son.
(41) Father's father's father's father's son's son.
(42) Father's father's father's father's son's son's son.
(43) Father's father's father's father's mother.
(44) Father's father's father's father's father.
(45) Father's father's father's father's father's son.
(46) Father's father's father's father' father's son's son.
(47) Father's father's father's father's father's son's son's son.
(48) Father's father's father's father's father's mother.
(49) Father's father's father's father's father's father.
(50) Father's father's father's father's father's father's son.
(51) Father's father's father's father's father's father's son's son.
(52) Father's father's father's father's father's father's son's son's son.
(53) Father's father's father's father's son's son's son's son.
(54) Father's father's father's father's son's son's son's son's son.
(55) Father's father's father's father's son's son's son's son's son's son.
(56) Father's father's father's father's father's son's son's son's son.
(57) Father's father's father's father's father's father's son's son's son's son.
(58) Father's father's father's father's father's son's son's son's son's son's son.
(59) Father's father's father's father's father's father's son's son's son's son.
(60) Father's father's father's father's father's father's father's son's son's son's son.
(61) Father's father's father's father's father's father's father's son's son's son's son's son.

Order of succession amongst Samanodaks.

323. The order of succession amongst Samanodaks is subject to the following rules:

(1) The nearer line excludes the line more remote; and

(2) A nearer kinsman excludes a remoter kinsman in the same line.

2286. **Analogous Law.**—As to the order of succession amongst samanodaks, the Mitakshara says: (*After citing Manu*) "To the nearest Sapinda the inheritance next belongs."[1] Nor is the claim in virtue of propinquity restricted to sapindas; but on the contrary, it appears from this very text that the rule of propinquity is effectual without any exception, in the case of samanodaks as well as other relatives when they appear to have a claim to the succession.[2]

The principle of propinquity then amounts to this. The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor, and amongst descendants of the same ancestor, the nearest excludes the more remote.

2287. **Samanodaks.**—Failing all *gotraj sapindas*, the inheritance falls to the *samanodaks*, who are all agnates beyond the degree of heritable *sapindas*,[3] *i.e.*, from the seventh to the thirteenth degree, 147 relations in number. The Mitakshara carries them even further so long as the pedigree can be proved.[4] But the Mitakshara text is somewhat ambiguous. It runs as follows:—

(1) Manu, IX-187.
(2) Mit., II-III-4.
(3) *Kalka* v. *Mathura*, 30 A. 510 P. C.; *Ram Baran* v. *Rajwanti*, 32 A. 594 (597).
(4) Mit., II-V-6; Mayukh, IV-III-8. To the same effect, Manu, V-60. See *Devkore* v. *Amrit Ram*, 10 B. 372 (380); *Ram Baran* v. *Kamla Prasad*, 32 A. 594; *Hira Singh* v. *Vir Singh*, (1918) P.R.

Mitakshara.—"If there be none such, the succession devolves on *samanodaks*, and they must be understood to reach to seven degrees beyond *sapindas*, or else as far as the limits of knowledge as to birth and name extend. Accordingly, Vrihat Manu says,[1] 'The relation of the *sapindas* ceases with the seventh person; and that of *samanodaks* extends to the fourteenth degree; or as some affirm, it reaches as far as the memory of birth and name extends.' This is signified by *gotra*."[2]

It is held that both Manu and Vidynaneshwar limited the *samanodaks* to the fourteenth degree, though they quoted a contemporary opinion favouring its further extension, which they did not endorse,[3] but in other cases the correctness of the above reading is questioned, it being held that the correct reference to Manu is as follows:—

Manu.—"The *sapinda* relationship ceases with the seventh person (in the line), and that of *samanodaks* ends when births and names are no longer known.[4] It has accordingly been held that the *samanodak* relationship is not limited to the fourteenth degree, but must be held to extend further so long as the relationship can be traced."[5]

2288. The samanodaks thus comprise the following relations:—

(1) The seven descendants of the propositus, from the seventh to the thirteenth degree (=7).

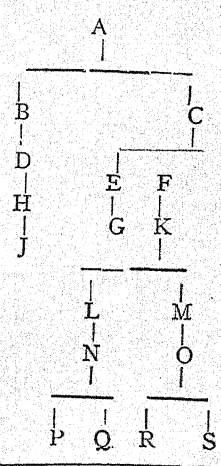
(2) The seven ascendants of the owner, from the seventh to the thirteenth degree (=7).

(3) The seven descendants from the seventh to the thirteenth degree in each of the 6 collateral lines of the owner (=6×7=42).

(4) The 13 descendants in each of the collateral lines of the 7 ascendants, who are up in the line from the seventh to the thirteenth degree from the owner (=7 ×13=91).

(Total=147.)

2289. All *samanodaks* inherit in the order of propinquity,[6] one related in the seventh degree excluding one related in the eighth degree, and so on. In one case the *samanodaks* were related as shown in the pedigree.



One Tulsi was the widow of *G*, and the question was who were her next reversioners, whether *P*, *Q*, *R* and *S* on the one side or *J* on the other. It was held that *P*, *Q*, *R* and *S* were nearer in degree as regards propinquity than *J*, in that while they were related to *G* through his grandfather, *J* was only related to him through his great-grandfather, and could not, therefore, be preferred to them.[7]

No. 47:43 I.C. 560; *contra* in *Rama Rao* v. *Kuttiya*. 40 M. 654 (Relationship should not be extended beyond the 14th degree).

(1) Manu, V-60.

(2) Mit., II-V-6.

(3) *Rama Row* v. *Kuttiya*, 40 M. 654 (657-659); *Narain* v. *Chandihin*, 9 A. 467.

(4) So quoted in Mayukh, IV-8, (Mandlik p. 82).

(5) *Devkore* v. *Amritram*, 10 B. 372 (380), followed in *Ram Baran* v. *Kamla Prasad*, 32 A. 594; *Hira Singh* v. *Vir Singh*, (1918) P.R. No. 47: 43 I.C. 460; Cf. *Kaika Pershad* v. *Mathura Parshad*, 30 A. 510 P.C. Sarv. Inh., (2nd Ed.), 569.

(6) Manu, IX-187, cited in Mit. II-III-3.

(7) *Uman Prasad* v. *Debi Prasad*, 2 A.L.J. 705. *See* the table of succession in Sarv. Inh., 656.

2290. The order of succession amongst *samanodaks* is as follows:—

Failing all *gotraj sapindas*, the inheritance passes to what are called the *samanodaks*, who are all agnates beyond the degree of a *sapinda*.

The order of succession amongst the *samanodaks* appears to be governed by two principles, namely:—

(1) The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor.

(2) Amongst the descendants of the same ancestor the nearer excludes the more remote.

In the case of *samanodaks*, it is not possible to apply the test of religious efficacy.

2291. The following order of succession of *samanodaks* is given by Sir Henry Cunningham in his Digest of Hindu Law:—

(1) Seven generations from the grandson's grandson's son's son exclusive.

(2) Seven generations from the brother's son's son's son's son's son exclusive.

(3) Seven generations from the father's brother's brother's son's son's son's son's son exclusive.

(4) Seven generations from the father's father's brother's son's son's son's son's son exclusive.

(5) Seven generations from the father's father's father's father's son's son's son's son's son's son exclusive.

(6) Seven generations from the father's father's father's father's father's son's son's son's son's son's son's son's son.

(7) Seven generations from the father's father's father's father's father's father's son's son's son's son's son's son's son.

(8) Mother of father's father's father's father's father's father.

(9) Father's father's father's father's father's father's father.

(10) His male descendants up to thirteen generations.

(11) Mother of father's father's father's father's father's father's father.

(12) Father's father's father's father's father's father's father's father.

(13) His male descendants up to thirteen generations.

Similarly, up to thirteenth grandfather exclusive.

For all practical purposes this marks the extreme verge of provable *samanodak* relationship, and the Privy Council regard it as the legal limit.[1] And so does the Dayabhag.

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(1) *Atmaram* v. *Baji Rao*, (1935) P.C. 57; *Rama Row* v. *Kuttiya*, 40 M. 654; *contra* in *Devkore v. Amrit Ram*, 10 B. 372; *Ram Ratan* v. *Kamla Prasad*, 32 A. 594 (in which, however, the *contra* held in *Narain* v. *Chandihin*, 9 A. 467, was overlooked); *Hira Singh* v. *Vir Singh*, (1918) P.R. No. 47: 43 I.C. 460.

III. Bandhus.

Heritable Bandhus.

324. **(1) All bandhus do not inherit, but only those who are related to the propositus within five[1] degrees of the common ancestor or (within five or seven degrees of the common ancestor on the mother's or the father's side of the claimant respectively).[2]**

(2) The deceased owner and the *bandhu* claiming the heritable right must be sapindas of each other, either through themselves or through their father and mother.[3]

2292. **Analogous Law.**—The following texts mention the heritable *bandhus*:—

Mitakshara.—"1. On failure of *gotraj* as the *bandhus* are heirs. *Bandhus* are of three kinds: (*i*) those related to the person himself, (*ii*) to his father or (*iii*) to his mother, as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncles must be reckoned his mother's cognate kindred.'

"2. Here by reason of near affinity, the *atma bandhus* are his successors in the first instance; on failure of them his *pitri bandhus*, or if there be none, his *matri bandhus*. This must be understood to be the order of succession here intended."[4]

Two questions arise in a case of *bandhu* succession: *First*, Is the claimant a bandhu? and *secondly*, if so, is he the nearest bandhu? These two questions are not solved by any text in the Mitakshara, which contains a meagre reference to them.

2293. The fact is that the law of *bandhu* succession is of later growth. Manu does not mention *bandhus* among the heirs at all. They were for the first time mentioned by Yadnyavalkya who provided that they should offer *pindas* even to the manes on the maternal side.[5] The *pinda* was offered to the three ascendants of the mother but no *lepa* and no water were offered to the higher ascendants as in the case of agnatic *sapindas*. The right of inheritance thus became limited to five degrees. Both Manu and Yadnyavalkya made succession dependent upon these offerings. As such, they laid down the rule which is still the primary rule of succession under the Dayabhag system. But by the time the Mitakshara was composed (§ **129**) the right of inheritance elsewhere became more dependent upon consanguinity than upon the right to offer funeral oblations, which consequently receded into the background, but was not wholly ignored. The Mitakshara only enumerated nine Bandhus classified into three classes, which the Viramitroday (§ **142**) enlarged by the

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(1) *Ramchandra* v. *Vinayak*, 42 C. 384 (420) P.C.; *Gajadhar* v. *Gauri Shankar*, 54 A. 698 F.B.

(2) *Kesar Singh* v. *S. S.*, 49 M. 652 (664, 665, 682, 689).

(3) Mit., II-II-4; Mayukh, IV-VIII-13; *Ramachandra* v. *Vinayak*, 42 C. 384 (420) P.C.; *Adit Narayan* v. *Mahabir*, 48 I.A. 86: (1921) P.C. 53.

(4) Mit., II-VI-1, 2.

(5) Yad. I-X-242 (Mandlik) 190.

inclusion of maternal uncle.[1] It held the Mitakshara enumeration as merely illustrative and not exhaustive, and as already remarked, its view was accepted by the Privy Council.[2] This led to the inclusion of other heirs with the result that their list now comprises no less than 123 relations.

2294. But the multiplication of *bandhus* naturally gave rise to the question as to their relative preference and rules became necessary to ascertain their right and their respective priority. Of these, those stated in the section are generally accepted. But as it was to be expected, the courts being left with scanty guidance from the texts and without any assistance from the Legislature, which some Judges regret,[3] divergences became soon apparent, with the result that they have formulated other rules more or less supplementary which at times are not mutually reconcilable, as will be seen presently. It is proposed to examine first the general rules and then advert to the local rules.

2295. Bandhus.—With the exception of the daughter's son, who succeeds by virtue of a special text[4] all other bandhus take the last place in the order of succession, which, as already remarked, first falls on the *gotraj sapindas*, then on the *samanodaks* and lastly on bandhus who cannot inherit so long as there is a *sapinda* or a *samanodak* in existence.[5] As such, the *samanodak*, however remote, even in the thirteenth degree, will succeed, in preference to the deceased sister's son, who is a *bandhu*.[6]

The term "bandhu" has already been defined. (**S. 312**). A bandhu is a cognate sapinda, that is to say, one related through a female, not more than five degrees removed from the propositus or the common ancestor.[7] The bandhus are, therefore, also called *bhinna gotra sapindas*. A person is a bandhu if he can show that he is related to the deceased through a female and that he is his sapinda. There must be at least one female between the propositus and the bandhu, and in the case of bandhus *ex parte paterna*, there cannot be more than two females between them.[8]

2296. On the authority of an anonymous[9] text, the Mitakshara divides bandhus into three clauses:—

(1) **Atma Bandhus** comprising:—

(1) Father's sister's son.[10]

(1) III-VII-5.

(2) *Girdhari Lall* v. *Bengal Government*, 12 M.I.A. 448 (457).

(3) *Subramania* v. *Ranganath*, 44 M. 114 (120), reversed on the merits O.A. *Vedachela* v. *Subramania*, ib., 753.

(4) Mit., II-II-6; Mayukh, IV-VIII. 13; Viv. Chint. (Tagore), 294; *Srikrishna*, XI-II-28.

(5) Mit., II-V-1; *Jeebnath* v. *Court of Wards*, 23 W.R. 409 P.C.; *Ram Singh* v. *Ugur Singh*, 13 M.I.A. 373; *Narain* v. *Chandi Din*, 9 A. 467; *Dindayi* v. *Bhatan Lall*, 11 W.R. 300.

(6) *Rani* v. *Khogendra*, 31 C. 871 (882) P. C. (Mithila case); *Kalika Prasad* v. *Mathura Prasad*, 30 A. 510 P. C.; *Dig Daji* v. *Bhatan*, 11 W.R. 500.

(7) *Ramchandra* v. *Vinayak*, 42 M. 384 (420).

(8) Sarv. Inh. 689.

(9) Balam Bhat ascribed it to Vriddh Satatap, while it is quoted in the Mayukh as a text of Baudhayan.

(10) Which includes the grandson; *Adit Narayan* v. *Mahabir*, 60 I.C. 251: 19 A.L.J. 208: 48 I.A. 86 P.C., followed in *Harihar Prasad* v. *Ram Daur*, 47 A. 172 (178). The rule appears to the Punjab Hindus in the absence of custom; *Tani* v. *Rokhi Ram*, 1 L. 554. Father' sister's son is heir preferable to father's brother's daughter; *Kenchava* v. *Girimallappa*, 48 B. 569 P.C. Father's sister's son's son is heir preferable to grandmother's brother's son; *Harihar Prasad* v. *Ram Daur*, 47 A. 172.

(2) Mother's sister's son.[1]
(3) Mother's brother's son.[2]

(2) **Pitri Bandhus** comprising:—
(1) Father's father's sister's son.
(2) Father's mother's sister's son.[3]
(3) Father's mother's brother's son.

(3) **Matri Bandhus** comprising:—
(1) Mother's father's sister's son.[4]
(2) Mother's mother's sister's son.
(3) Mother's mother's brother's son.

This enumeration is merely illustrative and not exhaustive.[5] For example, it excludes the maternal uncle,[6] and the father's maternal uncle, though their sons are mentioned. So, again, the sister's son[7] and the sister's daughter's sons[8] are heritable *bandhus*, though neither of them is mentioned in the list. So, again, a mother's sister's son's son is an *atma bandhu*, though he is omitted from the above list. But none-the-less, he excludes the mother's paternal aunt's son, who is a *matri bandhu* and so mentioned.[9]

2297. In addition to the textual *bandhus*, other relations are classed as *bandhus*. Thus, in Bombay, the daughters of descendants and collaterals within seven degrees are *bandhus*,[10] who come in after the *bandhus* expressly named in the Mitakshara.[11] Such is the son's daughter,[12] daughter's daughter,[13] or a brother's daughter[14] or a sister's daughter,[15] which is questionable and has been questioned.[16]

In Madras, the son's daughter,[17] daughter's daughter,[18] brother's daughter,[19] father's sister[20] are *bandhus*. But a sister's daughter is not

(1) *Harihar* v. *Ram Daur*, 22 A.L.J. 1012: 82 I. C. 1032: (1925) A. 17. He has priority over brother's daughter; *Balkrishna* v. *Ramkrishna*, 22 Bom. L. R. 1442; also over father's brother's daughter; *Kenchava* v. *Girimallappa*, 48 B. 569 P.C.; also over maternal uncle; *Venkatarama* v. *Boregowda*, 2 My. L.J. 183.

(2) Mother's brother's son and mother's sister's son take equally; *Rajappa* v. *Gangappa*, 47 B. 48. *Contra*, the former excludes the latter, *Rame Reddi* v. *Gangi Reddi*, 48 M. 722 (733); *Ramcharan Lal* v. *Rahim Baksh*, 38 A. 416.

(3) *Ram Sarup* v. *Nadir Mal*, 14 I. C. (A.) 55.

(4) Preferred to the maternal uncle, on the ground that he is nearer to the stock or line, to which each claimant belongs; *Venkatarama* v. *Bore Gowda*, 2 My. L. J. 183.

(5) *Girdhari Lal* v. *Government*, 12 M.I.A. 448, explained in *Ramachandra* v. *Vinayak*, 42 C. 384 (416, 417) P.C.; *Adit Narayan* v. *Mahabir*, 60 I.C. (A.) 251 P.C.; *Gajadhar* v. *Gouri Shankar*, 54 A. 698 F.B.

(6) *Girdhari Lal* v. *Government*, 12 M.I.A. 448; *Muthusami* v. *Simambedu*, 19 M. 405 P.C.; *Vedachala* v. *Subramania*, 44 M. 753 P.C.

(7) *Omrit* v. *Lukee*, 10 W.R. 76 F. B.; *Bishan Dayal* v. *Jaiseri*, (1918) Pat. 323: 48 I.C. 746.

(8) *Umaid Bahadur* v. *Udoi Chand*, 6 C. 119 F.B.

(9) *Adit Narain* v. *Mahabir*, 60 I.C. (A.) 251 P.C.

(10) W. & B., H.L., 137, 496, 498.

(11) *Ib.*, 491.

(12) *Venolal* v. *Parjaram*, 20 B. 173.

(13) *Gangaram* v. *Ballia*, (1876) B. P. J. 31; *Lallubhai* v. *Mankuvarbai*, 2 B. 388 (446), affirmed O.A. *Lallubhai* v. *Cassibai*, 5 B. 110 P.C.; *Tuljaram* v. *Mathuradas*, 5 B. 662 (672); *Madhav Ram* v. *Dave*, 21 B. 739.

(14) W. & B., H.L., (3rd Ed.), 497.

(15) *Balambhat*, cited in W. & B., H. L., (3rd Ed.), 130 *Foot-note* (C.).

(16) W. & B., H.L., (3rd Ed.), 476.

(17) *Nallanna* v. *Ponnal*, 14 M. 149.

(18) *Ramappa* v. *Arumugah*, 17 M. 182.

(19) *Venkatasubramaniam* v. *Thayarammah*, 21 M. 263; *Kutti* v. *Radakristna*, 8 M.H.C.R. 88; *Ramappa* v. *Arumugath*, 17 M. 182.

(20) *Narasimma* v. *Mangammal*, 12 M. 10; *Chinnammal* v. *Venkatachella*, 15

a *bandhu* in Madras[1] as she is in Bombay. Various reasons have been given in Bombay and Madras for letting in these relations. But the fact is that the woman's right had not developed when the Mitakshara was written, and its subsequent acceptance by the courts as the last word in Hindu Law has stereotyped the inequity which, however justified in a patriarchal age, is wholly unsuitable to modern times.

But though the Bombay and Madras courts have succeeded in letting in the female relations named, the courts in the other Mitakshara countries strictly follow the text of the Mitakshara, admitting none but those expressly mentioned therein as heirs.[2] As such, even a sister was excluded, because she was not expressly named.[3]

Clause (1).

2298. Who is a Heritable Bandhu.—The term "*bandhu*" cognate relation, and if his right of inheritance were not limited, his list would, as Vidnyaneshwar points out, end with the human race. Hence a limit had to be placed upon such succession. And the question is what is the limit? In the *Acharkand* of Mitakshara,[4] the limit imposed for the purpose of prohibiting marriage is the fifth and the seventh degree on the mother's and father's side[5] and the question is whether it is also the limit for the purpose of inheritance. In a case of a claim to succession to a person who was related to the propositus in the sixth degree on the mother's side from the common ancestor, this question was considered by the Privy Council who declared that the list of heritable *bandhus* ceased with the fifth degree,[6] but in a Madras case,[7] this case was distinguished on the ground that their observations, though general, were intended to be limited to the case before them, which, being a claim *ex parte materna* fell within the general rule given in the *Acharkand* of Mitakshara; that as such, it did not go into or negative a claim of a *bandhu ex parte paterna* seven degrees remote, which, according to the Madras High Court, is the true limit of such *bandhu* succession.[8] In a full bench case, the Allahabad High Court have held the Privy Council view as equally applicable to both classes of *bandhus* on the ground that after the fifth degree the second test of mutual sapindaship would be wanting.[9]

Clause (2).

2299. Mutual Sapindaship.—It has already been pointed out before, that in order that one person should inherit to another by reason of his sapinda relationship, it is not only necessary to show that he was the sapinda of the deceased, but also that the deceased was his sapinda. In other words, mutual sapindaship is essential to create a heritable right. In the case of agnatic kinsmen, mutuality is not insisted on, because it is always there. But in the case of *bandhus* the fact that one person is the sapinda of another, does not necessarily imply that the two are sapindas of each. Take, for instance, the following tree: *P* is the propositus, *A* is

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M. 421; *Venkatasubramaniam* v. *Thayarammah*, 21 M. 263.

(1) *Sundrammal* v. *Rangasami*, 18 M. 193.

(2) *Ram Dyal* v. *Magnee*, 1 W. R. 227; *Treelochun* v. *Raj Kishan*, 5 W. R. 214; *Mothooranath* v. *Eusuff*, 14 W. R. 356; *Jullessur* v. *Uggur*, 9 C. 725; *Balaji* v. *Maina*, (1883) C.P. S. C., Pt. VIII, 102; *Lalita* v. *Sita Ram*, 6 C. P. L.R. 138; *Lochan* v. *Babai*, 5 N.L.R. 161.

(3) *Jagat Narain* v. *Sheo Das*, 5 A. 311; *Jullessur* v. *Uggar*, 9 C. 725; *Lochan* v. *Babai*, 5 N.L.R. 161.

(4) Mit., II-V-7.

(5) *See* § 2226.

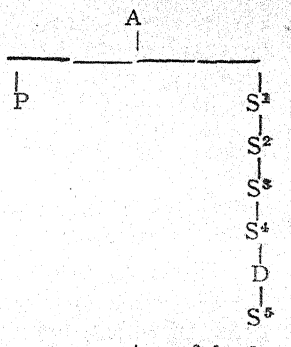
(6) *Ramchandra* v. *Vinayak*, 42 C. 384 (420) P.C.

(7) *Kesar Singh* v. *S. S.* 54 M. 693 F.B.

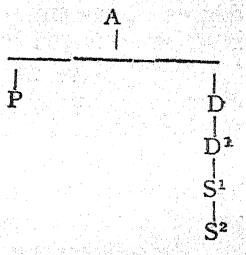
(8) *Kesar Singh* v. *S. S.*, 49 M. 652.

(9) *Gajadhar Prasad* v. *Gouri Shankar*, 54 A. 698 F.B.

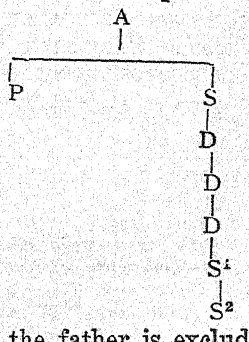
his father; S^1—S^4, S^5 are his male descendants, and D a female descendant. Now, Since the sapinda relationship reaches to the 6th degree in the father's line and 4th degree in the mother's line, it follows that P who is related to S^5 through his father A, and in the 6th degree of A (the common ancestor of both), is the *sapinda* of S^5. But S^5 being related to P through his mother D, is not his *sapinda*, because *sapinda* relationship in the maternal line does not extend beyond the 4th degree, *i.e.*, beyond S^2; and in order to be P's sapinda, S^5 should have been within 4 degrees of A, the common ancestor of both A and S^5.



2300. Now, two persons may be related as *sapindas* to each other either through themselves or through their mother and father[1] Take, for instance, the following table for illustration. P is the propositus, A his father, D the daughter of A, D^1 the daughter of D, whose son is S^1 whose son is S^2. Now, P and S^1 are sapindas of each other, but not P and S^2 although S^2 is within six degrees from the common ancestor, yet S^2, not being the descendant of the line of maternal grandfather, either of S^2 or of his father S^1 or his mother, they are not sapindas to each other; but P being a sapinda of S^1, through his mother, they are sapindas of each other.



2301. Take, for instance, the following tree. Here the question is who is to inherit to P. Now, S^1 cannot; because he is related to P through the common ancestor, A, in the mother's line and being beyond the fifth degree is not his *sapinda*, though P, being related to him through A in the father's line, is his *sapinda*. Consequently, the test of mutuality failing, S^1 is not the heir of P, though his son S^2 is, because claiming as he does through his father S^1, he is allowed 7 degrees and as such, being the *sapinda* of A who is also his *sapinda*, he will inherit to P. This rule leads to the anomaly that while the father is excluded, the son is not. It is an anomaly, but an anomaly which necessarily follows from the rule approved by the Privy Council,[2] whose reference to the father's and the mother's line follows an archaic description, but overlooks the fact that a *bandhu* includes other relations in a line in which a female intervenes.



(1) *Umaid Bahadur* v. *Udoi Chand*, 6 C. 119 (128) F.B.; *Babulal* v. *Nanuk*, 22 C. 339; *Ramchandra* v. *Vinayak*, 42 C. 384 (420) P.C.

(2) *Ramchandra* v. *Vinayak*, 42 C. 384 P.C.; *Adit Narain* v. *Mahabir*, 6 Pat.L. J. 140 P.C.; *Shib Sohai* v. *Saraswati*, 37 A. 583, explained in *Ram Sia* v. *Bua*, 47 A. 1013.

It need scarcely be added, that, in counting the degrees, law follows the canonical rule of counting both the heirs and the propositus or the common ancestor, so that if these are excluded, the intervening relations would be reduced to 5 and 3 respectively.

Order of succession amongst Bandhus.

325. The order of succession among *bandhus* is subject to the following rules:—

(1) *Bandhus* take in the following order:—(1) *atma bandhus;* (2) *pitri bandhus* and (3) *matri bandhus*.[1]

(2) Of *bandhus* of the same class, where both are expressly mentioned in the Mitakshara, the order of preference is according to the order in which they are mentioned therein;[2]

(3) *Bandhus* in a nearer line exclude those of a line more remote, and a nearer *bandhu* excludes a remoter *bandhu* in the same line;[3]

(4) Other conditions being equal, amongst *bandhus* of the same degree of descent from a common ancestor, a *bandhu* of the whole blood is to be preferred to one of the half blood.[4]

(5) Save as provided in clause (4), among *bandhus* of the same class, propinquity to the propositus is measured by their efficacy in conferring spiritual benefit on him;[5]

(6) As between *bandhus* of the same class and degree, a male is to be preferred to a female; and a *bandhu* descended through a male is to be preferred to one descended through a female;[6]

This clause applies only to Bombay,[7] Berar and Madras.

Explanation.—(1) A bandhu *ex parte paterna* is not to be preferred to a bandhu *ex parte materna* when the latter is nearer in degree in the sense that the oblations offered by the former are more efficacious than those offered by the latter.

Explanation (2) : *to clauses* (2) *and* (7).—*Bandhus* are said to belong to the same class when they are all *atma bandhus, pitri bandhus* or *matri bandhus*. They are of the same degree when they are all equally related to the propositus either directly to him or through a common ancestor.[8]

2302. Analogous Law.—Having once established the sapinda, relationship as provided, in the last section we have next to select out the

(1) Mit., II-VI-2, followed in *Saguna* v. *Sadashiv*, 26 B. 710 (715).

(2) *Ram Dyal* v. *Magnee*, 1 W.R 227; *Trilocan* v. *Raja Kishan*, 5 W. R 214; *Mothooranath* v. *Eusuff*, 14 W. R. 356; *Jullesur* v. *Uggur*, 9 C. 725; *Balaji* v. *Maina*, (1883) C. P. S. C., Pt. VIII, 102; *Lalita* v. *Sitaram*, 6 C. P.L.R. 138; *Lochan* v. *Babai*, 5 N.L R. 161.

(3) *Narasamma* v. *Mangamma*, 13 M. 10; *Kedachala* v. *Subramania*, 44 M. 753 P.C.; *Kenchava* v. *Girimallappa*, 48 B. 569 (578, 579) P.C.; *Balasubramanya* v. *Subbayya*, (1938) P.C. 34; *Muthusami* v. *Simambedu*, 19 M. 405 (409) P.C. affirming O. A. *Muthusami* v. *Muthukumarsami*, 16 M. 23 (30); *Kalimuthu* v. *Ammamuthu*, 58 M. 238 (243).

(4) *Jatindra Nath* v. *Nagendra Nath*, 59 C. 576 P.C.; *Muttuswami* v. *Muthukumaraswami*, 16 M. 23, affirmed O.A. *Muthuswami* v. *Simambedu*, 19 M. 405 P.C., followed in *Vedachela* v. *Subramania*, 44 M. 753 P.C.; *Marudappa* v. *Collector*, (1935) M. 1057.

(5) *Jatindra Nath* v. *Nagendra Nath*, 59 C. 576 P.C.; *Vedachela* v. *Subramania*, 44 M. 753 P.C.; approving *Muthusami* v. *Simambedu*, 16 M. 23 (30).

(6) *Muthuswami* v. *Simambedu*, 19 M. 405; *Ganga Sahai* v. *Kesri*, 37 A. 576 P. C.; *Jatindra Nath* v. *Nagendra Nath*, 59 C. 576 P.C.

(7) *Vithalrao* v. *Ramrao*, 24 B. 317; *Shanker* v. *Kashinath*, 51 B. 194 F.B.

(8) *Kenchava* v. *Girimallappa*, 48 B. 569 (578, 579) P.C.; *Ramcharanlal* v. *Rahim Baksh*, 38 A. 416; *Rami Reddi* v. *Gangi Reddi*, 48 M. 722 (contra *Appandai* v. *Bagubali*, 33 M. 439 dissented from).

nearest sapinda, that is to say, the heir, between whom and the deceased there must be closest community of blood. Now, how is this to be determined? The following text offers a solution:—

Mitakshara.—"Here, by reason of near affinity, the *bandhus* of the deceased himself are his successors in the first instance; on failure of them, his father's *bandhus;* or, if there be none, his mother's *bandhus.* This must be understood to be the order of succession here intended."[1]

2303. Classification of Bandhus.—The Mitakshara divides *bandhus* into three classes: those (1) related to the person himself,—*atma bandhus,* (2) to his father,—*pitri bandhus,* or (3) to his mother,—*matri bandhus.* The right of succession among these classes is governed by the propinquity of the class: no *pitri bandhu* succeeds until the class of *atma bandhus* is exhausted, and no *matri bandhu* succeeds until the classes of *atma bandhus* and *pitri bandhus* are exhausted[2] This rule—in preferring the nearer to the more remote—is not dependent on individual propinquity or on the efficacy of offerings to a deceased person. As such, the mother's brother, who is an *atma bandhu,* is entitled to succeed in preference to the father's father's sister's son, who is a *pitri bandhu*[3] and the mother's father's daughter's son's son, being an *atma bandhu,* is to be preferred to the mother's father's daughter's son, who is a *matri bandhu.*[4]

Clause (1).

2304. The tern "*atma bandhu*" is sub-divided into three sub-divisions: (*i*) descendants of the propositus, *e.g.,* son's daughter's son, daughter's son's son, and daughter's daughter's son of whom the second is entitled to preference over the third.[5] It is only, after this sub-division of the person's own descendants are exhausted that we turn to (*ii*) the father's descendants, and (*iii*) the descendants of the grand-father. It is only after the exhaustion of those three sub-divisions of *atma bandhus* that succession goes to the *pitri bandhus,* and failing these to the *matri bandhus.*[6]

So far as the above text goes, it is conclusive. But the question still remains whether this order of precedence was limited only to the bandhus named in the Mitakshara or applies equally to others not therein named. That it must apply to all is clear from the fact that it is now settled that the Mitakshara list is merely illustrative, and not exhaustive, from which it follows, and it has been so held, that the same rule as to propinquity should be applied in testing the claim of all bandhus.[7] At one time, considerations of religious efficacy were held to determine the preference,[8] but this is not the sole test, for as stated in the Virmitro-

(1) II-VI-2; *Saguna* v. *Sadashiv,* 26 B. 710 (715); *Adit Narain* v. *Mahabir,* 60 I.C. (A.) 251 (254) P.C.

(2) Mit., II-VI-2, cited *ante* § 2723; *Adit Narayan* v. *Mahabir,* 48 I.A. 86 : 60 I.C. 251 (254) P.C.; *Vedachela* v. *Subramania,* 44 M. 753 (763) P.C.; followed in *Kenchava* v. *Girimallappa,* 48 B. 569 (578) P.C.; *Muthusami* v. *Simambedu,* 19 M. 405 P.C.; affirming O.A. *Muttusami* v. *Muttukumarasami,* 16 M. 23 (30); *Krishna Ayyangar* v. *Venkatarama,* 29 M. 115; *Chaman Lal* v. *Doshi Ganesh,* 28 B. 453.

(3) *Muthusami* v. *Simambedu,* 19 M. 405 P.C.

(4) *Vedachela* v. *Subramania,* 44 M. 753 (763) P.C.

(5) *Tirumalachariar* v. *Andalamma,* 30 M. 406.

(6) *Kalimuthu* v. *Ammamuthu,* 58 M. 238 (249).

(7) *Muthusami* v. *Muthukumaraswami,* 16 M. 23, affirmed O.A. *Muthusami* v. *Simambedu,* 19 M. 405 (410) P.C.; *Appandai* v. *Bagubali,* 33 M. 439 (443); *Adit Narain* v. *Mahabir,* 60 I.C. (A.) 251 P.C.; *Vedachala* v. *Subramania,* 41 M. 753 P.C.

(8) *Ram Singh* v. *Ugar Singh,* 13 M. I.A. 373 (392); *Suba Singh* v. *Sarafraz,* 19 A. 215 (223, 224, 226, 231); *Muttu-*

daya, "nearness of propinquity is alone the criterion of succession,"[1] but nearness is to be judged by the test of spiritual efficacy.

Clause (2).

2305. Bandhus expressly mentioned in the Mitakshara.—It was also at one time suggested that the *bandhus* enumerated in the Mitakshara or by Satatap must be given preference over others; but this view, too, has been negatived by the courts, in which the contest lay between the sister's son[2] and the maternal uncle,[3] against the mother's sister's son. "But the introduction of the maternal uncle and the sister's son into a list of *bandhus*. so as to effect a breach in the order of persons named, is no reason for repudiating the notion of order amongst the persons *inter se* who have been named."[4] But this view was dissented from in a later case,[5] and must now be held to have been impliedly overruled by the Privy Council.[6] In one case, the contest lay between the mother's brother's son and the mother's sister's son and the court held the former entitled to preference on account of his superior spiritual efficacy, though, in Mitakshara, the mother's sister's son is mentioned before the mother's brother's son. And the Privy Council have held a maternal uncle (not even named in the Mitakshara) to be preferred to the paternal aunt's son (who has the first place among *pitri bandhus* there).

When Two Females Intervene.

2306. Another ground of preference equally unsupported by the texts is founded upon the fact that "the general preference exhibited by the Mitakshara for the male over the female line. . . . may legitimately be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes only one female link, to that claimant who is separated from the stem by two such links."[7] But this view has been dissented from elsewhere.[8] It may then be stated that apart from these divergences, the rule stated in the clause remains, and is all that has received the consensus of approval.

Clause (3).

2307. The Nearer Excludes the Mode Remote.—This clause merely repeats the often-quoted general rule of inheritance propounded by Manu, and repeated by all commentators, *viz.*, "To the nearest *sapinda* the inheritance next belongs."[9] The question is how the nearness of the *sapinda* to the deceased is to be determined. A large number of rules have been suggested (*i*) that nearness should be determined by religious efficacy; (*ii*) that it should be determined by nearness is degree; but if both are equal in

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sami v. *Muttukumara*, 16 M. 23 (30); *Balusami* v. *Narayana*, 20 M. 342 (348).

(1) Virmitrodaya p. 194, cited and followed in *Appandai* v. *Bagubali*, 33 M. 439 (445); *Lallubhai* v. *Mankuvarbai*, 2 B. 388, approved in *Ramchand* v. *Vinayak*, 42 C. 384 (409) P.C.; *Gauri Shankar* v. *Manrai*, (1919) Pat. 441.

(2) *Gunesh* v. *Nil Komul*, 22 W.R. 264.

(3) *Mohandas* v. *Krishnabai*, 5 B. 597.

(4) *Appandai* v. *Bagubali*, 33 M. 439 (445, 446).

(5) *Rami Reddi* v. *Gangi Reddi*, 42 M. 722 (738); but held in *Rajeppa* v. *Gangappa*, 47 B. 48 that they both take equally; *sed quaere*.

(6) *Vedachela* v. *Subramania*, 44 M. 753 (761, 762) P.C.; overruling O.A. *contra* in *Subramania* v. *Ranganathan*. 44 M. 114.

(7) *Tirumalachariar* v. *Andal*, 30 M. 406 (407); *Appandai* v. *Bagubali*, 33 M. 439 (445).

(8) *Ramcharan* v. *Rahim Baksh*, 38 A. 416 (424); *Uma Shankar* v. *Nageswari*, (1919) Pat. 162 (192) F.B.

(9) Manu, IX-187.

degree, then it is permissible to apply the other test of religious efficacy.[1] As previously remarked, the second test has now received the sanction of the Privy Council and must be the sole test. Now, nearness in degree may arise (*i*) from the fact that the claimant is so mentioned in the texts, or (*ii*) because of his proximity to the common ancestor or (*iii*) because of his superior spiritual efficacy.[2]

Clause (4).

2308. Whole blood and Half-blood.—The rule as to the preference of the whole to the half bloods applicable to sapindas, already explained (P) apply equally to bandhus.[3]

Clause (5).

2309. Spiritual Efficacy.—Spiritual efficacy is out of question in the case of female bandhus, who inherit in Bombay and Madras.[4] Elsewhere, female bandhus are excluded. Again, it has no application to clause (1), under which the three classes of bandhus rank one after the other without advertence to their spiritual efficacy. (§ **2303.**) It is a test which the Privy Council have always regarded as a ground admissible to determine preferential claims as between bandhus of the same class.[5] As far back as 1870, their Lordships considered this test admissible in determining the question of priority. Their Lordships said: "Where a question of preference arises, as preference is founded on superior efficacy of oblations, the principle must be applied to the solution of the difficulty."[6] Still, the doctrine of spiritual efficacy has only a secondary place in the Mitakshara succession and is by no means as well-developed as in the Dayabhag, under which it is the primary test in every case of succession. Even as such, it is not an infalliable guide, since even some of the textual *pitri bandhus* and *matri bandhus* are in no way connected by funeral oblation to the propositus, and so are some of the *atma bandhus, e.g.*, the maternal uncle's son.[7] But nevertheless, it is a test which the courts are loath, to discard, though it is only resorted to when other tests fail. In one case, the true view was said to be that, while nearness of blood determines the heritable right, the doctrine of spiritual efficacy determines the preferential right.[8]

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(1) Virmitroday, II-1, 23; III-1, 11; Sarv. Inh. (1882), 726; *Rami Reddy* v. *Ganga Reddi*, 48 M. 722.

(2) *Vedachala* v. *Subramania*, 44 M. 753 P.C.; *Marudappa* v. *Collector*, (1935) M. 1017 (1029).

(3) *Jatindranath* v. *Nagendranath*, 59 C. 576 (579) P.C.

(4) *Lallubhai* v. *Mankuvarbai*, 2 B. 388 (429), O.A. *Lallubhai* v. *Casibai*, 5 B. 110 P.C.

(5) Virmitroday, II-I-23; III-II, § 2; *Vedachela* v. *Subramania*, 44 M. 753 P.C.; *Buddha Singh* v. *Lalta Singh*, 37 A. 604 (613) P.C.; (case of Gotrajas); *Bhyah Ram Singh* v. *Bhya Ujur Singh*, 13 M.I.A. 373 (392); *Soorendronath Roy* v. *Heeromonee*, 12 M.I.A. 81 (96); *Rami Reddi* v. *Gangi Reddi*, 48 M. 722 (734, 737); *Sakharam* v. *Balkrishna*, 49 B. 739 (756); *Uma Shankar* v. *Nageswari*, 3 Pat.L.J. 663 : 48 I.C. 625 (650, 651) F.B.; *Omrit Koomaree* v. *Luckhe Narain*, 2 B.L.R. 28 F.B. : 10 W.R. 76 F.B.; *Gunesh Chunder* v. *Kamul Roy*, 22 W.R. 264; *Janki* v. *Nand Ram*, 11 A. 194 F.B.; *Suba Singh* v. *Sarafraz Kunwar*, 19 A. 215 F.B.; *Mohan Das* v. *Krishnabai*, 5 B. 597; *Chelikani* v. *Rajah Suraneni*, 6 M. H. C .R. 278 (285, 291); *Lakshmanammal* v. *Tiruvengada*, 5 M. 241 (250); *Muttusami* v. *Muttukumarasami*, 16 M. 23 (30), affirmed O.A. *Muthusami* v. *Simambedu*, 19 M. 405 P.C.; *contra* in *Balusami* v. *Narayana*, 20 M. 343; *Appandai* v. *Bagubali*, 33 M. 439, must now be held overruled.

(6) *Bhyah Ram Singh* v. *Bhya Ugur Singh*, 13 M.I.A. 373 (392).

(7) *Vedachela* v. *Subramania*, 44 M. 753 P.C.

(8) *Uma Shankar* v. *Nageswari*, 3 Pat. L. J. 663 : 48 I.C. 625 (633 650) F.B.

Clause (6).

2310. This clause states two rules: (*i*) that as between *bandhus* of the same class and degree, a male is to be preferred to a female; and (ii) that a *bandhu* descended through a male is to be preferred to one descended through a female. The first rule has no application outside the two Southern presidencies, where female *bandhus* can inherit. But the rule has received the *imprimatur* of the Privy Council,[1] who held the paternal aunt's son preferable to the paternal uncle's daughter, and the Madras High Court has, on the same ground, held the mother's brother preferable to the father's sister[2] and a sister's son to a sister,[3] on the ground that, except the females specially mentioned in the Mitakshara, male heirs are entitled to priority over a female *bandhu*, even though nearer in degree.[4] The Bombay High Court has decided two cases, in one of which it followed this view, while in another it held the contrary. In the earlier case, it held the father's half-sister entitled to priority over the maternal uncle, and dissented from the Madras case on the ground that it recognized no females who are not mentioned in special texts and on the further ground that the order of precedence underlying the classification of the three classes of *atma bandhus, pitri bandhus* and *matri bandhus*, who are specially enumerated by the Mitakshara, is that the paternal relations should come before the maternal relations. The same principle of priority regulates the order in which the members of each group succeed as heirs,[5] but the very contrary was laid down in a later case in a competition between a mother's sister's son and a brother's daughter, where the former was held entitled to preference, on the ground that a male *bandhu* excluded a female *bandhu*, though the latter is nearer in degree.[6] In so holding, the court followed the Madras court but the earlier contrary decision was neither cited nor referred to. But in a later case, the same learned Judge who had decided the previous case, while regretting that he had decided that case without reference to the earlier case, still opined that that case could not have laid down that all female bandhus on the father's side were to be exhausted before the male bandhus on his mother's side could come in[7] He, therefore, held that in a contest between bandhus, both *ex parte paterna* and of the same degree, namely, the father's sister's and the father's brother's daughter, the former was entitled to preference. This decision was affirmed by the Privy Council,[8] who, however, noticed the conflict between the two decisions but left it to be settled by the High Court. The state of the case-law in Bombay is, then, a conflict between the two principles of preference: (*a*) that among *bandhus*, the male is to be preferred to the female, even though the latter is nearer in degree,[9] and (*b*) that the paternal *bandhus* have prior and paramount claim over maternal bandhus irrespective of their sex.[10]

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(1) *Kenchava* v. *Girimalappa*, 48 B. 569 P.C.

(2) *Narasimma* v. *Mangammal*, 13 M. 10; *contra* in *Saguna* v. *Sadashiv*, 26 B. 710.

(3) *Lakshmanammal* v. *Tiruvengada* 5 M. 241.

(4) *Rajah Venkata* v. *Raja Suraneni*. 31 M. 321.

(5) *Saguna* v. *Sadashiv*, 26 B. 710 (715).

(6) *Balkrishna* v. *Ramkrishna*, 45 B. 353, following *Rajah Venkata* v. *Raja Suraneni*, 31 M. 321.

(7) *Girimallappa* v. *Kenchava*, 45 B. 768 (777).

(8) *Kenchava* v. *Girimallappa*, 48 B. 569 (578, 579) P.C.

(9) *Balkrishna* v. *Ramkrishna*, 45 B. 353.

(10) *Saguna* v. *Sadashiv*, 26 B. 710.

2311. As between *bandhus* of the same class, that is, where both the claimants are *atma bandhus, pitri bandhus* or *matri bandhus,* a question has arisen whether bandhus *ex parte paterna* (or related through the father) are to be preferred to those *ex parte materna* (or related through the mother). It was held by some cases of the Madras and Bombay High Courts that, as between bandhus of the same class, the bandhus related through the propositus's father were, though remoter in degree, to be preferred to those related to him through his mother, though nearer to him in degree.[1] As such, the court preferred the father's father's son's daughter's son to the *mother's* father's deaughter's son, on the ground that the one was related to the deceased through his father, while the latter was not. In another case, it held the deceased's (*V's*) sister's son (*D*) as entitled to preference over his mother's sister's son (*P*), because, though they were both *atma bandhus,* and it was admitted that *D's* capacity to confer religious benefit upon the propositus decidedly preponderated, still *D* must be preferred to *P,* because *P* traced his right through *V's* maternal grandfather, which *D* traced it to a nearer ancestor, namely *V's father.*[2] For the same reason, the father's half-sister was held to have priority over the mother's brother.[3] This question came up for decision before the Privy Council in a contest between the maternal uncle (*P*) and the paternal aunt's son (*D*), both *atma bandhus,* but one was related to the deceased through his paternal grandfather, while the other was related through his maternal grandfather, but the latter was preferred, because he offered *pindas* to his father and grandfather, to whom the deceased was also bound to offer *pindas.* The deceased thus shared the merit resulting from *D's* oblations to the manes of his ancestors, whereas *P,* as the father's sister's son, offered no *pindas* to the deceased's ancestors.[4]

Explanation (1).

2312. Other Local Rules.—While the general rules stated in the section are generally applicable to the entire Mitakshara country, local variations have set in, and as both the High Courts of Bombay and Madras admit other bandhus including females, they have formulated some rules of their own for their own guidance, which may be briefly referred to here. Their result will be seen in the ensuing lists of bandhus where comments thereon have been made, where necessary.

2313. The Bombay High Court holds that among *bandhus* of the same class, the one nearer in degree is entitled to preference.[5] This rule was followed by the majority of a full bench of the Patna High Court but is likely to create difficulties. In this case, the full bench held the maternal uncle preferabe to the sister's daughter's son, on the ground that the former was only two degrees removed from the common ancestor (the maternal grandfather), while the latter was four degrees removed from the common ancestor (from the propositus's) father.[6] While the decision itself is unexceptionable, the reasons by which it was supported by Mallik and

Bombay rules.

(1) *Sundarammal* v. *Rangasami,* 18 M. 193 (199) (*per* Muttusami Ayyar and Best, JJ.)

(2) *Balusami* v. *Narayana,* 20 M. 342 (348).

(3) *Saguna* v. *Sadashiv,* 26 B. 710 (715).

(4) *Vedachela* v. *Subramania,* 44 M. 122 753 (767) P.C., reversing O.A. *Subramania* v. *Ranga,* 44 M. 114.

(5) *Dattatraya* v. *Gangabai,* 46 B. 541.

(6) *Uma Shanker* v. *Nageswari,* 3 Pat. L.J. 663: 48 I.C. 625 (656); *contra* in *Saguna* v. *Sadashiv,* 26 B. 710; *Madho* v. *Janki,* 12 N.L.R. 148: 36 I. C. 514.

Jwala Prasad, JJ., may at times lead to a *contretemps,* as in a competition, say, between a father's grandson's daughter's son and a grandfather's daughter's daughter's son when, according to the full bench, the latter, who is four degrees removed from the common ancestor, should be preferred to the former, who is five degrees removed, and yet the former is in the direct line of descent from the propositus, and in the latter's line two females intervene which, it was admitted, is a disability. In fact, it is a rule accepted by both the Madras and the Allahabad High Court,[1] though in Bombay, it was held to have been stated "somewhat too broadly."[2] Nevertheless, the court admits that, of two *bandhus* equally removed from the propositus, the one in the direct line of descent is to preferred to another in the collateral line. As such, the son's daughter's son is preferable to the father's daughter's daughter. Where the two *bandhus* are of the same class and degree, they are entitled to take equally. Such is the case of the mother's brother's son and the mother's sister's son who were held to share the inheritance equally,[3] but it is submitted in this case, by reason of his spiritual efficacy, the former would exclude the latter (Clause 5).

Madras Rules.

2314. In Madras, it has been held that among *bandhus* of the same class, the nearer line excludes the more remote. As such, the father, being a nearer ancestor than the mother's father, a descendant of the father, however remote, is to be preferred to a descendant of the mother's father, howsoever near. Consequently, the father's daughter's grandson is preferable to the mother's father's daughter's son, though the former is four degrees removed, while the latter is only three degrees removed from the common ancestor. Both are *atma bandhus,* and if the test of spiritual benefit is applied, the latter should have preference.[4]

The rule is based on no text, but is deduced from the order of succession given in the Mitakshara as to certain named agnates, but, even in that connection, it is not of general application, as witness the case of the grandson's grandson, who is excluded by collateral descendants within three degrees in the line of the father and the grandfather.

It has been held in some cases in Madras, that in a contest between a male *bandhu ex parte materna* and a female *bandhu ex parte paterna,* the latter is entitled to preference.[5] Another rule was formulated in some cases of that court that persons connected through the father are to be preferred to those connected through the mother, and that persons in a line with one female should be preferred to one where two females intervene. So, in a case, the preference of a daughter's son to a daughter's daughter's son was justified on the following ground: "It is legitimate to prefer that claimant, between whom and the stem there

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(1) *Tirumalachariar* v. *Andalammal,* 30 M. 406; *Appandai* v. *Bagubali,* 33 M. 430 (445); *Ramcharan* v. *Rahim Baksh,* 38 A. 416 (424).

(2) *Rajeppa* v. *Gangappa,* 47 B. 48 (53, 54).

(3) *Rajeppa* v. *Gangappa,* 47 B. 48 (77), but *see* Cl. (5); *Vedachala* v. *Subramania,* 44 M. 753 P. C.; *Ramcharan* v. *Rahim Baksh,* 38 A. 436; *Rama Reddi* v. *Gangi Reddi,* 48 M. 722, dissenting from *Appandai* v. *Bagubali,* 33 M. 439.

(4) *Balusami* v. *Narayana,* 20 M. 342 (348); *Krishna* v. *Venkatarama,* 29 M. 115.

(5) *Sundaramma* v. *Rangasami,* 18 M. 193; *Balusami* v. *Narayana,* 20 M. 342; *Subramania* v. *Ranganatha,* 44 M. 141; reversed O. A. *Vedachela* v. *Subramania, ib.,* p. 753 P.C.; *Uma Shankar* v. *Nageswari,* 3 Pat. L. J. 663: 48 I.C. 625 (650) F.B.

intervenes one female link, to that claimant who is separated from the stem by two such links.''[1] But that this is not an invariable rule, since, in another case, the mother's sister's son was preferred to the maternal uncle's son, on the ground that he was mentioned before the latter in the Mitakshara[2] a reason which has been held to be unsound, and a case which has since been overruled.

2315. These clauses deal with the textual proximity and the rules arising therefrom. They are intended to be guides to natural proximity. But in some cases this proximity must, it is said, follow the analogy of the former.[3] Reasons, have already been given why that view cannot be accepted. There then remains the sole test, *viz.*, nearness of the line of the heir to the deceased in the case of *bandhus* other than those enumerated in the Mitakshara, who succeed in the order in which they are classed.[4] First come *atma bandhus* and then *bandhus* connected through the father are preferred to those connected through the mother.[5] Other *bandhus* obtain no fictitious priority by any analogy drawn therefrom, but follow the rule of propinquity judged by the combined tests laid down in this section.

CLASSIFIED ORDER OF HERITABLE BANDHUS.

I. ATMA BANDHUS.

Sub-division of Atma-Bandhus.

2316. Even amongst *bandhus* a ground for preference *in se* is said to be found in two sub-divisions into which they are grouped, *viz.*, (1) those related through the daughters of the family, and (2) those related through the mother of the deceased. Of these, the former are said to exclude the latter and among them, preference is given to the descendants of the deceased. But this further classification is deprecated,[6] and the better course held to be is to prefer one who is nearer in degree to the common ancestor.[7] The Mitakshara defines the term ''atma bandhu'' as comprising the sons of a man's own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle or, in short, the sons of his father's sister or those of the sister or brother of the mother. These are held to be merely illustrative of the kind of relations intended. Even as illustrations, they are not those of the nearest of kin, and the courts have supplemented that list by declaring many more relations as included in this class.

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(1) *Tirumalachariar* v. *Andalammal*, 30 M. 406; *Ramcharan* v. *Rahim Baksh*, 38 A. 416 (421-424); *Uma Shankar* v. *Nageswari*, 3 Pat. L.J. 663: 48 I. C. 625 (650) F.B.

(2) *Appandai* v. *Ragubali*, 33 M. 439 dissented from in *Ramcharan* v. *Rahim Baksh*, 38 A. 416 (421-424), overruled in *Vedachela* v. *Subramania*, 44 M. 753 P. C.

(3) *Thirumalachariar* v. *Andal*, 30 M. 406 (407); *Krishnaswami* v. *Ragubali* 33 M. 439 (445); *contra* in *Ramcharan* v. *Rahim Baksh*, 89 A. 416 (424); *Uma Shankar* v. *Nageshwar*, (1919) Pat. 162 (192) F.B.; *Parat* v. *Mehta*, 19 B. 631 (634); *Umaid Bahadur* v. *Udoichand*, 6 C. 119; *Venkatagiri* v. *Chandra*, 23 M. 123; *Krishna* v. *Venkatarama*, 29 M. 115.

(4) *Muttusami* v. *Muttukumaraswami*, 16 M. 23, affirmed O. A. *Muthusami* v. *Simambedu*, 19 M. 405 P.C., followed in *Vedachela* v. *Subramania*, 44 M. 753 P.C.

(5) *Saguna* v. *Sadashiv*, 26 B. 710 (715); *Kenchava* v. *Girimallappa*, 48 B. 569 (578) P. C.

(6) *Uma Shankar* v. *Nageswari*, (1919) Pat. 162 (173) F.B.

(7) *Adit Narayan* v. *Mahabir*, 1 Pat. L.J. 324; *Uma Shankar* v. *Nageswari*, (1919) Pat. 162 (173) F.B.; *Ramcharan* v. *Rahim Baksh*, 38 A. 416 (425); *Madho* v. *Jonki*, 12 N.L.R. 148.

(1) The son's daughter's son.[1]

A son's daughter is entitled to inherit her grandfather's estate as a *bandhu*,[2] though she cannot inherit in preference to the father's sister's son, because he is a *bandhu* expressly mentioned in the Mitakshara.[3] A son's daughter's son is entitled to succeed in preference to the sister's daughter, and the latter is preferred to the sister's son's son.[4] The Madras court, in one case, enunciated "another fundamental principle of the law" that among *bandhus*, those who are *ex parte paterna* were entitled to preference over *bandhus ex parte materna*.[5] But the Privy Council have held that there is no foundation for this principle, and, consequently, they decreed the claim of the maternal uncle to succession in preference to the paternal aunt's son's son both on the ground of propinquity and religious efficacy.[6]

(2) The son's son's daughter's son.

(3) Sister's son,[7] which includes a stepsister's son.[8]

(2) Sister's Son.

2317. The sister's son has had a strenuous struggle to get admitted into the table of heirs. At first, he was ruled out as no heir at all,[9] since he was not specified in the list of heritable bandhus in the Mitakshara, which was taken to be exhaustive, and this view was even concurred in by the Privy Council,[10] but his claim was too strong to be ignored, and it was first conceded, almost simultaneously,[11] by a full bench decision of the Calcutta High Court[12] and by the Privy Council in 1868,[13] and since then in several cases.[14] In Madras, a sister's son's right succeed was held superior to that of a sister.[15] He was a nearer heir than the mother's sister's son,[16] the paternal uncle's daughter's son,[17] the father's uncle's daughter's son,[18] as also the sister's daughter's son.[19] He

(1) *Natwar Lal* v. *Ranochand*, 22 Bom.L.R. 71 : 55 I.C. 313 (preferred to sister's daughter); *Dattatraya* v. *Ganga Bai*, 44 B. 541.

(2) *Nallana* v. *Ponnal*, 14 M. 149; *contra* in *Koomud* v. *Seetakanth*, W.R. 75 (F.B.); *Vithal* v. *Ganpath Rao*, 16 C.P.L.R. 65.

(3) *Nanhi* v. *Gouri*, 28 A. 187.

(4) *Dattatraya* v. *Ganga Bai*, 24 Bom. L.R. 69.

(5) *Balusami* v. *Narayana*, 20 M. 342; *Venkata* v. *Surenani*, 31 M. 321.

(6) *Vedachela* v. *Subramania*, 44 M. 753 P.C.

(7) *Amrita* v. *Lakhi Narayan*, 10 W. R. 76 F.B.; *Chelikini* v. *Vencata*, 6 M. H.C.R. 278; *Srinivasa* v. *Rangasami*, 2 M. 304; *Lakshmanammal* v. *Tiruvengada*, 5 M. 241; *Naraini* v. *Chandi Din*, 9 A. 467; *Raghunath* v. *Munnon*, 20 A. 191.

(8) *Subharaya* v. *Kylasa*, 15 M. 300; *Mari* v. *Chinnammal*, 8 M. 126.

(9) *Johari* v. *Kylaso*, 1 W.R. 74; *Girdhari Lal* v. *Secretary of State*, 4 W. R. 13; *Deo v. Kuppu*, 1 M.H.C.R. 85.

(10) *Thakoorain* v. *Mohun Lall*, 11 M. I.A. 386; *Kurun Singh* v. *Tyzali*, 14 M. I.A. 178.

(11) The Calcutta Full Bench decided on the 12th September, 1869 and the Privy Council on the 17th July, 1868.

(12) *Omrit* v. *Luckee Narain*, 10 W. R. 76 (88) F.B.

(13) *Girdharilal* v. *Government*, 10 W. R. 31 P.C.; *Muthusami* v. *Muthu Kumarasami*, 16 M. 23 (30); approved in *Vedachela* v. *Subramania*, 44 M. 753 (767) P.C.

(14) *Chelikani* v. *Raja Surenani*, (1871) 6 M.H.C.R. 278; *Srinivasa* v. *Rangasami*, 2 M. 304 (306); *Lakshmanammal* v. *Tiruvenkada*, 5 M. 241; *Umaid Bahadur* v. *Udoi Chand*, 6 C. 119 F.B.; *Nearam* v. *Andaram*, 35 C. L.J. 34: 64 I.C. 145; *Naraini* v. *Chandi*, 9 A. 467; *Raghunath* v. *Munnan*, 20 A. 191; *Ram Baran* v. *Kamla*, 7 A.L.J. 802: 6 I.C. 698; *Uma Shankar* v. *Nageswari*, (1919) Pat. 162 F.B.; *Goormukh* v. *Goomanee*, (1866) P.R. No. 30; *Mohunee* v. *Mohunna*, (1866) P.R. 35.

(15) *Lakshmanammal* v. *Tiruvengada*, 5 M. 241.

(16) *Gauri Shankar* v. *Manraj*, (1919) Pat. 441.

(17) *Khargai* v. *Debi*, 9 I.C. (A.) 339.

(18) *Ib.*

(19) *Uma Shanker* v. *Nageswari*, (1919) Pat. 162 F.B.

was, however, not so near as the paternal uncle's grandson, who being a *gotraj sapinda,* excluded the sister's son, who is only a *bandhu,*[1] and as such, he yields place to a *samanadok,* howsoever remote,[2] at least up to the thirteenth degree.[3] The sister's son includes a step-sister's son.[4] In a contest between a sister's son and the maternal uncle's son, the former was held to be nearer in degree to the propositus than the latter, and, therefore, entitled to exclude him.[5] A sister's son's son's son is no bandhu, because he and the propositus are not mutually related as sapindas, as the propositus is not connected with him either through his maternal grandfather's line or his father's maternal grandfather's line or his mother's maternal grandfather, line.[6]

While a sister's son is a heritable *bandhu,* the stepson of a stepsister of the deceased is not his heir in any case.[7]

(4) Brother's daughter's son.[8]

(5) Brother's sons daughter's son.

(6) Father's father's daughter's son.[9]

(7) Father's father's son's daughter's son.[10]

(8) Father's father's son's son's daughter's son.

Atma bandhus ex parte paterna to whom the deceased was a *pitri bandhu.*

(9) Daughter's son's son.[11]

(10) Son's daughter's son's son. Son's son's daughter's son's son.[12]

(11) Father's daughter's son's son.[13]

(12) Brother's daughter's son's son.

(13) Father's father's daughter's son.[14]

(14) Father's father's son's daughter's son's son.

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(1) *Annayya* v. *Sidya,* 22 Bom.L.R. 1092: 59 I.C. 125; *Bishen Dyal* v. *Jeisiri,* (1918) Pat. 323: 48 I.C. 746.

(2) *Ram Ratan* v. *Kamala Prasad,* 32 A. 594.

(3) *Rama Rao* v. *Kuttiya,* 40 M. 654.

(4) *Mari* v. *Chinnammal,* 8 M. 126, explained in *Subbaraya* v. *Kylasa,* 15 M. 300 (301, 302); *Muthusawmy* v. *Muttukumara,* 16 M. 23 O.A. 19 M. 405 P. C., followed in *Vedachela* v. *Subramania,* 44 M. 753 P.C.; *Sreenarain* v. *Bhya Jha;* 2 B.S.R. 29.

(5) *Balusami* v. *Narayana,* 20 M. 342. The other reason given in this case for preference, *viz.,* that he was a Bhandhu *ex parte paterna,* and therefore entitled to preference over a *bandhu ex parte materna,* was disapproved in *Vedachela* v. *Subramania,* 44 M. 753 P.C.

(6) *Lowji* v. *Mithabai,* 2 Bom.L.R. 842.

(7) *Saminatha* v. *Angammal,* 42 M. L.J. 4.

(8) *Doorga* v. *Janaki Pershad,* 18 W. R. 133.

(9) *Tahaldai* v. *Gaya Pershad,* 37 C. 214; *Shamdai* v. *Birbhadra Prasad,* 43 A. 463; *Tani* v. *Rikhi Ram,* 1 L. 554: 56 I.C. 742; *Kenchava* v. *Girmalappa,* 48 B. 569, affirming O.A. 45 B. 768; *Sakharam* v. *Balkrishna,* 49 B. 739; *Jatindra Nath* v. *Nagendra Nath,* 59 C. 576 P.C., (Father's half sister preferred to mother's sister's son, Mit. case) *Gaddam* v. *Anam Hanuman,* (1937) M. 967.

(10) *Tirth Ram* v. *Kuhan Devi,* 1 L. 588; *Sujan Devi* v. *Jagir Mal,* 1 L. 608; *Sundrammal* v. *Rengasami,* 18 M. 193.

(11) *Sheobarat* v. *Bhagwati,* 17 A. 523; *Krishnayya* v. *Pichamma,* 11 M. 287; *Tirumalachariar* v. *Andal,* 30 M. 406; *Maharaja of Kolhapur* v. *Sundaram,* 48 M. 1 (preferred to sister's grandson).

(12) Sarv. Inh. 714.

(13) *Balusami* v. *Narayana,* 20 M. 342.

(14) *Sham Dei* v. *Birbhadra,* 43 A. 463 (467) preferred to father's daughter's daughter's son; but in *Vedachela* v. *Subramania,* 44 M. 953, a maternal uncle is held entitled to preference over father's father's daughter's son's son.

Atma bandhus ex parte paterna to whom the deceased was a *Matri bandhu.*

(15) Daughter's daughter's son.[1]

The daughter's daughter's son is recognized as a heritable *bandhu* in Upper India[2] and in Madras he is preferred to sister's son[3] though in the view of that court, a bandhu with one female in the line is preferred to a bandhu with two females in the line.[4] This view has been dissented from in Allahabad[5] and Patna.[6] But if the Madras view be sound, the daughter's son's son will take precedence over the daughter's daughter's son. In any view, the daughter's son's son has precedence, since the claims through the father, while the daughter's daughter's son claims through the mother.

(16) Son's daughter's daughter's son.

(17) Father's daughter's daughter's son.[7]

(18) Father's son's daughter's daughter's son.

(19) Grandfather's daughter's daughter's son.[8]

(20) Grandfather's son's daughter's daughter's son.

According to Dr. Bhattacharya and Professor Sarvadhikari, the following relations should come in next:—

(20-A) Great-grandfather's daughter's daughter's son.

(20-B) Great-grandfather's son's daughter's daughter's son.

(20-C) Great-great-grandfather's daughter's daughter's son.

(20-D) Great-great-grandfather's son's daughter's daughter's son.

2318. But in view of the preference given to a maternal uncle of half blood over a paternal aunt,[9] they cannot be classed amongst *atma bandhus.* But as a bandhu, a paternal uncle is entitled to succeed in preference to a maternal uncle's son[10] or to the paternal aunt's son's son both on the ground of propinquity and religious efficacy, in that he offered oblation to the father and the grandfather of the deceased, while the latter offered none,[11] and he is preferred to the father's sister by reason of the general preference given among *bandhus* to the male over female heirs,[12] though he yields precedence to the father's sister's son on account of his connection through the paternal grandfather, while the maternal uncle is connected only through his maternal grandfather, as also by the test of religious benefit to the propositus resulting from oblations offered

(1) *Ajudhia* v. *Ram Sumer,* 31 A. 454; *Ramphal* v. *Panmati,* 32 A. 640; *Tirumalachariar* v. *Andalammal,* 30 M. 406.

(2) *Ajudhia* v. *Ramsumer,* 31 A. 454; *Ramphal* v. *Panmati,* 32 A. 640.

(3) *Kalimuthu* v. *Ammamuthu,* 58 M. 238.

(4) *Tirumalachariar* v. *Andal,* 30 M. 604; *Appandai* v. *Bagubali,* 33 M. 439 (445).

(5) *Ramcharan* v. *Rahim Bux,* 38 A. 416.

(6) *Uma Shankar* v. *Nageswari,* (1919) Pat. 162 (173).

(7) *Umaid Bahadur* v. *Udaichand,* 6 C. 119 F.B.; *Sham Dei* v. *Birbhadra,* 43 A. 463 (465); but in *Uma Shankar* v. *Nageswari,* 3 Pat. L. J. 663 F.B., a maternal uncle was preferred to paternal aunt's daughter's son.

(8) *Parot* v. *Mahta,* 19 B. 631 (634), following *Umaid Bahadur* v. *Udaichand,* 6 C. 119 F.B.; *Venkatagiri* v. *Chandru,* 23 M. 123; *Krishna* v. *Venkatarama,* 29 M. 115; *Mukha* v. *Qabza,* 31 I. C. (A.) 553.

(9) *Muttusami* v. *Muttukumara,* 16 M. 23, affirmed O.A. *Muthuswami* v. *Simambedu,* 19 M. 405 P.C.

(10) *Jagannath* v. *Gangoo,* (1926) 95 I.C. (A.) 541.

(11) *Vedachela* v. *Ranganathan,* 26 C. W.N. 159 P.C.

(12) *Narasamma* v. *Mangamma,* 13 M. 10, cited in *Vedachela* v. *Subramania,* 44 M. 753 P.C., approved in *Kenchava* v. *Girimallappa,* 48 B. 569 (577) P.C.

by the two *bandhus* in question.[1] For the same reason, the mother's brother's son is entitled to succeed in preference to the mother's sister's son.[2]

Atma Bandhus Ex Parte Materna:—

(21 Mother's father.[3]

.....

(Here come *atma bandhus*, to whom the deceased was *atma bandhu ex parte paterna*.)

(22) Mother's father's son,[4] (*i.e.*, mother's brother).[5]
(23) Mother's father's son's son.[6]
(24) Mother's father's son's son's son.
(25) Mother's father's father.[7]
(26) Mother's father's brother.
(27) Mother's father's brother's son.
(28) Mother's father's brother's son's son.[8]
(29) Mother's great grandfather.
(30) Mother's grandfather's brother.
(31) Mother's grandfather's brother's son.
(32) Mother's grandfather's brother's son's son.
(33) Mother's father's daughter's son.[9]
(34) Mother's father's son's daughter's son.
(35) Mother's father's son's son's daughter's son.
(36) Mother's father's great-great-grandson.
(37) Mother's grandfather's great-great-grandson.
(38) Mother's great-grandfather's great-great-grandson.

(Here come *atma bandhus ex parte materna*, to whom the deceased was *pitri bandhu*.)

(39) Mother's sister's son's son.[10]

The Patna High Court have in two cases given preference to a *matri bandhu* over a *pitri bandhu*, because he was nearer in degree counting from the common ancestors in their respective lines, and also on the ground of religious merit, holding that when there is a contest between *bandhus* other than the nine *bandhus*, or between one of the former and one of the latter, the principle of numerical propinquity alone will determine the heritable right, supplemented, in case of doubt, by the rule of religious efficacy and such other rules derived from the succession of

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(1) *Sakharam* v. *Balkrishna*, 49 B. 739.

(2) *Rami Reddy* v. *Ganga Reddy*, 48 M. 722.

(3) *Chinnammal* v. *Venkatachala*, 15 M. 421.

(4) *Narasimma* v. *Mangammal*, 13 M. 10; *Manikchand Golecha* v. *Jagat Settani*, 17 C. 518; *Muthusami* v. *Simambedu*, 19 M. 405 P.C.; *Mohandas* v. *Krishnabai*, 5 B. 597; *Saguna* v. *Sadashiv*, 26 B. 710; *Uma Shankar* v. *Nageswari*, 3 Pat.L.J. 663 F.B. ; 48 I.C. (preferred to sister's daughter's son); *Vedachela* v. *Subramania*, 44 M. 753 (preferred to father's father's daughter's son's son).

(5) *Balasubramanya* v *Subbayya*, (1938) P.C. 34.

(6) *Ram Charan* v. *Rahim Baksh*, 38 A. 416 (preferred to mother's sister's son); *Rami Reddi* v. *Gangi Reddi*, 48 M. 722, dissenting from *Appandai* v. *Bagubali*, 33 M. 439; *Balusami* v. *Narayana*, 20 M. 342.

(7) *Krishnayya* v. *Pichamma*, 11 M. 287.

(8) *Ratnasubba* v. *Ponnappa*, 5 M. 69.

(9) *Appandai* v. *Bagubali*, 33 M. 39; *Ram Charan* v. *Rahim Baksh*, 38 A. 416; *Sundarammal* v. *Rengasami*, 18 M. 193; *Chamanlal* v. *Doshi Ganesh*, 28 B. 453.

(10) *Vijli* v. *Prabhalakshmi*, 9 Bom. L.R. 1129; *Chaman Lal* v. *Ganesh*, 28 B. 453; *Adit Narayan* v. *Mahabir Prasad*, 6 Pat.L.J. 140 ; 48 I.A. 86.

agnates as may be appropriate. In this view, it has postponed the mother's sister's son's son to the maternal grandfather's daughter's son, as being one degree nearer to the common ancestor, though he is described as a *matri bandhu* in the Mitakshara and the former is an *atma bandhu*.[1] These decisions proceed upon the view that outside the specially named nine *bandhus*, there is no justification for following the same gradation.

It was so decided by the majority of three judges of a full bench, the minority of two, however, being in favour of the tripartite distinction as applicable to all *bandhus*, whether out of the nine enumerated in the Mitakshara or those not so named.[2]

(40) Mother's brother's daughter's son's son.—

Dr. Bhattacharya[3] and Professor Sarvadhikari[4] here place:—

(40-A) Maternal great-grandfather's daughter's son's son;
(40-B) Maternal great-grandfather's son's daughter's son's son;
(40-C) Maternal great great-grandfather's daughter's son's son;
(40-D) Maternal great great-grandfather's son's daughter's great-grandson.

But as the maternal great-grandfather's daughter's son is mentioned in the Mitakshara as *matri bandhu*, it follows that his son and those following his son are not *atma bandhus*.

(41) Mother's sister's daughter's son.
(42) Mother's brother's daughter's son.

These last two are *atma bandhus ex parte materna*, to whom the deceased was *matri bandhu*. They are sons of daughter's daughters.

Here the two learned authors abovenamed place—

(42-A) the maternal great-grandfather's daughter's daughter's son;
(42-B) the maternal great-grandfather's son's daughter's daughter's son;
(42-C) the maternal great great-grandfather's daughter's daughter's son;
(42-D) the maternal great great-grandfather's son's daughter's daughter's son; but, for the reason last noted, they are not *atma bandhus*.

II. PITRI BANDHUS.

2319. Next in the order of pripinquity stand the *pitri bandhus*, who are as follows:—

(43) Great-grandfather's daughter's son.[5]
(44) Great-grandfather's son's daughter's son.[6]

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(1) *Adit Narayan* v. *Mahabir*, (1917) Pat. 12, followed in *Uma Shankar* v. *Nageswari*, (1919) Pat. 162 (173, 174) F.B.

(2) *Uma Shankar* v. *Nageswari*, (1919) Pat. 162 F.B.

(3) H.L., (2nd Ed.), 460.

(4) Sarv. Inh., 716.

(5) Mit., II-V-1; *Muthusami* v. *Simambedu*, 19 M. 405 P.C.; *Krishna* v. *Venkatarama*, 29 M. 115.

(6) *Kissen* v. *Javallah*, 3 M.H.C.R. 346 (351); *Tahaldai* v. *Gaya Pershad*, 37 C. 214; *Shamdei* v. *Birbhadra Prasad*, 43 A. 463; *Parmarandas* v. *Parbhudas*, 14 Bom. L. R. 630 : 16 I.C. 591; *Ramsia* v. *Bua*, 47 A. 10.

(45) Great-grandfather's son's son's daughter's son.
(46) Great great-grandfather's daughter's son.
(47) Great great-grandfather's son's daughter's son.
(48) Great great-grandfather's son's son's daughter's son.[1]
(49) Great-grandfather's daughter's son's son.[2]
(50) Great-grandfather's son's daughter's son's son.
(51) Great great-grandfather's daughter's son's son.
(52) Great great-grandfather's son's daughter's son's son.
(53) Great-grandfather's daughter's daughter's son.
(54) Great-grandfather's son's daughter's daughter's son.
(55) Great great-grandfather's daughter's daughter's son.
(56) Great great-grandfather's son's daughter's daughter's son.

Here follow the *pitri bandhus*, to whom the deceased was *atma bandhu ex parte paterna*:—

(57) Father's maternal grandfather's son.[3]
(58) Do. grandson.
(59) Do. great-grandson.[4]
(60) The father's maternal great-grandfather's son.
(61) Do. grandson.
(62) Do. great-grandson.
(63) The father's maternal great great-grandfather's son.
(64) Do. grandson.
(65) Do. great-grandson.
(66) The father's maternal grandfather's daughter's son.
(67) Do. son's daughter's son.
(68) Do. son's son's daughter's son.
(69) The father's maternal great-grandfather's daughter's son.
(70) Do. son's daughter's son.
(71) Do. son's son's daughter's son.
(72) The father's maternal great great-grandfather's daughter's son.
(73) Do. son's daughter's son.
(74) Do. son's son's daughter's son.
(75) Father's mother's father's great-grandson.
(76) Father's mother's father's father's great-grandson.
(77) Father's mother's great grandfather's great-grandson.

Here follow the *pitri bandhus*, to whom the deceased was *pitri bandhu*.

(78) The father's maternal grandfather's daughter's grandson.
(79) Do. son's daughter's grandson.
(80) The father's maternal great-grandfather's daughter's grandson.
(81) Do. son's daughter's grandson.

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(1) *Manikchand* v. *Jagat Settani*, 17 C. 518 (Jain case), following *Uma Shankar* v. *Kali Komul*, 6 C. 256, affirmed O A. 10 C. 232 P.C.; *Padmakumari* v. *Court of Wards*, 8 C. 302 P.C.

(2) *Sethurama* v. *Ponnammal*, 12 M. 155, following *Ratnasubba* v. *Ponnappa*, 5 M. 69; *Chamanlal* v. *Doshi*, 28 B. 453; *Muthusami* v. *Simambedu*, 19 M. 405 P. C.

(3) *Girdharilal* v. *Government*, 12 M. I.A. 448.

(4) *Ananda Bibi* v. *Nownit Lal*, 9 C. 315.

Here follow the *Pitri bandhus*, to whom the deceased was *Matri Bandhu*.

(82) The father's maternal grandfather's daughter's daughter's son.
(83) Do. son's daughter's daughter's son.
(84) The father's maternal great-grandfather's daughter's daughter's son.
(85) Do. Son's daughter's daughter's son.

III. MATRI BANDHUS.

2320. Next follow *matri bandhus*, but this is not acceded to by the Patna High Court, who regard propinquity and religious benefit the sole test.[1]

(86) The maternal great-grandfather's daughter's son.
(87) Do. son's daughter's son.
(88) Do. son's son's daughter's son.
(89) The maternal great great-grandfather's daughter's son.
(90) Do. son's daughter's son.
(91) Do. son's son's daughter's son.
(92) The maternal great-grandfather's daughter's son's son.
(93) Do. son's daughter's son's son.
(94) The maternal great great-grandfather's daughter's son's son.
(95) Do. son's daughter's son's son.
(96) The maternal great-grandfather's daughter's daughter's son.
(97) Do. son's daughter's daughter's son.
(98) The maternal great great-grandfather's daughter's daughter's son.
(99) Do. son's daughter's daughter's son.

(Here follow the *matri bandhus*, to whom the deceased was *pitri bandhu ex parte paterna*.)

(100) The mother's maternal grandfather.
(101) The mother's grandfather's son.
(102) The mother's grandfather's grandson.[2]
(103) The mother's grandfather's great grandson.
(104) The mother's maternal great-grandfather.
(105) The mother's maternal great-grandfather's son.
(106) The mother's maternal great-grandfather's grandson.
(107) The mother's maternal great-grandfather's great-grandson.

Here Dr. Bhattacharya places the great-great-grandson of the mother's maternal grandfather and great-grandfather,[3] but according to Mr. Sarvadhikari, he should come after the daughter's son of the mother's maternal great-grandfather.[4]

(Here follow the *matri bandhus*, to whom the deceased was *atma bandhu ex parte materna*.)

(108) The mother's maternal grandfather's daughter's son.

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(1) *Adit Narain* v. *Mahabir*, (1917) Pat. 12, followed in *Uma Shankar* v. *Nageswari*, (1919) Pat. 162 (173, 174) F.B. (*Per* Mullick, Jwala Prasad and Thornhill, JJ., *contra* Dawson Miller, C. J., and Manuk, J., *dissentients*).
(2) Mit., II-VI-1.
(3) H. L., (2nd Ed.), 461.
(4) Inh., 717.

MITAKSHARA BANDHUS

(Remote Ones Omitted)

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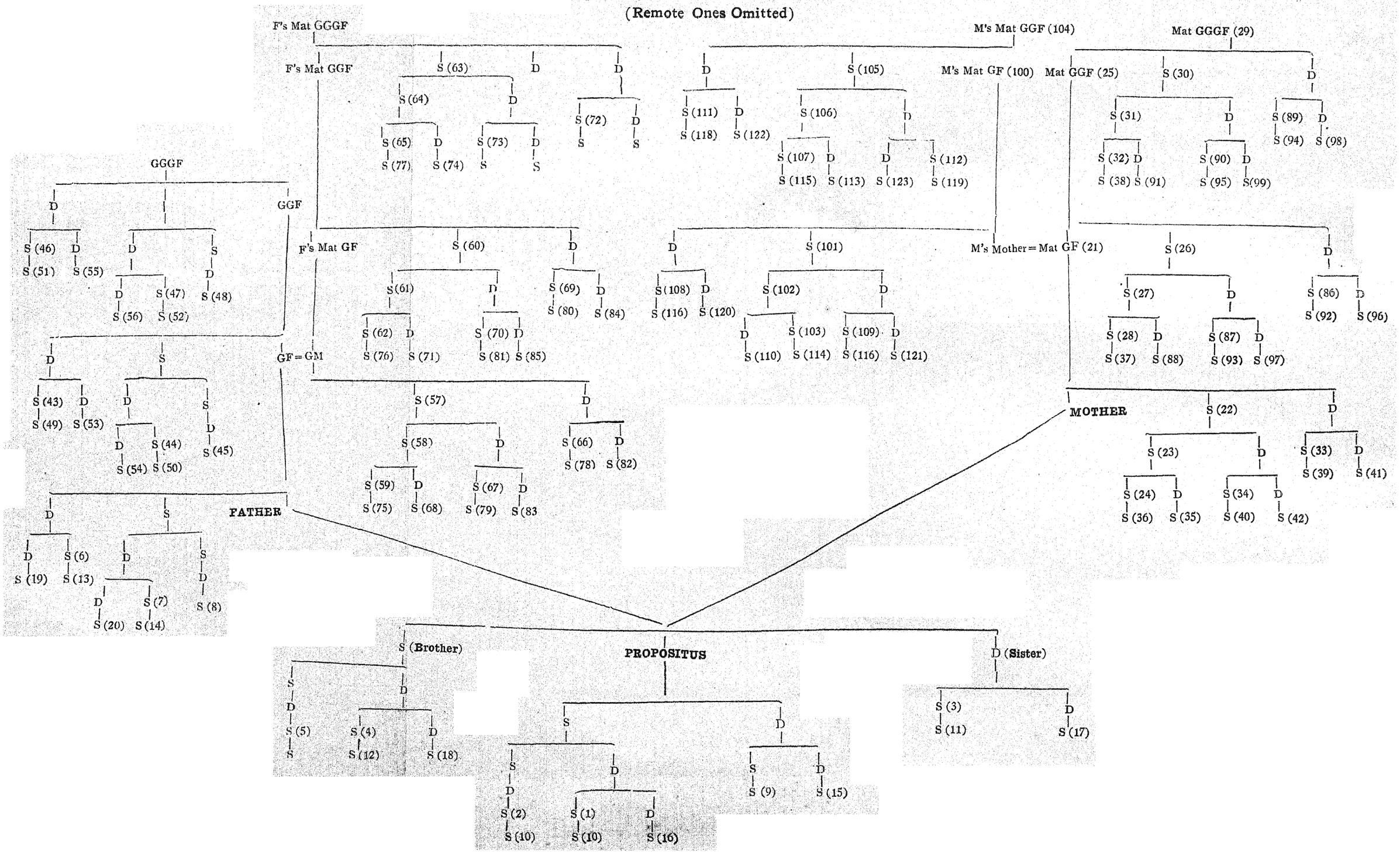

Here, according to Mr. Sarvadhikari there should come—

(108-A) his great great-grandson, and

(108-B) his great-grandfather.

(109) The mother's maternal grandfather's son's daughter's son.

(110) Do. grandson's daughter's son.

(111) The mother's maternal great-grandfather's daughter's son.

(112) Do. son's daughter's son.

(113) Do. grandson's daughter's son.

(114) The mother's maternal grandfather's great great-grandson.[1]

(115) The mother's maternal great-grandfather's great great-grandson.

(Then follow the *matri bandhus*, to whom the deceased was *pitri bandhu*.)

(116) The mother's maternal grandfather's daughter's son's son.

(117) Do. son's daughter's son's son.

(118) The mother's maternal great-grandfather's daughter's grandson.

(119) Do. son's daughter's grandson.

(Then follow the *matri bandhus*, to whom the deceased was *matri bandhu*.)

(120) The mother's maternal grandfather's daughter's daughter's son.

(121) Do. son's daughter's daughter's son.

(122) The mother's maternal great-grandfather's daughter's daughter's son.

(123) Do. son's daughter's daughter's son.

The relative position of all these relations may be more conveniently studied in the chart here appended.

2321. Other Bandhus.—Amongst other unclassified *bandhus* are the following:—

(1) The grandfather's brother's daughter's son.[2]

(2) The father's sister's son's son, who is entitled to inherit the propositus was the mother's father's mother's brother's son.[3]

(3) The father's sister's son's daughter's son (of whom the propositus was the mother's father's mother's brother's son.)[4]

2322. No Heirs.—Both under the Bengal and the Benares schools, the following relations are not *bandhus*, and are, therefore, no heirs to the owner:—

(1) Father's brother's daughter,[5] except in the Bombay presidency.[6]

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(1) Dr. Bhattacharya would place him after No. 107.

(2) *Ram Sia* v. *Bua*, 47 A. 10.

(3) *Harihar* v. *Ram Daur*, 47 A. 172.

(4) *Kesar Singh* v. *Secretary of State*, 49 M. 652.

(5) *Gaura (Mt.)* v. *Lal Singh*, 10 C.P.L.R. 95; *Sadashiv* v. *Jaikrishna*, 14 N. 6.

(6) *Lakshmi* v. *Jayram*, 6 B.H.C.R. (A.C.) 152; *Lallubhai* v. *Mankuar Bai*, 2 B. 388 (403, 444) O.A. *Lallubhai* v. *Cassibai*, 5 B. 110 P.C.

(2) Brother's daughter.[1]
(3) Sister's daughter.[2]
(4) Wife's sister.[3]
(5) Father's sister's great-grandson.[4]
(6) Paternal grandfather's mother's brother's grandson.[5]
(7) Paternal grandfather's great-grandson's daughter's son.[6]
(8) Paternal grandfather's daughter's son's daughter's son.
(9) The stepson of a stepsister.[7]

Special female heirs in Bombay.

326. In a case where the succession opened before the enactment of the Hindu Inheritance (Amendment) Act, 1929, in Bombay, Berar and Sindh, subject to the Mayukh, the wives of *gotraj sapindas* would be treated as *sagotra sapindas;* and take their husbands' places in the line of heirs, subject to the two following rules:—

(1) They come in only after all the *gotraj sapindas* in the line, to which their husbands belonged, are exhausted.

(2) A widow of a *gotraj sapinda* cannot inherit until after the sister.

(3) As such, the following other females are recognized as heirs:—

(*i*) Sister, whether of the whole or half blood;

(*ii*) Widows of predeceased *sapindas* and *samanodaks*;

(*iii*) Son's widow;

(*iv*) Stepmother;

(*v*) Father's widow;

(*vi*) Brother's widow;

(*vii*) Brother's son's widow;

(*viii*) Paternal uncle's widow and the widows of the paternal first cousins;

(*ix*) Daughters of descendants and collaterals within five degrees:—

(*a*) The son's daughter;

(*b*) The daughter's daughter;

(*c*) Brother's daughter;

(*d*) Sister's daughter;

who all inherit after the nine bandhus expressly enumerated in the Mitakshara;

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(1) *Sujan* v. *Jagiri*, 1 L. 608. But the brother's daughter's son is a bandhu and is preferable to a son's daughter; *Avudai* v. *Ramalinga*, 97 I.C. 314: (1926) M. 1163.

(2) *Saroo* v. *Bani*, 62 I.C. (N.) 257; *Dattatraya* v. *Gangabai*, 44 B. 541 (She is preferred to sister's son's son).

(3) *Nearm* v. *Andaram*, 35 C.L.J. 34: 64 I.C. 145.

(4) *Sheo Nandan* v. *Muni*, 21 A. L. J. 288: 71 I.C. 1013: (1923) A. 398.

(5) *Veera* v. *Padmanabha*, 39 M. L. J. 417.

(6) *Shib Sahai* v. *Saraswati*, 37 A. 533.

(7) *Saminatha* v. *Angammal*, 45 M. 257.

(*x*) **The father's sister, who comes in after all the *gotraj sapindas* but before the *bandhus*.**

(4) Women inheriting under this rule take an absolute or a limited estate according as they belong to the family by birth or by marriage.

(5) In a case where the succession opens after the enactment of the said Act, the females therein mentioned will inherit as therein provided, and in respect of other females, the rules stated in the foregoing clauses shall apply.

2323. Analogous Law.—This section has been slightly altered so as to incorporate in it the alterations made in the law, in the case of female heirs, by the Hindu Inheritance (Amendment) Act, 1929. The effect of that enactment, so far as the special female heirs in Bombay are concerned, is that the females such as the sister who have already obtained a high place in the catena of heirs continue to inherit as such, but otherwise they inherit, as mentioned in the enactment, as heirs, ranking in the order of succession next after the father's father and before the father's brother, where the succession opens after the said enactment; but where it opened before that enactment, they inherit after the nine *bandhus* expressly named in the Mitakshara and other females not mentioned in the said enactment will continue to inherit as mentioned in the first 4 clauses of this section.

2324. Widows of Predeceased Sapindas.—It has already been stated that widows of *gotraj sapindas* are classed in Bombay as *sagotra sapindas* with their husband, and as such, possess the right to collateral succession, but not immediately after their husbands, as was at one time supposed,[1] but after all the male *gotrajas* are exhausted by any males existing in that line, within the limits to which the *gotraj* relationship extends.[2] The word "line" here means the same as *gotra* or continuation of the line of ascent or descent.

Clause (2).

For example, widows of the males in the paternal grandfather's line come after the males who are heirs in the same line, and similarly those in the paternal grandfather's line and the paternal great-grandfather's line. The males are exhausted before the females come in.[3] Now, since the line of heritable *sapindas* includes descendants up to the sixth degree, it follows that widows in any line will take in default of the males in that particular line to which their husbands belong. In this view, the paternal uncle's grandson is preferable to the paternal uncle's widow, since both are in the same line and male *gotrajas* are preferable to females.[4] In dealing with the line of *gotraj sapindaship*, the descendants must be

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(1) *Lakshmi Bai* v. *Jagrave*, 6 B.H.C.R. (A.C.) 152, explained and dissented from, *per* Telang, J., in *Rachava* v. *Kalingappa*, 16 B. 716 (719).

(2) *Rachava* v. *Kalingappa*, 16 B. 716 (719); *Kashi Bai* v. *Moreswar*, 35 B. 389 (392); *Khandacharya* v. *Govindacharya*, 13 Bom.L.R. 1005.

(3) *Kashi Bai* v. *Moreswar*, 35 B. 389 (492); *Kashi Bai* v. *Sita Bai*, 13 Bom. L.R. 552.

(4) *Khandacharya* v. *Govindacharya*, 13 Bom.L.R. 1005 (1008).

exhausted at each step of the ascent, before proceeding higher to bring other heirs into the competition.[1] In this view, a brother's widow is entitled to succeed in preference to the grandson of the paternal grand uncle of the propositus.[2] Widows of *gotraj sapindas*, inheriting to a male, take a limited woman's estate, but, it is said, they take an absolute estate, if the relation they inherit to was a female, in which case the person to inherit to them would be their own *stridhan* heir and not the heir of the last male owner.[3]

Sister.

2325. As already explained,[4] the sister had always a place in the catena of heirs in the Bombay and Madras presidencies. Her place is now made more secure there and elsewhere by the enactment of the Hindu Law Inheritance (Amendment) Act[5] which however does not affect her higher place in Bombay, namely, her place between the grandmother and the grandfather.[6]

The sister was an heir by virtue of the following text of Mayukh already quoted. (§ 2272.)

An unendowed sister has no prior right of succession over the endowed sister, such as an unendowed daughter has over an endowed daughter, a distinction based on express texts which cannot be extended by analogy to sisters.[7] Sisters take equally,[8] but in severalty, and not as joint tenants.[9]

Madras female heirs.

327. (1) In a case where the succession opened before the enactment of the Hindu Inheritance (Amendment) Act, 1929, in the Madras Presidency the following females are recognized as heritable bandhus, ranking after all male bandhus:—

(*i*) Sister.
(*ii*) Half sister.
(*iii*) Son's daughter.
(*iv*) Daughter's daughter.
(*v*) Brother's daughter.

(2) In a case where the succession opens after the enactment of the said Act, the females therein mentioned, will inherit as therein provided; and a brother's daughter will inherit as theretofore next after all male *bandhus*.

2326. **Analogous Law.**—Although Madras follows the orthodox rule that women do not inherit, unless they are expressly named in the texts, still the courts have liberally construed the texts, and let in certain female relations, holding "that any relative who is also a cognate may be treated as coming within the definition of *bhinna gotra sapinda*, and that the term *sapinda*, used in Chap. II, Sec. VI of the Mitakshara, in-

(1) *Kashi Bai* v. *Sita Bai*, 13 Bom. L.R. 552; *Khandacharya* v. *Govindacharya*, 13 Bom.L.R. 1005 (1008).
(2) Manu, IX-107.
(3) *Narayan* v. *Waman*, 46 B. 17, following *Gandhi* v. *Jadeb*, 24 B. 192 F.B.
(4) § 2272 and S. 327.
(5) Act II of 1929.
(6) *Shidramappa* v. *Neelawa Bai*, 57 B. 377.
(7) *Bhagirathi Bai* v. *Baya*, 5 B. 264 (267).
(8) *Ib*.
(9) *Rindavai* v. *Anacharya*, 15 B. 206.

cludes females."[1] It will be seen that while the courts in Bombay and Madras both recognize the right of certain female relations to inheritance, each gives a different reason in support of its view. In Bombay, females are admitted, because they are held to pass into their husband's *gotra* upon marriage and with them are entitled to be classed as *sagotra sapindas*, while in Madras, the term *sapinda* is construed regardless of sex, though it is conceded that female *bandhus* take after all male *bandhus*, a female *bandhu* nearer in degree being excluded by a male *bandhu* more distantly connected.[2] This view is supported by the following reasoning: The Mitakshara designates nine heritable *bandhus*. The Privy Council have held that list to be merely illustrative and not exhaustive, from which it follows that in regard to *bandhus*, the Mitakshara did not limit the right of inheritance to certain prescribed relationships of that nature; but since it lays down a definite order of succession prescribed by law for the several classes, it follows "that all relatives however remote, must be exhausted before the estate can fall to persons who have no connection with the family."[3] This made the way for all females easy and it was made easier by a judgment of Turner, C.J., who passed the whole case-law in review and disposed of the implied textual exclusion of the females in the following words: "It may, we think, be admitted—and herein is the reason why we consider it unnecessary to pronounce definitely on the sister's claim—that Vidnyaneshwar recognized the texts excluding females so far as to give priority to males, and he indicates with sufficient clearness the rules which are to be observed in ascertaining the order of succession; but his work does not profess to be a Code but a commentary of law already accepted, and which he assumes to be generally known. There is, therefore, much force in the observation of Mr. Justice Holloway that the rule of law ought not to be derived from the positive words of such a commentator, much less from his omissions."[4] The Privy Council may, perhaps, condemn this process of reasoning, but it is now too late to exclude the female heirs who have since 1875 been so recognized. As observed by Muthusamy Ayyar, J: "The course of decisions from that date proceeds on the principle that consanguinity may be recognized as the basis of title to succession, in the absence of preferential male heirs."[5]

On this principle the following female relations have been held to be be heirs:—

2327. Sister.—Before her statutory elevation, the sister was allotted a place amongst *bandhus*,[6] though her claim elsewhere was said to rest only upon custom.[7]

Clause (1) (i).

(1) *Kutti* v. *Radhakrishna*, 8 M. H. C.R. 88, explained, *per* Muttusami Ayyar, J., in *Balamma* v. *Pullayya*, 18 M. 168(177), followed in *Venkatasubramaniam* v. *Thayarammal*, 21 M. 263 (267).

(2) *Venkata* v. *Suremani*, 31 M. 321 (324).

(3) *Kutti* v. *Radhakrishna*, 8 M. H. C. R. 88 (93).

(4) *Lakshmanammal* v. *Tiruvengada*, 5 M. 241 (250).

(5) *Nallanna* v. *Ponnal*, 14 M. 149.

(6) *Raghunath* v. *Munnan Missar*, 20 A. 191; *Kutti* v. *Radhakrishna*, 8 M.H. C.R. 88; *Lakshmanammal* v. *Tiruvengada*, 5 M. 241; *Mari* v. *Chinnammal*, 8 M. 107 (130) F.B.; *Nallanna* v. *Ponnal*, 14 M. 149; *Muliani* v. *Lala Mal*, (1889) P.R. No. 180; *Nanak Gir* v. *Kishan Kaur*, (1919) P.R. No. 161; 53 I.C. 815; *Puro* v. *Sulakhan*, 76 I.C. 121: (1925) L. 82.

(7) *Bhadia* v. *Bhagi*, 10 N.L.R. 24; *Madho* v. *Janki*, 12 N.L.R. 148 (149).

And, being a female *bandhu*, she was postponed to her son, who is a male *bandhu*.[1] But, being a *bandhu*, she was preferred to a brother's daughter, who was no *bandhu* at all,[2] and in Bombay, she had precedence over a son's daughter,[3] and the brother's widow.[4]

2328. Half Sister.—The half sister is now equally in the line of heirs, though she too must abide her chance till all the male *bandhus* have passed out of the line.[5]

Clause (ii).

2329. Son's Daughter.—The son's daughter is entitled to inherit to her grandfather as a *bandhu*.[6]

Clause (iii).

2330. Daughter's Daughter.—The daughter's daughter has been allowed to come in on the ground of her consanguinity, which is recognized as the basis of title to succession, in the absence of preferential male heirs.[7] It will also probably let in the sister's daughter, though she has been held not to be a *bandhu*.[8] But as a mere relative, she has a place in the line of heirs before the property escheats to the Crown.[9]

Clause (iv).

2331. Brother's Daughter.—On the same principle, a brother's daughter would exclude the adopted son of the maternal uncle.[10]

Clause (v).

2332. Sister's Daughter.—A sister's daughter has also a place in the catena of heirs, though she comes in as a female relative and not as a *bandhu*, who will have precedence over her.[11] As such, the son's daughter's son has precedence over her,[12] though she herself has precedence over her sister's son son.[13]

2333. Father's Sister.—So the father's sister is a bandhu. Her son is expressly mentioned in the Mitakshara among the cognates related to the man himself,[14] but the maternal uncle is held to be preferable to him on account of his propinquity.[15] His mother must be equally a *bandhu* of the same class though she cannot inherit in preference to the mother's brother,[16] the maternal uncle,[17] or the maternal grandfather who ranks higher than the

(1) *Kutti* v. *Radhakrishna*, 8 M.H. C.R. 88 (93); *Lakshmanammal* v. *Tiruvengada*, 5 M. 241. In *Vellanki* v. *Venkatta*, 1 M. 174 (185) P.C., the question was raised but not decided.

(2) *Puro* v. *Sulakhan*, 76 I.C. 121: (1925) L. 82.

(3) *Dattatraya* v. *Ganga Bai*, 44 B. 541.

(4) *Shidramappa* v. *Neelava Bai*, 57 B. 377.

(5) *Kumaravelu* v. *Virana*, 5 M. 29.

(6) *Nallanna* v. *Ponnal*, 14 M. 149, (150).

(7) *Ramappa* v. *Arumugath*, 17 M. 182 (183), following *Nallanna* v. *Ponnal*, 14 M. 149 (150); *Venkata* v. *Surenani*, 31 M. 321 (324); *Gangaram* v. *Ballia*, (1876) B.P.J. 31; *Ghunaji* v. *Tulsi*, 20 N.L.R. 182 : 82 I.C. 457 : (1925) N. 98 (Mayukh case).

(8) *Sundarammal* v. *Rangasami*, 18 M. 193 (198, 199).

(9) *Ramappa* v. *Arumugath*, 17 M. 182; *Bansidhar* v. *Ganeshi*, 22 A. 338; *contra* S. 305.

(10) *Venkatasubramaniam* v. *Thayarammal*, 21 M. 763.

(11) *Sundarammal* v. *Rangasami*, 18 M. 193 (198).

(12) *Dattatraya* v. *Ganga Bai*, 44 B. 541.

(13) *Ib.*

(14) Mit., II-VI.

(15) *Marudappa* v. *Collector*, (1935) M. 1017 (1029, 1030).

(16) *Narasamma* v. *Mangammal*, 13 M. 10 (14).

(17) *Girdharilal* v. *Government*, 12 M. I.A. 448; *Chinnammal* v. *Venkatachela*, 15 M. 421.

maternal uncle.[1] Under the Bombay School, the father's sister is preferred to the maternal grandfather in matters of succession.[2]

2334. Preceptor, Pupil and Fellow-student.—The following texts support these heirs:—

Apastamb.—"If there be no male issue, the nearest kinsman inherits; or in default of kindred, the preceptor; or failing him the disciple."[3]

Mitakshara.—"If there be no pupil, the fellow-student is the successor. He who received his investiture or instruction in reading or in the knowledge of the sense of scripture from the same preceptor, is a fellow-student.[4]

2335. It has been held that this rule relating to the inheritance must not be regarded as obsolete or dead by reason of its rare application. The Crown's right of escheat is as rarely enforced, but nevertheless the rule exists, and must be applied when an occasion for its application arises.[5] The rule applies equally to *shudras*.[6]

2336. "On failure of these a Brahmin shall succeed."—The preceptor, the pupil and the fellow-student are heirs to the property of a householder. All these are teachers and associates of religious learning. The preceptor and the pupil are the teacher and the student of the Vedas, while a fellow-student is his fellow-learner under the same *Acharya*. As the Shudra cannot partake of religious knowledge, there is no intermediate heir to him between his *bandhus* and the Crown.

2337. The Crown.—The Crown is regarded as the *ultima haeres* in all systems, and the Mitakshara designates it as the last heir, except a Brahmin whose property shall never be taken by the king.[7] "On failure of heirs, the wealth of a Brahmin must be given to a Brahmin."[8]

2338. The Mitakshara declares with some emphasis that the property of a Brahmin shall not be taken by the King, and that "if there be no heir of a Brahmin's wealth, on his demise, it must be given to a Brahmin. Otherwise, the King is tainted with sin."[9] The effect of this clause had to be considered in the case of a zemindari, of which the last male holder, a Brahmin, had died, leaving a widow, who took a widow's estate, and upon her death, there was no heir of the husband to inherit the zemindari. It was contended that the estate of a Brahmin did not escheat to the Crown, and the Mitakshara was cited in support of the contention, but the Privy Council held that his property equally escheated to the Crown. In so holding, they said: "It appears to their Lordships that the passage quoted by the Mitakshara from Narad, in the very section which cites the prohibition of Manu, shows what the law in its utmost strictness was. That passage is, 'If there be no heir of a Brahmin's wealth, on his demise, it must be given to a Brahman, otherwise the King is tainted with sin.' In other words, the king is to take the property, but to take it subject to the duty, which he cannot neglect without sin, of disposing of it, at his discretion, amongst Brahmins of the kind con-

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(1) *Chinnammal* v. *Venkatachala*, 15 M. 421.
(2) *Madho* v. *Janki*, 12 N.L.R. 148 : 36 I.C. 514; cf., *Saguna* v. *Sadashiv*, 26 B. 710.
(3) Apastamb cited in Mit., II-VII-1.
(4) Mit., II-VII-3.
(5) *Sambasivam* v. *Secretary of State*, 44 M. 704 (708, 709).
(6) *Ib.*
(7) Manu, IX-189; Mit., II-VII-5.
(8) Narad, cited in Mit., II-VII-5.
(9) Mit., II-VII-5.

templated by the preceding texts.[1] If this is so, their Lordships hold that the property vests in the King, subject to a trust in favour of Brahmins."

2339. As the question in the case was between the Government claiming the property by escheat and an adverse claimant, their Lordships had not to consider the further question as to the nature of the trust, whether the duty imposed upon the King was one of imperfect obligation or a positive trust affecting the property in his hands, or whether if a trust, it was or was not incapable of enforcement by reason of the uncertainty of its object; but they were inclined to the view that such a trust would fail for want of certainty of its object.[2] The Crown, by the general prerogative, will take the property by escheat, subject to any trusts or charges affecting it.[3] It is not, however, any more than the reversioner bound by any unauthorized alienations of the widow.[4] The right of an *istemrari moukarari* tenant in Bengal escheats to the Crown and not to the zemindar, on the ground that such tenure created an absolute interest in the tenant and reserved no such power to the zemindar.[5]

2340. Where the Crown claims by escheat against a person in possession, the burden lies on it to show that the last proprietor had died without heirs: and the defendant in possession has the right to defend his possession on the ground of an existing *jus tertii*.[6]

All property in India belonging to the King vests in the Secretary of State for India, in whom the escheated property will also vest as the King's representative. The Bengal and the Madras Regulations make provision for the superintendence of escheated property.[7]

328. The heir of a hermit (*Vanprasth*) is a spiritual brother or an associate in holiness, or an ascetic (Sanyasi or Yati), a virtuous pupil, and that of a professed student (*Brahmachari*), his religious preceptor.

Hermit's heir.

In default of these heirs, any one associated in holiness may inherit.

2341. Analogous Law.—This section is supported by the following texts:—

Yadnyavalkya.—"The heirs of a hermit, of an ascetic and of a professed student are, in their order, the preceptor, the virtuous pupil and the spiritual brother and associate in holiness."[8]

Mitakshara.—"5. A spiritual brother is one who is engaged as a brotherly companion (having consented to become so). An associate in holiness is one appertaining to the same hermitage. Being a spiritual companion, and belonging to the same hermitage, he is spiritual brother associate in holiness.

"4. The virtuous pupil is one who is assiduous in the study of theology, in retaining the holy science and in practising its ordinances. For, a person, whose conduct is bad, is unworthy of the inheritance, were he even the preceptor or (standing in) any other (venerable relation).

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(1) *Collector* v. *Cavaly*, 8 M. I. A. 500 (553).

(2) *Collector* v. *Cavaly*, 8 M. I. A. 500 (524), followed in *Sonet Koer* v. *Himmut*, 1 C. 391 (399) P.C.

(3) *Ib., p.* 527; *Cavaly* v. *Collector*, 11 M.I.A. 619; *Sonet Koer* v. *Himmut*, 1 C. 391 P.C.

(4) *Collector* v. *Cavaly*, 8 M. I. A. 529.

(5) *Somet Koer* v. *Himmut*, I.C. 391 (402) P.C.

(6) *Girdhari Lal* v. *Government*, 12 M.I.A. 448 (469); *Ganpat* v. *Secretary of State*, 45 B. 1116.

(7) Beng. Reg. XIX of 1810, S. 7; Mad. Reg. VII of 1817, S. 6.

(8) Yad., III-47; *see* Manu, VI-15.

"3. The student (Brahmachari) must be a professed or perpetual one, for the mother and the rest of the natural heirs take the property of temporary students; and the preceptor is declared to be heir to a professed student, as an exception (to the claim of the mother and the rest).

"7 Are not those who have entered into a religious profession unconcerned with heritable property.[1]

"8. The answer is, a hermit may have property; for the text (of Yadnavalkya) expresses: 'The hermit may make a hoard of things sufficient for a day, a month, six months or a year, and in the month of *Aswin*, he should abandon (the residue of) what has been collected.' The ascetic too has clothes, books and other requisite articles; for a passage (of the Veda) directs that 'he should wear clothes to cover his privy parts,' and a text (of law) prescribes that 'he should take the requisite for his austerities and his sandals.' The professor, student likewise, has clothes to cover his body and he possesses also other effects.

"9. It was therefore proper to explain the partition or inheritance of such property."[2]

2342. To begin with, this section only relates to inheritance to persons therein named. It cannot be extended, by analogy, to persons who affect to belong to a religious order, but follow secular occupations. Then, again, it applies only to the twice-born classes to whom these orders were open. It cannot apply to the Shudras,[3] a *Gossain*, or a *Bairagi*, because the order of *Bairagis* is not confined to the members of the twice-born castes.[4] It is also pertinent to note that the sort of property, for which the chapter prescribes the rule of inheritance, is the personal belongings of the ascetic, such as his clothes and grain. The law cannot be diverted to apply to property acquired or possessed by *quasi*-ascetics and hermits, who do not belong to the class to whom the rules were intended to apply. As was observed in a case: "To become a religious ascetic and exclude his heirs from succession to property subsequently acquired, he must *bona fide* retire from all worldly affairs and in fact become, as it were, dead to the world, leaving all the property then vested in him to his legal heirs who succeed to it at once."[5] In order to entitle the heir to succeed to the deceased, he must shew that the latter had completely and permanently renounced the world. Such is the case of the *mahant* of a *math*, whose private effects would be subject to the ordinary law.[6] It must be confessed that the orders, here provided for, have long since ceased to exist, and the rules can only apply by analogy and should be applied with caution.

2343. Hermit.—The hermit, as such, does not now possess any property of value. Whatever he does, goes to his associates and not to one belonging to the same order, since the principle of succession is based entirely upon fellowship and personal association with the ascetic, and a stranger, though belonging to the same order of ascetics, is excluded.[7]

2344. Sanyasi or Yati.—*Sanyasi* means an ascetic or anchorite. *Yati* means a *Bhiksu*, a religious mendicant who lives upon the voluntary

(1) Yad., II-138; cited in Mit., II-VIII-1.

(2) Mit., II-VIII-1-9.

(3) *Harish Chandra* v. *Atir Mohamed*, 40 C. 545; *Somasundaram* v. *Vaithilinga*, 40 M. 846.

(4) *Ram Das* v. *Baldeodasji*, 39 B. 168 (174); *Dharmapuram* v. *Virapandiya*, 22 M. 302.

(5) *Mudobun* v. *Kishen*, (1852) S.D. A.B. 1089 (1093): 12 I.D. (O.S.) 840 (843); *Khodeeram* v. *Rookhinee*, 15 W. R. 197; *Gouri Sunker* v. *Nider Singh*, 18 C.W.N. 59.

(6) *Dukharam* v. *Lachmun*, 4 C. 954; *Lok Nath* v. *Amar Nath*, (1911) P.L. R. 24: 9 I.C. 541.

(7) *Khuggender* v. *Sharupgir*, 4 C. 543.

alms given to him.[1] The pupil is his heir, but the pupil here intended is the *shishya* as opposed to the *chela*, that is a pupil who has undergone the final ceremony which severs him from his family[2] but in Bombay, a designated *chela* was held entitled to succeed, though his *guru* had died before his formal initiation.[3] A pupil who deserts his master, cannot inherit to him.[4]

2345. Brahmachari.—The professed religious student may himself be the preceptor of another, to whose assets he will succeed. In one case such a case was supported on custom, which was held proved.[5]

2346. Heirs of Other Ascetics.—In another case; a religious mendicant died, leaving no heir except a pupil of the same spiritual teacher, who was held entitled to succeed in accordance with the opinion of the Pandits who said: "On the death of a religious mendicant, his spiritual teacher's pupil has the right of succession to his estates, and there is no relationship between them; but the person who becomes a follower of the spiritual teacher, is universally termed a religious brother by the fraternity of devotees. If such a person attend on the deceased at the time of death, and performs his exequial rites, and if the spiritual teacher himself disclaim all right of succession, such religious brother is entitled to the inheritance. This doctrine is justified by universal usage."[6] In still another case of succession to a *Bairagi*, his pupil was held to succeed in preference to his own brother, whose fraternal relationship was held to have effect, so long only as the proprietor continued in the order of a householder.[7]

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(1) *Gouri Sunkar* v. *Nider Singh*, 18 C.W.N. 191 : 23 I.C. 287.

(2) *Ramdhan* v. *Dalmir Puri*, 14 C. W.N. 191. But *Parbhu Dayal* v. *Latta Das*, 29 O.C. 127; 92 I. C. 764: (1926) O. 293, places the preceptor before the pupil.

(3) *Krishnagiri* v. *Shridhar*, 46 B. 655.

(4) *Soogun Chand* v. *Gopal Gir*, 4 N. W.P.H.C.R. 101.

(5) *Collector* v. *Jagatchunder*, 28 C. 608 (610).

(6) 2 Mac. H. L. S. VII, Case 2, p. 91.

(7) *Ib.*

CHAPTER XXIV.

THE DAYABHAG SUCCESSION.

2347. Topical Introduction.—In the topical introduction to the Mitakshara succession, sufficient reference has been made to the wholly different standpoint from which the Dayabhag school views the law of succession. As pointed out there, the scheme of the Dayabhag law of succession is radically distinct from, and to some extent incompatible with, the scheme of the Mitakshara, in that while propinquity is the primary test in the latter school,[1] spiritual benefit is the sole test in the former system.[2] The Mitakshara does not wholly eschew the latter test but only regards it as a secondary test to be applied in settling the contest between persons of the same degree of propinquity.[3] But though the two schools approach the same question from two divergent standpoints, there is not much divergence in the result so far as the near relations are concerned, though the exclusion of a child widow and a sonless widowed daughter from inheritance furnishes, perhaps, apt illustrations of the subordination of propinquity and natural affection to the moloch of religious efficacy. Other daughters inherit because, though "daughters confer no benefit, they succeed because their sons do."[4] The logical sequence of this mode of computation might have led to other startling results. But "in most cases, propinquity, spiritual efficacy and natural love and affection run in the same lines, and no difficulty arises, but whenever they run in different lines, Jimut Vahan was compelled to ignore spiritual efficacy and had recourse to other principles or express texts,"[5] with the result that the claims of near relations are mostly safeguarded. But in the region of *bandhus* of the same class, this divergence becomes well marked, and in ascertaining the relative rank of *bandhus*, the courts are cautious against using the Mitakshara to supplement the Dayabhag. It has been held that the scheme of the Dayabhag is, as regards the law of succession, radically distinct from and to some extent incompatible with the scheme of the Mitakshara; so that the latter cannot be made to supplement the former.[6] For instance, under the Mitakshara, a *bandhu ex parte materna* is an heir, but under the Dayabhag, he cannot come in, because he is not a *sakulya* of the Propositus—a term which includes only agnates of the family, including, however, in that term the male descendants of the daughters of the family. As such, the uncle of the propositus, being his great-great-grandfather's daughter's son's son, though a heritable *bandhu ex parte materna* under the Mitakshara, is no heir at all under the Dayabhag, because he does not belong to his *kula*.[7] "Although the Dayabhag may be silent so far as express enumeration goes, it is not silent so far as the indication of the general principle

(1) *Appandai* v. *Baghubali*, 33 M. 439; *Ganuo* v. *Beni*, 14 N.L.R. 82: 43 I.C. 943.
(2) *Dino Nath* v. *Chundi*, 16 C.L.J. 14: 16 I.C. 349; *Umashankar* v. *Nageswari*, (1919) Pat. 162 F.B.
(3) *Adit Narayan* v. *Mahabir*, (1917) Pat. 12: 35 I.C. 687; *Hari Har* v. *Jang Bahadur*, 34 I.C. (Pat.) 183.
(4) *Bamundoss* v. *Tarinee*, 7 M.I.A. 169 (183).
(5) *Akhoy* v. *Haridas*, 35 C. 721 (726).
(6) *Dina Nath* v. *Chundi Koer*, 16 C. L.J. 14; *Sambu Chandra* v. *Kartik Chandra*, 54 C. 171 (178).
(7) *Sambu Chandra* v. *Kartik Chandra*, 54 C. 171.

according to which heirship is to be determined, is concerned, that general principle being clearly the principle of spiritual benefit."[1] Applying this test, a maternal great-great-grandfather's daughter's son,[2] and a father's maternal grandfather's great-great-grandson are no heirs, which they would have been if propinquity had been the primary test.[3] Applying the other test, mother's sister's son is entitled to succeed, in preference to a maternal uncle's son, since it is the order of enumeration in the Mitakshara.[4]

These and other analogues will be found examined in the ensuing commentary.

329. **In this chapter, unless there is anything repugnant in the subject or context—"sapinda" means a sapinda as defined in section 312, but not more than three degrees removed, and includes cognate sapindas within that limit.**

"Sapinda" defined.

330. **"Sakulya" is a male agnate relation of the propositus four to six degrees remote from him, or from the common ancestor in the male line of ascent or descent.**

"Sakulya" defined.

2348. Analogous Law.—The term "*sakulya*" occurs in the following texts :—

Manu.—"On failure of such kindred (*i.e., sapindas*), the *sakulyas* shall be the heirs or the spiritual preceptor, or the pupil."[5]

Dayabhag (citing the last).—"The distant kinsman (*sakulya*) is one who shares a divided oblation, as the grandson's grandson or other descendant beyond three degrees reckoned from him, or the offspring of the grandfather's grandfather or other remoter ancestor."[6]

Shrikrishna (referring to the last).—"The *samanodaks* used to be taken to be included in the term *sakulya*, because they also have sprung from the same family. Although both classes of heirs (near *sakulyas and samanodaks*, or remote *sakulyas*) are included in the same term, their order of succession is regulated by the degree of benefit conferred. This is the meaning."

The following texts of the Dayabhag define this term :—

"The paternal great-grandfather and grandfather, the father and man himself; his brothers of the whole blood, his son by a woman of the same tribe, his son's son and his great-grandson, all these partaking of undivided oblations are pronounced sapindas. Those who share divided oblations are called *sakulyas*. Male issue of the body being left, the property must go to them. On failure of *sapindas* or near kindred, *sakulyas* or remote kinsmen are heirs. "If there be none, the preceptor, the pupil or the priest takes the inheritance. In default of these, the king has the escheat."[7]

"If there be no such distant kindred, the *samanodaks*, kinsmen allied by a common libation of water, must be admitted to inherit as being signified by the term *sakulya* (conformably with Baudhayan's explanation of it). The distant kinsmen, that is, the descendants of the paternal grandfather's grandfather or other remoter ancestor, and such relatives, are denominated *samanodaks*."[8]

2349. The term "*sakulya*" literally means "belonging to the same *kul* or family." Originally, a *sakulya* was one contradistinguished from a stranger. But later on, the term underwent several changes. It has

(1) *Dino Nath* v. *Chundi*, 16 C.L.J. 14: 16 I.C. 349; followed in *Shambo Chandra* v. *Kartick Chandra*, 54 C. 171.
(2) *Shambo Chandra* v. *Kartick Chandra*, 54 C. 171.
(3) *Dinanath* v. *Chandi*, 16 C.L.J. 14.
(4) *Appandai* v. *Baghubali*, 33 M. 439.
(5) Manu, IX-187.
(6) Dayabhag, XI-VI-21.
(7) Baudhayan, cited in Dayabhag, XI-I-37.
(8) Dayabhag, XI-VI-23.

already been seen that the ancestor in the fourth, fifth and sixth degrees was treated as a *sakulya*, but this term does not occur in the Mitakshara. The term is used in the Dayabhag to apply to all persons who presented divided oblations to the deceased, who received divided oblations from them, and who presented divided oblations (to common ancestors) in which the deceased had a right of participation.[1] This is not all. The descendants of those ancestors to whom the deceased presented divided oblations, were also his *sakulyas*, because the last owner had also a right of participation in the *pindas* (undivided or divided) which these presented to common ancestors.[2] The kinsmen *ex parte materna* are excluded from *sakulyas*.[3]

Now, *Sakulyas* are divided into those who are near and those remote. While the former can be ascertained with some certainty, it is not possible to exhaust the enumeration of the latter.

The subject will have to be further considered in the sequel.

Heritable property.

331. All property (movable or immovable) owned by a person, whether joint or separate, passes by succession on his death.

2350. Analogous Law.—It has been stated before that the Mitakshare recognizes two modes of succession according to the nature of the property. But the Dayabhag school recognizes no succession by survivorship; the only succession it recognizes is that by descent, whether the property be co-parcenary or separate. Consequently, when the owner dies issueless, his estate whether comprising movable or immovable property, joint or separate, devolves upon his widow, to the exclusion of her husband's coparceners.[4] In other words, in all cases succession is by descent and not by survivorship.

Deformity as a disqualification.

332. (1) The following defects, if congenital, disqualify a person from inheritance, namely:—

(*i*) Idiocy;

(*ii*) Blindness;

(*iii*) Deafness;

(*iv*) Dumbness;

(2) And the following defects, if present at the time the succession opened, equally disqualify him from inheritance, namely:—

(*v*) Madness;

(*vi*) Sanious or ulcerous leprosy;

(*vii*) Permanent lameness;

(*viii*) Impotency;

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(1) Dayabhag, XI-VI-15.
(2) Dayabhag, XI-I-38; Sarv. Inh. 833.
(3) *Shambu* v. *Kartick Chandra*, 54 C. 171.
(4) *Durga Nath* v. *Chintamani*, 51 C. 214 (219).

(*ix*) **Other incurable diseases; and**

(*x*) **When the widow is the heir, her remarriage falling under the provisions of section 2 of the Hindu Widows' Remarriage Act:**

(3) Provided that the disqualification in all cases is personal only to the heir disqualified, and does not affect his natural issue, though it affects equally his adopted son and the widow, and other heirs.

Illustrations.

(*a*) *A* has three sons, *B*, *C* and *D*. *B* is born blind, *C* lost his legs in the war. *B* never was, while *C* ceases to be, a coparcener in *A's* ancestral estate.

(*b*) *A*, *B* and *C* are members of a joint family. *A* loses his visual organ. It entails his exclusion from the joint family.

(*c*) *A*, *B* and *C* are members of a joint family. *A* loses his visual organ, whereupon he adopts a son *D*. Both *A* and *D* are excluded from the joint family.

2351. Analogous Law.—Both the Mitakshara and the Dayabhag devote considerable space to persons excluded from inheritance.[1] So far as the Mitakshara is concerned, the Legislature has removed all disabilities except congenital lunacy and idiocy from the path of a coparcener or the heir, the only exceptions being persons who claim a right to a religious office or service or to the management of any religious or charitable trust.[2] The Act excludes persons subject to the Dayabhag law who remain still subject to the Shastric law, the reason for their exemption being that unlike the Mitakshara, Dayabhag makes inheritance dependent upon religious efficacy, whereas the Mitakshara makes it dependent upon propinquity. All the same, the exemption was made out of deference to Bengali opinion in the Assembly, and if that opinion favours the extension of the Act equally to them, there would be no difficulty in removing the exemption. But, for the present, the amended law is as above stated.

2352. This section, which was, before the enactment of the Hindu Inheritance (Removal of Disabilities) Act, 1928,[3] of a more general application, is now limited only to persons subject to the Dayabhag law or to those who succeed as managers of a religious or charitable trust. It is supported by the following texts:—

Baudhayan.—Granting food, clothes (and shelter) they shall support those who are incapable of transacting legal business, (*viz.*), the blind, idiots, those immersed in vice, the incurably deceased, and so forth. Those who neglect their duties and occupations; but not the outcast and his offsprings. Intercourse with an outcast shall not take place. But he shall support an outcaste mother without speaking to her.[4]

Manu.—"Eunuchs and outcasts, persons born blind or deaf, mad men, idiots, the dumb, and such as have lost the use of a limb are excluded from a share of the heritage."[5]

Narad (cited in the Mitakshara).—"An enemy to his father, an outcast, an impotent person, and one who is addicted to vice, have no shares of the inheritance, even though they be legitimate, much less, if they be sons of the wife by an appointed kinsman."[6]

Mitakshara.—"The masculine gender is not here used restrictively. It must be, therefore, understood that the wife, the daughter, the mother or any other female,

(1) Mit., II-X, §§ 1-15; Dayabhag, Ch. V, §§ 1-20.
(2) Hindu Inheritance (Removal of Disabilities) Act, 1928, S. 3.
(3) Act XII of 1928 (which came into force on the 20th September, 1928).
(4) II-2-3 §§ 37-42; 14 S. B. E. 230.
(5) Manu, IX-201.
(6) Narad, XIII-21; cited in Mit., II-X-3.

being disqualified for any of the defects which have been specified, is likewise excluded from participation."[1]

"Under the term 'others' are comprehended one who has entered into an order of devotion, an enemy to his father, a sinner in an inferior degree. . . . Narad also declares: 'An enemy to his father, an outcast, an impotent person and one who is addicted to vice, take no share of the inheritance, even though they be legitimate; much less, if they be sons of the wife by an appointed kinsman.'"[2] The specific mention of "legitimate" issue and "offspring of the wife" is intended to forbid the adoption of other sons.[3]

Yadnavalkya.—"An impotent person, an outcast and his issue, one lame, a mad man, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others similarly disqualified, must be maintained; excluding them, however, from participation."[4]

2353. Disqualified Heirs.—The several mental and physical defects disqualifying a person from inheritance are based upon the Vedic text which declares: "Females and persons deficient in the organ of senses are deemed incompetent to inherit." The reason assigned is that disabilities of this life are the result of past sins; but the true reason is obvious. They took no hand in fighting and therefore took no hand in the estate (§§ **16-17**).

The old reason has disappeared but the old disability remained, till it was removed by the Legislature. Even before the enactment removing them, it was doubted in some cases, whether infirmities, such as congenital leprosy,[5] or lameness,[6] blindness,[7] or a nasal tumour,[8] were sufficient to disqualify a person from inheritance. But a person suffering from congenital insanity or imbecility, and thus unfit to discharge the religious and other duties incumbent upon the heir, and, indeed unfit for the ordinary intercourse of life, stands upon a different footing,[9] but a mental disqualification admits of degrees, and the court would be loth to disinherit the heir, unless it is convinced that the disability was of a pronounced type and such as renders the person wholly devoid of understanding and incompetent to discharge the duties incumbent upon the heir,[10] which must be established by the clearest and most satisfactory evidence.[11]

Blindness Deafness and Dumbness must be congenital.

2354. Of these, it has been held that, in order to disqualify, the blindness, deafness and dumbness must be both congenital[12] and incurable at the time the succession

(1) Mit., II-X-8.

(2) Narad, II-13, 21; cited in Mit., II-X-3; Dayabhag, V-11, 13.

(3) Mit. X-11. The correct translation should be "forbid the inheritance of other descriptions of sons" (Colebrook's f.-n.)

(4) Mandlik, p. 223. Mitakshara denotes a whole chapter to the exposition of this text; Mit., II-X-1-15. Mayukh, IV-XI-4; Vivad Chintamani, 242; 3 Dig., Bk. V, Ch. V, p. 329.

(5) *Kayarohana* v. *Subbaraya*, 38 M. 250, approved in *Ramabai* v. *Harnabai*, 48 B. 363 P.C.

(6) *Venkata* v. *Purshottam*, 25 M. 133; but see *Fithick* v. *Juggut Mohini*, 22 W. R. 348.

(7) *Yellavajhulu* v. *Yellavajhulu*, 37 M. L.J. 405.

(8) *Subba* v. *Venkatarama*, 26 M.L.J. 508.

(9) *Tirumamagal* v. *Ramaswami*, 1 M. H.C.R. 214; *Muthusami* v. *Meenammal*, 43 M. 464; *Ramabai* v. *Harnabai*, 48 B. 363 P.C.

(10) *Ran Bijai* v. *Bisheshar*, 18 C. 111 (118) P.C.

(11) *Surti* v. *Narain Das*, 12 A. 530 (533).

(12) Dayabhag, V-V-9. The term 'born' is connected in construction with the words 'blind' and 'deaf'; *Gungeshwar* v. *Durga*, 15 C. 17 P.C.; *Bakubai* v. *Manchabai*, 2 B.H.C.R. 5; *Vallabh Ram* v. *Hariganga*, 4 B.H.C.R. (A. C.) 135; *Bharmappa* v. *Ujjan*, 46 B. 455 (457, 458); *Murarji* v. *Parvatibai*, 1 B. 177; *Umabai* v. *Bhavu*, 1 B. 57; *Kalidas* v. *Krishna*, 11 W.R. 11; *Bharmappa* v. *Bharmagauda*, 23 Bom. L.R. 1320; *Mohesh* v. *Chunder*, 23 W.R. 78; *Pudiava* v. *Pavanasa*, 45 M. 949 F.B., overruling *Yellavajhula* v. *Yellavajhula*, 43 M. 4 (16, 18); *contra* in *Pratapgavri* v. *Mul Shankar*, 26 Bom. L. R. 269, following *Charu Chunder* v *Nobo Sundari*, 18 C. 327.

opened.[1] The Mitakshara describes the blind as "destitute of the visual organ,[2] *i.e.*, he must be stone-blind. Both a male and a female heir, *e.g.*, the daughter, are disqualified for this and similar disabilities,[3] which, of course, must be strictly proved by those alleging them.[4]

2355. Want of Limb or Organ.—This must be such as to amount to serious physical disability. So in the Dayabhag, it is said that the disqualifying lameness must be such that "one cannot walk."[5] It must be also congenital.[6]

2356. Lunacy and Idiocy.—The Mitakshara comments on the term "madman" as one affected by any of the various sorts of insanity, proceeding from air, bile or phlegm, from delirium or from planetary influence, and, an "idiot" as a person deprived of the internal faculty, meaning one incapable of discriminating right from wrong.[7] It has been held that these definitions harmonize with the English view of lunacy and idiocy,[8] according to which idiocy is *non compos mentis*, but does not imply utter mental darkness.[9]

In order to disqualify, the lunacy or idiocy need not be congenital[10] or incurable, provided it exists when the succession opens.[11] But, then, it must at least be idiocy, and not a mere weakness of intellect, dullness or stupidity.[12] In one case, a boy bordering on idiocy was allowed to transmit a heritable right to his widow.[13] In the case of coparcenary property, where the interest of a coparcener vests immediately on his birth, the case would be different. If he then suffered from no disability, the estate would vest in him, and what vested in him then, could not be divested by his subsequent disability.[14] A lunatic, though disqualified to inherit, is not disqualified to possess property, of which he is possessed.[15]

2357. Leprosy.—In order to disqualify a person from inheritance, the leprosy must be of a virulent form.[16]. It is only the case of agonizing, sanious or ulcerous type of leprosy, and

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(1) *Muddun Gopal* v. *Khikhinda*, 18 C. 341 (348) P.C.; *Karalicharan* v. *Ashutosh*, 50 C. 604; *Savitri Bai* v. *Bhao Bhat*, 51 B. 50; *Nana* v. *Jogilal*, 19 N.L.R. 69: 71 I.C. 566: (1923) N. 151.

(2) Mit., II-X-2.

(3) *Bakubai* v. *Manchhabai*, 2 B.H.C. R. 5.

(4) *Karali* v. *Ashutosh*, 50 C. 604; *Budh Sagar* v. *Bishnu Sahai*, 47 A. 327.

(5) Dayabhag, V-V-10.

(6) *Venkata* v. *Purushottam*, 26 M. 133; *c.f.*, *Futtick* v. *Juggut*, 22 W.R.. 348.

(7) Mit., II-X-2.

(8) *Tirumamagal* v. *Ramaswami*, 1 M. H.C.R. 214 (215).

(9) 1 Gour's Penal Law, (5th Ed.), §§ 696-701.

(10) *Bodhu Narain* v. *Omrao Singh*, 13 M.I.A. 519 (531); *Dwarka Nath* v. *Mahendra Nath*, 9 B.L.R. 198; *Braja Bhukan* v. *Bichan*, 14 W.R. 330; *Ram Sahye* v. *Laljee*, 8 C. 149 (153), followed in *Ram Soonder* v. *Ram Sahye*, 18 C. 919 (922); *Purna Chandra* v. *Gopal*, 8 C.L.J. 369; *Murarji* v. *Parvati*, 1 B. 177; *Deo Kishen* v. *Budh Prakash*, 5 A. 509; *Ram Singh* v. *Bhant*, 38 A. 117; *contra* in *Hotchand* v. *Manghanmal*, 8 S.L.R. 279 F.B.: 29 I.C. 42; *Muthusami* v. *Meenammal*, 43 M. 464; *contra* in *Murarji* v. *Parvati Bai*, 1 B. 177 (*obiter* by Westropp, C.J.); *Bapuji* v. *Dattu*, 47 B. 707; *Raja* v. *Bhimrao*, 57 I.C. (N.) 647. (That idiocy must be congenital is unsound).

(11) *Dwarkanath* v. *Denobundo*, 18 W. R. 305; *Deo Kishen* v. *Budh Prakash*, 5 A. 509; *Bapuji* v. *Dattu*, 47 B. 707.

(12) *Surti* v. *Narain Das*, 12 A. 530.

(13) *Amrit* v. *Manik*, 12 B.H.C.R. 79; W. & B., H.L. Inter., p. 155.

(14) *Muthusami* v. *Meenammal*, 43 M. 464.

(15) *Court of Wards* v. *Kupulmun*, 19 W.R. 164.

16) *Bhagaban* v. *Ram Prapana*, 22 C. 843 (858) P.C.; *Janardhan* v. *Gopal*, 5 B. H.C.R. (A.C.) 145; *Ananta* v. *Ramabai*, 1 B. 554; *Ranchod* v. *Ajoobai*, 9 Bom. L.R. 1149 (1151); *Raju* v. *Ramasami*, 16 M.L.T. 254: 25 I.C. 963.

not of the anaesthetic type,[1] that creates the disqualification.[2] A person suffering from the anaesthetic form of leprosy, though considered incurable by medical men, is not disentitled to inherit. "Both the texts of the Hindu Law and the decided cases fully establish that it is only the agonizing, sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion. It may be that it is only that type that was regarded as incurable by the Hindu writers. It is not safe to adopt the test whether the disease is curable or not. This is very much a matter of opinion, on which the medical profession itself might be divided. The test would, moreover, be an indefinite one for legal purposes, as what is at one time regarded as curable may, at other times, be regarded as incurable. Deformity and unfitness for social intercourse, arising from the virulent and disgusting nature of the disease, would appear to be what has been accepted in both the texts and the decisions as the most satisfactory tests."[3] But, however, practical or convenient, this was not the Shastric test, which seems to have regarded the disability as arising from permanent disability, which is clear from the concluding clause "other incurable disease," which seems to suggest that all other disabilities must be of a like nature.

2358. Impotency.—Procreation of a son being the one desirable purpose of life, impotency was naturally regarded as a serious disqualification, and eunuchs were debarred of all civil rights. The impotency may, of course, be both congenital and incurable. In this and similar cases, the courts require the very clearest proof of the disease before decreeing disinherison.[4]

2359. Other Incurable Diseases.—The other incurable diseases must be, in point of seriousness, *ejusdem generis*, that is to say, they must be of such a malignant type as to put the sufferer out of count as a member of society.[5] In one case, the disease alleged was the "drying up of the bones," some kind of atrophy, but the plea failed for want of cogent evidence.[6] It has been held that the disqualifying disease must be beyond the skill of medical science. Dropsy, as such, is not an incurable disease, nor is so a nasal tumour.[7]

2360. Outcast.—The texts provide for the exclusion of an outcast, but this was repealed by the Caste Disabilities Removal Act, 1850,[8] so that conversion or loss of caste is no longer any disqualification for inheritance (**S. 308**). The marriage of a man with a woman of lower grade in the same caste being, in the absence of custom, valid, there is nothing to

(1) *Surendranath* v. *Asutosh*, 27 C.W.N. 950: (1923) C. 33; *Ramabai* v. *Harna Bai*, 48 B. 363 (367, 368) P.C.

(2) *Bhagaban* v. *Ram Praparna*, 22 C. 843 (858) P.C.; *Lakhi* v. *Bhairab*, 5 B.S.R. 315; *Bhobunnessuree* v. *Gouree Dass*, 11 W.R. 535; *Janardhan* v. *Gopal*, 5 B.H.C.R. (A. C.) 145; *Ananta* v. *Ramabai*, 1 B. 554; *Muttevilaya* v. *Parasakti*, 1 M.S. D. 239; *Rangayya* v. *Thanikachalla*, 19 M. 74; *Kayaharona* v. *Subharaya*, 38 M. 250 (253); *Kelan* v. *Durga*, 4 C.L.J. 323; *Karalicharan* v. *Ashutosh*, 50 C. 604.

(3) *Kayarohana* v. *Subharaya*, 38 M. 250 (255); *Janardhan* v. *Gopal*, 5 B.H.C. R. (A.C.) 145, approved in *Ramabai* v. *Harnabai*, 48 B. 363 P.C.; *Ranchod* v. *Ajoobai*, 9 Bom. L.R. 1149 (1151).

(4) *Issur Chunder* v. *Ranee*, 2 W.R. 125 (126); *Nullit* v. *Bagola*, 21 W.R. 249.

(5) *Murli* v. *Jai Singh*, 5 A.L.J. 115.

(6) *Issur Chunder* v. *Ranee*, 2 W.R. 125 (126).

(7) *Subba* v. *Venkatarama*, 56 M.L.J. 208: 23 I.C. 528.

(8) XXI of 1850, S. 1; *Bhujjunlal* v. *Gayaprashad*, 2 N.W.P.H.C.R. 446; *Taijsingh* v. *Konsilla*, 1 Agra 90; *Honamma* v. *Timanabhai*, 1 Bom. 559; *Gopal* v. *Dhungazee*, 3 W.R. 206; *Kuruthedatta* v. *Mele*, 1 L.J. (N.S.) 236; *Subbaraya* v. *Ramaswami*, 28 M. 327; *Kunnilal* v. *Govind*, 33 A. 256 P.C., *reversing* O.A. *Govind* v. *Kunnilal*, 29 A. 487; *Jabha* v. *Mehtab*, 1867 P.R. No. 67; *Goverdhan* v. *Piara*, 1872 P.R. No. 6; *Gurumuksh* v. *Mitta*, (1872) P.R. No. 12.

disqualify him or his issue from inheritance.[1] Nor does the conversion of a Hindu woman to Mahomedanism affect her right of succession except to her Hindu husband.[2] Similarly, dancing girls, though outside the pale of the Hindu religion, still retain their Hindu Law, and their children retain that right, irrespective of their father, if they follow the Hindu religion and adopt its manners and custom. Where, therefore, a dancing girl had two sons, the grandson of one son was held entitled to sue as reversioner to the estate of the great-grandson of the other son.[3] An Englishman lived with a Brahmin woman who, however, lived apart from him. She had two sons by him. It was held that they were Hindus and would be classed as Shudras, and in the absence of preferential heirs, would inherit the property of their father and of one another.[4] And the fact that their mother lived in adultery, would not impair the right[5] (S. 302).

Clause (3).

The disqualification of a person disqualifies his widow[6] and adopted son and even his other heirs since a disqualified person has no jural existence, and having no rights of his own he can transmit no rights to his heirs.[7] But this does not mean that the heir cannot by his relationship with his claim to another relation.

Dayabhag heirs.

333. (1) Except as provided in the Hindu Women's Right of Property Act 1937, the heirs of an intestate deceased are in the first instance the same relations as are enumerated in section 313 (1) except—

(*a*) **That the father takes before the mother;**

(*b*) **That as between married daughters, the daughter who has or one who is likely to have male issue is entitled to preference;**

(*c*) **and the right of the daughter to inherit is subject to her chastity at the time the succession opened.**

(2) Failing the last, the heir is the nearest of kin drawn from the following classes of persons in the order named:—

(*i*) *Sapindas*;
(*ii*) *Sakulyas*;
(*iii*) *Samanodaks*;
(*iv*) *Bandhus*, **other than those taking as sapindas;**
(*v*) **Preceptor;**
(*vi*) **Pupil;**
(*vii*) **Fellow student;**
(*viii*) **The Crown.**

2361. Analogous Law.—The Dayabhag contains a long disquisition on the subject of succession[8] which generally follows the Mitakshara except upon the three points noted in this section. Both the Mitakshara and the Dayabhag enumerate the nearest heirs and then leave the more distant ones to be ascertained, by the test of propinquity, in the Mitakshara, and by that of spiritual efficacy in the Dayabhag. But since the two are closely co-related in the Hindu system it follows that they are for the most part merely the two convergent standpoints from which the question of heirship is viewed in each school. The several points of difference that have

(1) *Har Prasad* v. *Kewal*, 47 A. 169.
(2) *Gansham Das* v. *Saraswati*, 87 I. C. 621: (1925) M. 861.
(3) *Visvanath* v. *Doraiswami*, 48 M. 944; *Ratna* v. *Krishna*, (1937) M. 353.
(4) *Mayna Bai* v. *Uttaram*, 8 M.I.A. 425, on remand 2 M.H.C.R. 196.
(5) *Venku* v. *Mahalinga*, 11 M. 393, explaining *Mayna Bai* v. *Uttaram*, 8 M. I.A. 425, on remand 2 M.H.C.R. 196.
(6) Mit., X-II-14.
(7) *Budhu* v. *Sahodra*, (1931) Pat. 367.
(8) Chapter **XI.**

arisen are due to ratiocination or the mental attitude of the people reflected in their local usage.

The principle of this section was settled by the Full Bench of the Calcutta High Court, in which Mitter, J., laid down the above as the heirs of the deceased owner subject to the Dayabhag law.[1] But though this is the net result of the law, the process of reasoning by which it is reached, requires examination. Under the Mitakshara system, propinquity is the governing rule of succession; but the Dayabhag law of succession is the religious law and succession is mainly, though not solely,[2] based upon the doctrine of spiritual benefit, which the heir is supposed to confer upon the deceased.[3] As was observed in a case: "Spiritual benefit, notwithstanding some authorities to the contrary, is not always the guiding principle of inheritance under the Bengal school of law. The theory of spiritual benefit cannot apply to a good many cases of inheritance under the Dayabhag school of law. Spiritual efficacy, as a principal guiding rule of succession, must fail in the case of all female relations. The widow, the daughter, the mother, and the paternal grandmother are said to inherit under express texts. It was necessary, in their cases, to have recourse to a different principle, and that principle must have been affinity and affection, which had led the more ancient sages to say that they come in the line of heirs. Yadnyavalkya's texts, as well as the texts of many sages, could not be either easily avoided or reconciled with the theory of spiritual efficacy in all cases. In most cases, propinquity, spiritual efficacy and natural love and affection run in the same lines, and no difficulty arises, but whenever they run in different lines, Jimut Vahan was compelled to ignore spiritual efficacy, and have recourse to other principles or express texts."[4] This too was pointed out in an earlier case, in which another Hindu Judge had said: "The succession of females according to Hindu Law is quite exceptional, and is not founded upon the ordinary rule, *viz.*, that of spiritual benefit. It is true that in the case of the widow, she confers some spiritual benefit, but if that were the sole test, she would have ranked much lower than what she does now. Daughters confer no benefit, but they succeed because their sons do. Thus, it is evident that succession of females according to Hindus is not a regular succession, and is not based upon the ordinary theory of spiritual benefit."[5]

But spiritual benefit is frequently a test and even a *conditio sine qua non*. It is, therefore, necessary to enquire what it means.

For a commentary on the Hindu Women's Right of Property Act, 1937, *see* Appendix.

2362. Spiritual Benefit.—It has been pointed out before that Hindus, with other ancient oriental races, were given to ancestor worship (§ 5). It was believed that on death, man passed from the material world into a shadowy region, where his earthly cravings continued. He needed food and drink, and it was but natural that those who took his estate had to perform this office. This was regulated by the priests with elaborate ceremonies, and of them, one of the earliest prescribes them in the following texts:—

Apastamb (*Abridged*).—"1-3. Formerly men and gods lived together in this world. Then the gods, as reward for their sacrifices, went to heaven, but men were

(1) *Gooroo Gobind* v. *Anund Lall*, 13 W.R. 49 (59) F.B.

(2) *Akshay* v. *Hari Das*, 35 C. 721 (725).

(3) *Kali Pershad* v. *Anand Roy*, 15 C. 471 (480) P.C.

(4) *Per* S. C. Mitter, J., in *Akshay* v. *Hari Das*, 35 C. 721 (726).

(5) *Per* S. C. Mitter, J., in *Ganga Pershad* v. *Shumbhoonath*, 22 W.R. 393 (394).

left behind. Those men who perform sacrifices in the same manner as the gods did, dwell after death with the gods and Brahma in heaven. Now, seeing men left behind, Manu revealed this ceremony, which is designated by the word *shradh*, and thus, this rite has been revealed for the salvation of mankind. At that rite the manes (of one's father, grandfather, and great-grandfather) are the deities to whom the sacrifice is offered. But the Brahmans who are fed are the sacrificial fire (the mouth of the gods).

"22. That rite must be performed in the latter half of every month. Numerous and distinguished offspring, success in agriculture and trade, store of cattle, success in battle and the attainment of general prosperity are the regards which the sacrificer obtains if he performs the ceremony at stated periods.

"23-24. The substances (to be offered) at these (sacrifices) are sesamum, mash, rice, barley water, roots and fruit. But the satisfaction of the manes is greater, if food mixed with fat and if beef, buffaloes' meat and the flesh of other tame and wild animals is offered to them."[1]

This was the original *shradh;* but it has since undergone a change. Manu's description of it is more elaborate:—

Manu.—"82. Each day let him perform a *shradh* with boiled rice and the like, or with water or with milk, roots, and fruit; for this he obtains favour from departed progenitors."[2]

"207. The divine manes are always pleased with an oblation of empty glades, naturally clean, on the banks of rivers, and in solitary spots.

"214. Having walked in order from North to South, and thrown into the fire all the ingredients of his oblation, let him sprinkle water on the ground with his right hand.

"215. From the remainder of the clarified butter, having formed three balls of rice, let him offer them, with fixed attention, in the same manner as the water, his face being turned to the South.

"216. Then having offered those balls, after due ceremonies and with an attentive mind, to the manes of his father, his paternal grandfather and great-grandfather, let him wipe the same hand with the roots of *kus* (grass), which he had before used for the sake of his paternal ancestors, in the fourth, fifth and sixth degree, who are the partakers of the rice and clarified butter thus wiped of.

"218. Whatever water remains in his ewer, let him carry back deliberately near the ball of rice, and, with fixed attention, let him smell those cakes, in order as they were offered.

"220. If his father be alive, let him offer the *shradh* to his ancestors in three higher degrees; or let him cause his own father to eat, as a Brahman, at the obsequies.

"221. Should his father be dead, and his grandfather living, let him, in celebrating the name of his father, that is, in performing obsequies to him, celebrate also his paternal great-grandfather."[3]

In course of time the *shradh* became sub-divided, and it was possible to perform a *shradh* for an individual ancestor or, as before, for the benefit of all ancestors generally. The latter was known as *Parvan* or ancestral and the former as *Ekodisht* or individual.[4] These two *shradhs* have, in course of time, acquired a legal significance.

A *Parvan Shradh* is a *shradh* with a double set of funeral balls; three balls are offered to the father, paternal grandfather, and great-grandfather; and three to the maternal grandfather, his father, and his grandfather; and the crumbs of each set to the remoter ancestors, paternal and maternal.[5]

2363. Parvan Shradh.—This ceremony consists in the presentation of certain number of oblations, namely, one to each of the first three ancestors in the paternal line and maternal line respectively or, in other words, to the father, the grandfather, and the great-grandfather, the

(1) 2 S. B. E. 138-140; last verse is incorrectly translated therein, *see* Sarv. Inh., pp. 49, 50.
(2) Manu, III-82.
(3) Manu, III-207, 214-216, 218, 220, 221.
(4) 2 Dig., 339.
(5) *Ib.*

maternal grandfather, maternal great-grandfather and the maternal great great-grandfather.[1]

The performance of an obsequial *shradh* postulates three degrees of kinship to the deceased: (1) those who receive the entire rice balls; (2) those who receive the *lepa* or scrapings (or, rather, wipings) from the hand; and lastly, (3) those who have to be content merely with the libations of water. These facts determine the degree of relationship between the two. The *pindas* are offered to the three immediate paternal ancestors, that is, the father, grandfather and great-grandfather, and the three immediate maternal ancestors, that is, the maternal grandfather, the maternal great-grandfather and the maternal great-great-granfather. He who offers a *pinda* and to whom a *pinda* is offered, are the *sapindas* of each other.

Next to them in degree are those to whom the *lepas* or wipings are offered. He who offers the *pinda lepa* and he to whom it is offered are *sakulyas* of each other.

Lastly, there are those to whom are offered libations of water, and he who offers and he to whom they are offered are *samanodaks* of each other.

2364. This is the first principle. But there still remains another. It is a principle of religious law that the deceased ancestor receives not merely the oblation offered to him but also participates in the benefit of oblations, which, though not offered to him, are yet offered to the paternal ancestors to whom he himself was bound to offer them while he was alive. This widens the circle of relationship beyond those directly receiving the oblation.[2] Now, as to those who make these offerings, Vishnu Puran describes them thus:

"The persons who are competent to perform the obsequies of relations connected by the offerings of the cake, are the son, grandson, great-grandson, the brother, the descendants of a brother, of the posterity of one allied by funeral offerings. In the absence of all these, the ceremony may be instituted by those related by presentation of water only; or those connected by offerings of cakes or water to maternal ancestors. Should both families in the male line be extinct, the last obsequies may be performed by women, or the associates of the deceased in religious or social institutions, or by any one who becomes possessed of the property of a deceased kinsman."[3]

It is thus clear that the performance of the obsequies was a duty first charged on the inheritance. In process of time, by a curious inversion of reasoning, the two came to be regarded as cause and effect, and the performance of a *shradh*, instead of a mere duty of the heir, became the cause of his succession.

2365. Relations Competent to Perform Shradh.—But whatever may be the nature of connection between the *shradh* and succession, the crucial question was what relations were eligible to perform it.

Bhavdev mentions the following relations as eligible to perform each kind of Shradh:—

(1) *Parvan.*—
- (1) Son;
- (2) Grandson;
- (3) Great-grandson;
- (4) Daughter's son;

(1) Cole, Mis. Essays, 166; Sarv. Inh., 225.
94; Nirnai Sindhu, 120.
(2) Dayabhag, XI-I-38; Shrikrishna,
(3) Vishnu Puran, 318.

(5) Son's daughter's son;
(6) Grandson's daughter's son.

(2) *Ekodisht.*—
(1) Son—
(*i*) Eldest son;
(*ii*) Youngest son;
(2) Grandson;
(3) Great-grandson;
(4) Widow—
(*i*) Sonless;
(*ii*) Mother of a disqualified son;
(5) Daughter—
(*i*) Maiden;
(*ii*) Betrothed;
(*iii*) Married;
(6) Daughter's son.
(7) Brother—
(*i*) Youngest full brother;
(*ii*) Eldest full brother;
(*iii*) Youngest stepbrother;
(*iv*) Eldest stepbrother;
(8) Brother's son—
(*i*) Son of youngest uterine brother;
(*ii*) Son of eldest uterine brother;
(*iii*) Son of youngest stepbrother;
(*iv*) Son of eldest stepbrother;
(9) Father;
(10) Mother;
(11) Son's widow;
(12) Son's daughter, maiden;
(13) Son's daughter, married;
(14) Grandson's widow;
(15) Grandson's daughter;
(16) Grandson's married daughter;
(17) Grandfather;
(18) Grandmother;
(19) Sapindas *ex parte paterna;*
(20) Samanodaks *ex parte paterna;*
(21) Sagotras;
(22) Maternal grandfather;
(23) Maternal grandmother;
(24) Maternal uncle;
(25) Sister's son;[1]
(26) Sapindas *ex parte materna;*
(27) Samanodaks *ex parte materna,*
(28) Widow belonging to a different caste;
(29) An unmarried woman living as wife;
(30) Father-in-law;
(31) Son-in-law;
(32) Grandmother's brother;

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(1) Preferred to a stepbrother; *Sukha- mayee* v. *Manoranjan,* 89 I.C. (C.) 827.

(33) Strangers—
(*i*) Pupils;
(*ii*) Priests;
(*iii*) Spiritual preceptor;
(*iv*) Friend;
(*v*) Father's friend;
(*vi*) Servants of the same caste living in the same village.[1]

Raghunandan gives the same list except that the two differ on the competency of the maternal grandmother (No. 23) and the great grandson's widow to perform these sacred rites. Raghunandan denies the competency of the former, Bhavdev of the latter.

2366. It will be thus seen that even in this table, the relations are grouped consonantly with their propinquity. The *sapindas* are allowed to come before the *sakulyas,* because undivided oblations are considered to be of higher spiritual value than divided ones; and the *sakulyas* are in their turn preferred to the *samanodaks,* because divided oblations are considered to be more valuable than libations of water. It is true, that the members of the last class are not competent, to offer either oblations of food or libations of water; but even in their case the doctrine of spiritual benefit is not forgotten. Thus, for instance, the lowest amongst them, namely, the learned Brahmin of the same village, is allowed to come in, upon the express ground that the virtue of the deceased proprietor is renewed by the acquisitions of fresh merit, through the circumstance of his wealth devolving on a Brahmin.[2]

2367. Sapindas.—The question still remains who are the *sapindas*? The whole doctrine of *sapinda* is contained in the following passage of the Dayabhag:—

Dayabhag.—"Since the father and certain other ancestors partake of three oblations as participating in the offering of obsequies, and since the son and other descendants to the number of three present oblations to the deceased (or to be shared by his manes), and he who, while living presents an oblation to an ancestor, partakes, when deceased, of oblations presented to the same person, therefore, such being the case, the middlemost of seven who, while living, offered food to the manes of ancestors, and when dead, partook of offerings made to them, became the object to which the oblations of his descendants were addressed in their lifetime, and shares with them, when they are deceased, the food which must be offered by the daughter's son (and other) descendants beyond the third degree. Hence those ancestors to whom he presented oblations, and those descendants who present oblations to him partake of an undivided offering in the form of (*pinda*) food at obsequies. Persons who partake of offerings are *sapindas*."[3]

It will be seen from this that if two Hindus are bound, during the respective terms of their natural life, to offer funeral oblations to a common ancestor, either of them would be entitled, after his death, to participate in the oblations offered by the survivor to that ancestor or ancestors, and hence it is that the person who offers those oblations, the person to whom they are offered and the person who participates in them are recognized as *sapindas* of each other.[4]

2368. The *sapindas* may thus be divided into three classes:—

(1) The ancestors of a person to whom he is bound to offer a *pinda.*

(2) His descendants who, on his death, will similarly offer a *pinda* to him.

(1) Bhavdev, (Cal. Ed.), 348.
(2) Dayabhag, XI-VI-26.
(3) *Ib.*, XI-I-38.
(4) *Gooroo Gobind* v. *Anund Lal,* 13 W.R. 49 (60) F.B.

(3) Other relations who are bound to offer a *pinda* to the ancestors to whom he is similarly bound to offer a *pinda*.

(4) Five female designated relations, *viz*:—

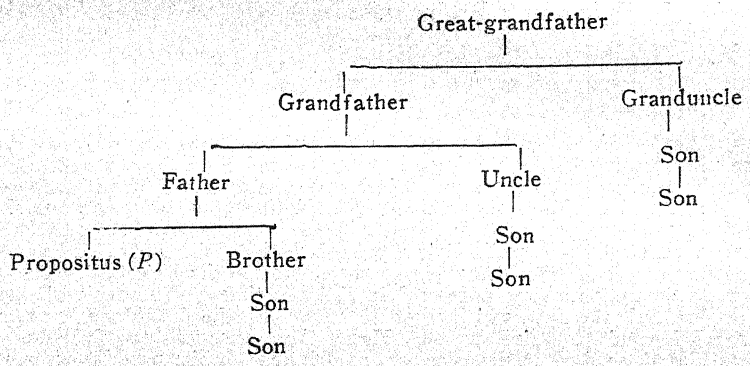
(*a*) The widow;
(*b*) The daughter;
(*c*) The mother;
(*d*) The father's mother's mother;
(*e*) The father's father's father's mother.

The relations who fall into the first class are his three immediate paternal and maternal father, grand-father and great-grandfather—*altogether* 6 *relations*.

Those who fall into the second class are his son, grandson, and great-grandson and his daughter's son, son's daughter's son and grandson's daughter's son—*altogether* 6 *relations*.

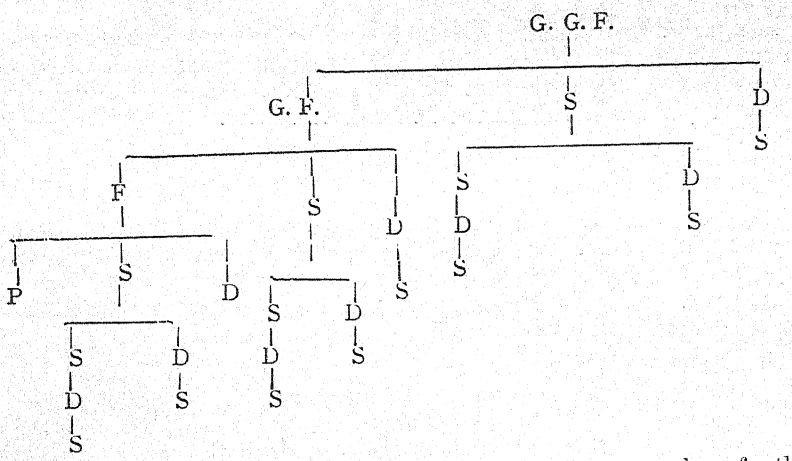
The third class includes all collateral relations, who may be grouped as follows:—

Firstly.—The brother, brother's son, brother's son's son, paternal uncle, paternal uncle's son, paternal uncle's grandson, paternal granduncle, paternal granduncle's son, and paternal granduncle's grandson—*altogether* 9 *relations*.



Of these the brother has to offer 3 pindas, one to each of the three paternal ancestors of the deceased, who are also his paternal ancestors. The brother's son will, however, offer only 2 pindas, one to his grandfather, that is, the father of the Propositus, and the other to his great-grandfather, that is, *P's* grandfather. The uncle and the uncle's son will also offer 2 pindas, one to each of the two paternal ancestors of *P*, *viz.*, G.-F. and G.-G.-F., who are equally their grandfather and great-grandfather. The remaining relations offer only 1 pinda each, the brother's son's son to *P's* father (F), the uncle's son's son to grandfather (G.-F.). In this case, the paternal ancestors of *P* are also the paternal ancestors of all the 9 relations.

Secondly.—Sister's son, father's sister's son, grandfather's sister's son, brother's daughter's son, brother's son's daughter's son, paternal uncle's daughter's son, paternal granduncle's daughter's son, paternal uncle's son's daughter's son, and paternal granduncle's son's daughter's son—*altogether* 9 *relations*, shown in the next diagram.



Here, the sister's son offers 3 *pindas,* one to each of the three paternal ancestors of the deceased, they being his own maternal ancestors. The father's sister's son and the paternal uncle's daughter's son offer one *pinda* each to the two paternal ancestors of the deceased, *viz.,* his grandfather and great-grandfather, they being their maternal ancestors. The brother's daughter's son offers 2 *pindas* one to the father and the other to the grandfather of the deceased, they being his maternal ancestors. The remaining five relations offer each one *pinda* to one or other of the three paternal ancestors of the deceased, that ancestor being their maternal ancestor. All these are *bandhus ex parte materna* of the Mitakshara school. They are *sapindas* of the Dayabhag school.

Thirdly.—Maternal uncle, maternal uncle's son, maternal uncle's grandson, maternal granduncle, maternal granduncle's son, maternal granduncle's grandson, maternal great-granduncle, maternal great-granduncle's son, maternal great-granduncle's grandson—*altogether* 9 *relations.*

The maternal uncle offers 3 *pindas,* one to each of the three maternal ancestors of the deceased, they being his paternal ancestors. The maternal uncle's son, the maternal granduncle and the maternal granduncle's son offer each 2 *pindas* to two out of the three maternal ancestors of the deceased, these ancestors being their paternal ancestors. The remaining five relations offer one *pinda* each to one or other of the three maternal ancestors of the deceased, those ancestors being their paternal ancestors. This is a case where some or all of the maternal ancestors of the deceased are the paternal ancestors of the 9 relations mentioned above. These are the *bandhus ex parte materna* of the Mitakshara school.

Fourthly.—Maternal aunt's son, maternal grandaunt's son, maternal great-grandaunt's son, maternal uncle's daughter's son, maternal uncle's son's daughter's son, maternal granduncle's daughter's son, maternal granduncle's son's daughter's son, maternal great-granduncle's daughter's son, maternal great-granduncle's son's daughter's son—*altogether* 9 *relations.*

Out of these, the maternal aunt's son offers 3 *pindas,* one to each of the three maternal ancestors of the deceased, they being also his maternal ancestors. The maternal grandaunt's son, the maternal uncle's daughter's son, and the maternal granduncle's daughter's son offer each 2 *pindas* to 2 out of the 3 maternal ancestors of the deceased, those

ancestors being also their maternal ancestors. The remaining 5 relations offer each one *pinda* to one or other of the 3 maternal ancestors of the deceased, these ancestors being their maternal ancestors. These relations are also *bandhus ex parte materna* of the Mitakshara school.

2369. **Female Sapindas.**—The five before-mentioned female relations are *sapindas,* being mentioned in the Dayabhag as the direct heirs.[1]

The total number of sapindas in thus 53, of whom the Dayabhag enumerates only 42. Of these, 5 relations specified in the clause are females, and no less than 10, who, though males, are mentioned as taking through females, *i.e.*, 15 out of 42 enumerated heirs, are either themselves females or take directly through females.

Now since such relations are classed as *bandhus* who take after all the agnatic kinsmen are exhausted, it follows that the Dayabhag gives precedence to *bandhus,* by including them in the list of agnatic *sapindas* and, as such, so far as these relations are concerned, in the tables of succession the two systems differ; otherwise, they more or less agree, though they approach the question from opposite standpoints.

2370. **Sakulyas.**—After the *sapindas,* the *sakulyas* succeed. The term has been already defined in **S. 329,** as persons related to the deceased in an unbroken line of male descent in the fourth, fifth and sixth degree. This is a sub-division unknow to the Mitakshara, which classes all agnatic relations up to the sixth degree as *sapindas.*

The total number of sakulyas is 33, as will be seen from the table of *sapindas* elsewhere given.

2371. **Samanodaks.**—Like the *sakulyas,* the *samanodaks* are also agnatic relations related to the deceased from the seventh to the fourteenth degree. This is also the Mitakshara conception of this term, with the slight difference, not recognized by the Dayabhag, that even relations beyond the fourteenth degree are deemed to be so related if the pedigree be clearly proved.

The samanodaks number 147, as already stated.

Order of Succession among Sapindas, etc.

334. The order of succession among *sapindas, sakulyas* and *samanodaks* is governed by the following rules:—

(1) Except in the cases stated below, those who offer *pindas* to the deceased are preferred to those who offer them to any of his ancestors;[2]

(2) And those who offer them to the deceased are preferred to those who accept them from the deceased;[3]

(3) A person who offers *pindas* to a near ancestor is preferred to one offering *pindas* to an ancestor more remote, irrespective of the number of *pindas* offered by each of them;[4]

(4) Those who offer oblations to both the paternal and maternal ancestors are preferred to those who offer them only to the paternal ancestors;[5]

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(1) Dayabhag, XI-1-II, IV; *Gooroo Govind* v. *Anand Lal,* 13 W.R. 49 (52) F.B.

(2) *Gooro Gobind* v. *Anand Lal,* 13 W.R. 49 (49).

(3) *Gobind* v. *Mohesh,* 23 W.R. 127.

(4) Dayabhag, XI-VI-5, 6; *Pran Nath* v. *Surrut Chunder,* 8 C. 460.

(5) *Hurri Das* v. *Bamachurun,* 15 C. 780 (790, 791).

(5) Those who are competent to offer *pindas* to the paternal ancestors of the propositus are preferred to those who are competent to offer them only to their maternal ancestors, irrespective of the number of *pindas* offered;[1]

(6) Agnatic *sapindas* in any line are always preferred to the cognate *sapindas* of the same line;[2]

(7) Between an agnate *sapinda* and a cognate *sapinda* of equal degree of propinquity, the former is preferred to the latter, even though the latter may offer more *pindas* in which the deceased would participate;[3]

(8) Subject to the above, those who offer a larger number of *pindas* of a particular description are preferred to those who offer a less number;[4]

(9) And where the number of such *pindas* is equal, those that offer to nearer ancestors are preferred to those offering to more distant ones.

Exception to clause (1).—**Nothing contained to clause (1) affects the priority of the sons, grandsons, great-grandsons and daughter's sons of the propositus.**

2372. Analogous Law.—The rules regulating the order of succession, though ostensibly based upon the doctrine of spiritual benefit, do not ignore propinquity, and, in fact, whenever they tend to divert succession from the natural line, other rules come in to check their course. Such are rules stated in clauses (2) and (5), which prefer males to females and nearer relations to more distant ones, lineal to collateral and those directly related to those indirectly related to the propositus. As a matter of fact, shorn of their religious mask, they result in designating the same heirs as the the Mitakshara, which fixed their order by a more rational process of reasoning.

The term "offer *pindas*" in the section does not mean offer them in fact, but rather entitled to offer them in law. Consequently if such relation joins a sect that observed no caste offers no *pindas*, the right of inheritance would still be judged by that test.[5]

Clause (1).

2373. Pindas to the Deceased Preferred.—The first clause lays down a rule which simply means that a nearer relation is preferred to one more remote, since it is only the nearest relations that give such *pindas*. They are the son, grandson and great-grandson of the deceased, his widow, daughter and daughter's son, who all offer pindas to the deceased, and are preferred to the father and the rest. But the son's daughter's son and the grandson's daughter's son are exceptions to this rule, being allotted a place amongst this class, though they offer no *pinda* to the deceased.

Clause (2).

2374. Another rule arising out of the last is that those who offer *pindas* to the deceased are preferred to those who accept them from him. Therefore, the son, grandson and great-grandson, who offer oblations to the deceased, are

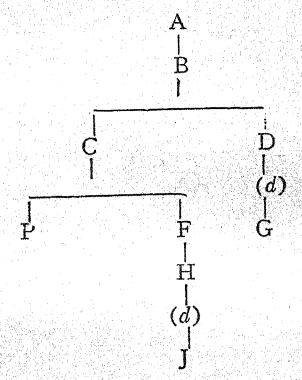
(1) 3 Dig., 480; *Raj Kishore* v. *Gobind*, 1 C. 27; *Sheo Soondary* v. *Pirthee Singh*, L.R. 4 I.A. 147 (152).
(2) *Ib.*
(3) *Gooro Gobind* v. *Anand Lal*, 13 W.R. 49 (59) F.B.
(4) *Gooro Gobind* v. *Anand Lal*, 13 W. R. 49 (59) F.B.; *Gobind* v. *Mohesh*, 23 W. R. 117.
(5) *Nilanaksha* v. *Bajanikanta*, 58 C. 1392 (1396).

preferred to the father, grandfather and great-grandfather, who receive them from the deceased, the former succeeding before the latter. As in the Mitakshara, the son, grandson and great-grandson follow the rule of representation, and all inherit as a single heir, this being justified on the spiritual theory that their offerings have an equal spiritual value.

Clause (3).

2375. As a part of the same rule and, indeed, as a necessary corollary thereof, is the rule stated in this clause that he who offers oblations to the father of the deceased is superior to one who offers such oblations only to the grandfather and great-grandfather of the deceased.

So, in a case the family tree was as follows:—On *P's* death the contest lay between *J* who was his brother's son's daughter's son, and his uncle's daughter's son *G*, and the Court upheld *J's* claim, holding that he was scarcely to be distinguished from the brother's daughter's son included in the *Daya Krama* in the list of heirs, and on the ground that he offered oblations only to his (*P's*) grandfather and great-grandfather.[1] Even on the ground of propinquity, *J*, who is related to *P* through his father, would be preferred to *G*, who is related to him through his grandfather.



Clause (4).

2376. Then, again, those who offer oblations to both the paternal and maternal ancestors are superior to those who offer them only to the paternal ancestors. As such, a brother of the whole blood who presents six oblations to the ancestors of the deceased, three on the father's side and three on the mother's side, is preferred to a half brother who presents only three oblations to the common father,[2] and not likewise to the common maternal ancestors of the deceased, since his mother and the mother of the deceased were different persons.

The Dayabhag, moreover, expressly declares that the whole brother succeeds before the half brother.[3] But when there has been a separation, a half brother who becomes re-united, acquires the rank of a full brother as in the line of succession, which proves that the theory of spiritual benefit, placed by Jimut Vahan as regulating the order of succession, is not always an infallible guide, and at times looks like placing the cart before the horse when he subordinates natural affinity to the so-called religious efficacy.

Clause (5).

2377. Preference of Agnates.—The preference of agnates over cognates, characteristic of the Mitakshara system, extends even to the Dayabhag law. And the grounds for their preference are stated in clauses (3) and (4) drawn from the case in which Petharam, C.J., and Ghose, J., stated the rules as follows: "Between an agnate *sapinda* and a cognate *sapinda*

(1) *Pran Nath* v. *Surrit*, 8 C. 460.
(2) Dayabhag, XI-V-3, 12; *Rajkishore* v. *Govind*, 1 C. 24 (34) F.B.
(3) Dayabhag, XI-V-11, 12.

of equal degree of propinquity, the former is preferred to the latter, although the latter is the giver of a larger number of cakes in which the deceased would participate than the former, and also by the fact that agnate *sapindas* in any line are always preferred to the cognate *sapindas* of the same line. For instance, the father's son's son (*i.e.*, a brother's son) of the deceased owner offers three *pindas*, one to his own father and the other two to the grandfather and great-grandfather respectively of the deceased, which *two pindas* only the latter participates. The father's daughter's son (*i.e.*, a sister's son) offers three *pindas*, *viz.*, to the father, grandfather and great-grandfather of the deceased, in *all* which *pindas* the latter participates. And yet the brother's son is preferential heir to the sister's son. Then, again, as between the father's great-grandson (*i.e.*, brother's grandson) and father's daughter's son (*i.e.*, sister's son) the former is the preferential heir, although he is more removed from the father of the deceased, and offers only one pinda (*i.e.*, to the father) in which the deceased participates, whereas the father's daughter's son offers a larger number of *pindas* in which the deceased participates."[1]

Clause (6).

2378. Paternal Preferred to Maternal Sapindas.—Then, again, the relations who offer *pindas* to the paternal ancestors of the deceased are preferred to those who offer them only to his maternal ancestors, irrespective of the number of *pindas* offered, because those who offer to the paternal ancestors are of superior religious efficacy in comparison with the latter. This is supported in the Dayabhag as follows: "Now, the *sapindas* on the paternal line offer oblations to the paternal ancestors, which the deceased was bound to offer and in which he participates, and the *sapindas* in the maternal line offer oblations to the maternal ancestors, which the deceased was bound to offer, but in which he does not participate; so that, while they both confer spiritual benefit on the deceased, the former benefit him doubly by enabling him to participate in the oblations offered by them and by discharging a duty, that was incumbent on him, of offering oblations to certain ancestors, and the latter benefit him only in one way, namely, by offering certain oblations which he was bound to offer, and therefore, while both are entitled to inherit his estate, the latter succeed only on failure of the former."[2]

Clause (7).

2379. So, in a competition between the deceased's paternal grandfather's great-grandsons and his brother's daughter's sons, the former were held entitled to succeed in preference to the latter, because they offered an oblation to his grandfather and their great-grandfather in which the deceased participated, whereas the latter offered oblations to them as their maternal ancestors, although they offered two oblations as opposed to the only one offered by the former.[3] For the same reason, the father's brother's daughter's son[4] and the great-grandfather's daughter's son's daughter's son[5] are preferred to the mother's brother's son, even though the latter is specifically mentioned in the Dayabhag as an heir, and the former is not. On the same principle, the granduncle's daughter's son would succeed in preference to maternal uncle.[6]

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(1) *Huri Das* v. *Bama Churn*, 15 C. 780 (791).
(2) Dayabhag, XI-VI-13, 20; *Brajalal* v. *Jiban Krishna*, 26 C. 285 (291).
(3) *Gobind* v. *Mohesh*, 23 W.R. 117 (120) F.B.
(4) *Brajalal* v. *Jiban*, 26 C. 285.
(5) *Kailash* v. *Karuna*, 18 C.W.N. 477.
(6) *Kailash* v. *Karuna*, 18 C.W.N. 477.

2380. Heir Fixed by the Number of Pindas Offered.—The rule that he who offers more *pindas* of the same description must be preferred to one who offers a less number of cakes of the same description which the deceased received or in which he participates, is subject to the preceding rules, under which it has been seen that a person who offers one oblation to the father of the deceased is preferred to another who offers two oblations to the grandfather and great-grandfather.[1] But subject to the other rules, Mitter, J., stated the two rules as follows: "Those who offer a larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description, and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones."[2] This is another way of securing propinquity. Under the rule, the brother comes before the uncle, because the former offers three oblations to the paternal ancestors of the propositus, while the latter offers only two. The *pindas* offered by the brothers are greater in number, and since the brother offers oblations to the father of the deceased while the uncle offers to his grandfather, he is preferable also under rule 3. The brother's son and the paternal uncle's son each offers to the father and grandfather of the deceased, besides offering an oblation to his own father; while the other offers to the grandfather and great-grandfather of the deceased, in addition to offering to his own father. Hence, though the number of *pindas* is the same in the two cases, still since the *pindas* offered by the brother's son are to the nearer ancestors of the deceased, the brother's son is preferable to the uncle's son.

Clauses (8), (9).

2381. The exception to rule 1, in favour of a son's and a grandson's daughter and brother's and nephew's daughter's sons of the propositus who claim succession in the order of proximity before the maternal grandfather, is justified on the ground of their special merit. Jagannath argues: "It must not be objected that, were it so, the son of a granddaughter would have a prior title, even though the father be living, inasmuch as he gives a funeral cake to the deceased himself. The oblations presented to the maternal grandfather and the rest are secondary, because they must follow funeral cakes offered to paternal ancestors; the son of a granddaughter can have no claim, so long as the giver or sharer of a principal oblation exists. Nor should it be objected as a consequence that the son of the late proprietor's daughter or of his father's daughter, and so forth, could have no title, if any *kinsmen* within the degree of *sapinda* were living. The Mahabharat showing that a daughter's son procures advantage even by his birth alone, it appears that he does confer important benefit. Sri Krishna Tarkalankar concedes this opinion."[3]

Exception to Rule (1).

2382. The son, the son's son and the son's son's son take as one heir by representation, as under the Mitakshara, in accordance with the following text:—

(1) Son.[4]

Dayabhag.—"The rule of distribution among sons extends equally to them and to grandson in the male line. There is not here an order of succession following the order of proximity according to birth. For those three persons, the son, grandson and

(1) *Prannath* v. *Surut*, 8 C. 460.
(2) *Guru Gobind* v. *Anand Lal*, 13 W. R. 49 (59) F.B.
(3) 3 Dig., 530.
(4) Dayabhag, X-I-31.

great-grandson, do not differ, in regard to the presenting of two oblations at solemn obsequies, one which it was incumbent on the ancestor to present, and the other which is to be tasted by his manes.[1]

In the Mitakshara country, the illegitimate son of a Shudra can inherit. But not so in Bengal, where an illegimate son of no caste can inherit. The Dayabhag repeats the same texts in favour of the right of a *dasiputra* to inherit,[2] but the courts have construed a *dasiputra* to mean the son by a female slave, which has become impossible since the abolition of the institution of slavery. The Dayabhag texts were examined by R. C. Mitter, J.,[3] in a case, in which it was held that it could not be broadly laid down that the illegitimate sons of a Shudra have a general right of inheritance to their father. All that could be said was that they may inherit in certain cases, though they have a right to maintenance in all cases.[4] In later cases, it was pointed out that the texts only warranted the claim of an illegitimate son begotton by a Shudra on a female slave, and that with the abolition of slavery, the text had become obsolete.[5] The difference between the Mitakshara and the Dayabhag schools is thus not due to different texts but to the difference in construction, the Calcutta court construing the term "*dasi*" literally as meaning a "slave," while the other courts construe it liberally as meaning a "mistress." But since the text is the same, the difference in construction does not appear to be justified, and it is submitted that the narrow view taken by the Calcutta Court requires re-consideration.

(2) **Son's Son.**[6] *See* § **2382** above.

(3) **Son's Son's Son.**[7] *See* § **2382** above.

(4) **Widow.**[8]

2383. The widow, unless she is childless,[9] obtains the estate as heir, and not in lieu of maintenance :—

Dayabhag.—"By this text relating to the order of succession, the right of the widow to succeed in the first instance is declared. It must not be alleged that the mention of the widow is intended merely for the assertion of her right to wealth sufficient for the subsistency. For, it would be irrational to assume different meanings of the same term used only once, by interpreting the word 'wealth' as signifying the whole estate in respect of brothers and the rest, and not the whole estate in respect of the wife. Therefore, the widow's right must be affirmed to extend to the whole estate."

The widow takes as the heiress of her husband, being entitled to all his interest, whether joint or separate, and as regards all property, whether movable or immovable.[10]. It is also well settled in Bengal that a widow, obtaining by inheritance her husband's share in joint property,

(1) Dayabhag, III-1-18; *Ib.*, XI-1-32.
(2) Ch. IX-29, 30; Colebrooke's translation corrected, *per* R. C. Mitter, J., in *Narain* v. *Rakhal*, 1 C. 1, followed in *Kirpal* v. *Sukurmani*, 19 C. 94; *Ramsaran* v. *Tekchand*, 28 C. 194 (202).
(3) *Narain* v. *Rahkal*, 1 C. 1 (7).
(4) *Ib.*
(5) *Kirpal* v. *Sukurmoni*, 19 C. 91; *Ram Saran* v. *Tekchand*, 28 C. 194 (203).
(6) Dayabhag, III-1, 18; XI-1-34.
(7) *Ib.*; *Gooroogobindo* v. *Hureemadub*, 2 Hay. 401.
(8) Dayabhag, XI-1-6, 43; *Cassinaut* v. *Hurrosoondry*, 2 Morley's Dig., 198; *Mohun Lal* v. *Sironmunee*, 2 B.S.R. 40; 6 I.D. (O.S.) 389; *Chunder Kant* v. *Bungshee*, 6 W.R. 61; *Deepo* v. *Gobinda*, 16 W.R. 42; *Durga Nath* v. *Chintamani*, 31 C. 214.
(9) *Bimola* v. *Dangoo*, 30 I.C. (C.) 567, modifying, on review, *contra* in 19 W.R. 189.
(10) Dayabhag, XI-1; *Cassinaut* v. *Hurrosoondry*, 2 Mor. Dig., 198; *Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M.I.A. 13; *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Durga Nath* v. *Chintamani*, 31 C. 214 (218).

is entitled to separate possession by partition with her coparceners, unless there be a bar on equitable grounds.[1]

2384. The question whether the widow could be excluded from inheritance by custom, was raised and decided against the widow in an old case decided in 1847, in which the widow's suit for possession was resisted on the ground of a peculiar family custom excluding childless widows from succession to the properties of her husband and father or grandfather, as the case may be, and entitling her only to maintenance.[2]

It is clear that the widow in Bengal, as well as elsewhere, takes only a limited interest and that her interest is divested by the subsequent birth[3] or adoption of sons (**S. 49**).

Where there are several widows, they succeed jointly with the right of partition and survivorship *inter se*, and in this respect their position is similiar to the Mitakshara co-widows inheriting to their husband. (**S. 290**).

(5) **Daughter.**

2385. "Daughters confer no benefit, but they succeed because their sons do."[4] This is in accordance with the following text:—

Dayabhag.—"2. It is the daughter's son, who is the giver of a funeral oblation, not his son nor the daughter's daughter; for the funeral oblation ceases with him.

"3. Therefore, the doctrine should be respected which Dikshit maintains; namely, that a daughter who is mother of male issue, or who is likely to become so, is competent to inherit; nor one, who is a widow, or is barren, or fails in bringing male issue as bearing none but daughters, or from other cause."

By the law of Bengal, the unmarried daughter is first entitled to inherit, if there be no maiden daughter, then the daughter who has and the daughter who is likely to have male issue are together entitled to the succession. Daughters who are barren, or widows without male issue or mothers of daughters only, can, under no circumstances, inherit.[5]

Of daughters, then, only the following succeed:—

(1) Unmarried daughter.[6]

(2) Daughter with son or who is likely to have male issue.[7]

Daughters who are—

(1) Barren, or

(2) Widows, or

(3) Without male issue, as mothers only of daughters,

are altogether excluded from inheritance.[8] A childless widow is excluded,[9] even though she may re-marry.

2386. Under the Widows' Re-marriage Act, it is competent to a widowed daughter to re-marry and beget sons after the death of her

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(1) *Soudamuney* v. *Jogesh Chunder*, 2 C. 262; *Janoki* v. *Mothura*, 9 C. 580; *Durga Nath* v. *Chintamoni*, 31 C. 214 (218).

(2) *Ibid.*

(3) *Russio Lal* v. *Purushmonee*, 3 B. S.D.A. 205: 9 I.D. (O. S.) 430.

(4) *Bamundoss* v. *Tarinee*, 7 M.I.A. 169 (183).

(5) *Per* R. C. Mitter, J., in *Gunga* v. *Shumbhonath*, 22 W.R. 393 (394).

(6) *Benode Kumari* v. *Purodhan*, 2 W. R. 176 (177).

(7) *Radha Kishen* v. *Ram Mundul*, 6 W.R. 147.

(8) *Malkundlal* v. *Manmohini*, 19 C.W. N. 472: 26 I.C. 903; *Itcha* v. *Nilmani*, 15 I.C. (C.) 169.

(9) *Raj Chunder* v. *Dhunmunee*, 3 B. L.R. 482: 6 I.D. (O.S.) 1033; *Taramonee* v. *Lukheemonee*, Marsh 29; *Bimola* v. *Dangoo*, 30 I.C. (C.) 467, *contra* 19 W.R. 189 overruled.

father,[1] but if she re-married and begot a son before her father's death, then the estate would vest in her and would not be divested by the subsequent death of her son.[2] So, it has been held that the daughter would inherit the estate if she was a childless widow when the succession opened, provided she was of marriageable age, in which case she must be deemed to be likely to become the mother of male issue, because she could re-marry under the Act. But the Dayabhag did not contemplate re-marriage of widows such as has been legalized by the Act, and an ancient text cannot be construed in the light of subsequent legislation.

2387. Every married daughter is presumed to be likely to beget male children. If, therefore, she was married and was not past the child-bearing age, she would inherit to her father. It is then immaterial that she becomes a widow or turns out barren afterwards, since an estate once vested cannot be devested by subsequent disability.[3]

Daughters, like co-widows, take a joint estate, with the right of partition and survivorship. When once an estate vests in two daughters, their right of survivorship, which is a vested right, cannot be devested by one of the daughters becoming widowed or childless.[4]

2388. It has already been seen[5] that unchastity in a female heir disqualifies her from inheritance. This disqualification extends to all female heirs, and their re-marriage is, for this purpose, regarded as an act of unchastity, unless custom comes to their rescue and permits it without forfeiture; of course, the female would be disqualified from inheritance, if she was in the keeping of a man when the succession opened,[6] even though she might have afterwards married him.[7]

Unchastity a Disqualification.

2389. The daughter's son gives a funeral oblation to his maternal grandfather and is therefore his heir.[8]

(6) Daughter's Son.

Where a testator left only two issues, one a grandson through a predeceased daughter and another a daughter, a childless widow, the former was held entitled to perform the religious ceremonies in preference to the daughter, for the testator's spiritual benefit, on the failure of the executor of the will to perform the same, and to receive the income of the trust funds though he could not appropriate the corpus.[9] The daughter's son's son is not an heir under the Dayabhag law, though he is a *bandhu* under the Mitakshara. On the principle that those who offer *pindas* directly to the deceased are preferred to those who make offerings in which the deceased merely participates, the next persons to come in the list should be the son's daughter's son and the grandson's daughter's son and they have been assigned this place by Messrs. Sarvadhikari and Ghose,[10] while Mr. Sarcar places them after the mother's sister's

(1) Hindu Widow's Re-marriage Act (XV of 1856), S. 4; *Makunda* v. *Mon Mohini*, 19 C.W.N. 472.

(2) Hindu Widows' Re-marriage Act (XV of 1856), S. 8; *Binola* v. *Dangoo*, 19 W.R. 139.

(3) *Amritlal* v. *Rajonikant*, 23 W. R. 214 (217) P.C.

(4) *Strimuttu* v. *Dorasinga*, 6 M.H.C. R. 310; *Boidyanath* v. *Durga Churn*, cited in *Amrit Lall* v. *Rajoneekant*, 23 W.R. 214 (218) P.C.

(5) S. 306, *ante*, and Comm.

(6) Mit., II-I-§§ 37-39; Dayabhag, XI-I-§§ 47, 48; Mayukh, IV-8 §§ 2, 6, 8, 9; Smriti Chandrika, XI-I-§§ 12-21; Vivad Chintamani, 289-291; *Kery Kolitani* v. *Moneeram*, 13 B.L.R. 1, affirmed O.A. 5 C. 776 P.C.

(7) *Aili* v. *Aidew*, 24 C.W.N. 173.

(8) Dayabhag, XI-II, 2-17-29; *Gunga Pershad* v. *Shambhoonath*, 22 W.R. 393.

(9) *Sib Chunder* v. *Treeporah*, Fulton 98: 1 I.D. (O.S.) 703.

(10) Sarv. Inh., 821; Ghose H.L. (3rd Ed.), 135 (136).

son,[1] though the judicial decisions relegate them to a place below the paternal great-grandfather's daughter's son.[2]

2390. This exhausts the heritable descendants of the deceased. After them come the ascendant *sapindas* agnates having precedence over the cognates in the following order :—

(7) **Father.**

2391. The father's right is equally supported by an express text :—

Dayabhag.—"If there be no daughter's son, the succession devolves on the father and not on the mother (before the father) nor at once on both parents. For, that is contrary to Vishnu's text: 'If there be none, it belongs to the father: if he be dead, it appertains to the mother.'[3]

"3. This is a result, too, of reasoning. The father's right of succession should be after the daughter's son and before the mother; for, the father offering two oblations of food to other manes in which the deceased participates, is inferior to the daughter's son who presents one oblation to the deceased and two to other manes in which the deceased participates."[4]

The Mitakshara places the mother before the father, and hence a long apologia in the Dayabhag for reversing the order of succession.

(8) **Mother.**

2392. The mother's claim is supported by the following text :—

Dayabhag.—"If the father be not living, the succession devolves on the mother; for, immediately after propounding the father's right to the estate, Vishnu's text declares: 'If he be dead, it appertains to the mother.' "

"2. This, too, is reasonable; for, her claim properly precedes that of the brothers and the rest; since it is necessary to make a grateful return to her, for benefits which she has personally conferred by rearing the child in her womb and nurturing him during his infancy, and also because she confers benefits on him by the birth of other sons who may offer funeral oblations in which he will participate.[5]

Ib. (XI-VI-3).—"Nor can it be pretended that the stepmother, grandmother and great-grandmother take their places at the funeral repast, in consequence of (ancestors being deified with) their wives; for the terms 'mother' (and grandmother and great-grandmother, etc.) (in such texts as the following) bear their original sense of his own natural mother, 'father's natural mother', and 'grandfather's natural mother' and it is by these terms that they are described as taking their places at the final repast. Thus it is said: 'A mother takes with her husband the funeral repast consisting of oblations to the manes; and the paternal grandmother with her husband, and the paternal great-grandmother with hers. But the introduction of stepmothers and the rest to a place at the periodical obsequies is expressly forbidden."[6]

It is thus clear that a stepmother has no right of succession to her stepson, and it has been so held.[7]

(9) **Brother.**

2393. The brother is expressly placed after the mother :—

Dayabhag.—"1. If the mother be dead, the property devolves on the brother; for Vishnu, having declared that 'If the father be dead, it appertains to the mother,' proceeds to say, 'On failure of her, it goes to the brothers.'

"3. That, too, is reasonable; for, the brother confers benefits on the deceased owner by offering three funeral oblations to his father and his other ancestors in

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(1) Sar. H. L. (4th Ed.), 319, 320.
(2) *Gobind Prashad* v. *Mahesh Chunder*, 23 W.R. 117; *Pran Nath* v. *Surrut*, 8 C. 460 (463, 464); *Huri Das* v. *Bamachurn*, 15 C. 780 (793); *Braja Lal* v. *Jiban Krishna*, 26 C. 285 (291).
(3) Dayabhag, XI-III-1, 3.
(4) Dayabhag, XI-IV-3-6.
(5) Dayabhag, XI-IV-1, 2 (§§ 3-7 combat the contrary view that she should have precedence over the father).
(6) Dayabhag, XI-VI-3.
(7) *Lalchi Priya* v. *Bhairabchandra*, 5 B.S.R. 369: 7 I.D. (O.S) 612; *Bhyrobee* v. *Nub Kissen*, 6 B.S.R. 61: 7 I.D. (O.S.) 712; *Alhadmoni* v. *Gokoolmoni*, (1852) 8 S.D.A.B. 563: 12 I.D. (O.S.) 438.

which the deceased participates and he occupies his place as presenting three oblations to the maternal grandfather and the rest, which the deceased was bound to offer; and he is, therefore, superior to the brother's son, who has not the same qualifications. But deriving his origin from the mother, the brother, though he does possess these qualifications, is inferior to the mother; and his succession, therefore, very properly takes effect after her.[1]

"9. Here, again, a brother of the whole blood has the first title under the following text (§ 10), and even under the general rule for the brother's succession. The meaning is that the whole brother shall inherit in the first place: but if there be one, then the half brothers; for he also is signed by the word brother, being issue of the same father.

"10. The passage alluded to (§ 9), is as follows: A re-united brother shall keep the share of his re-united (co-heir) who is deceased or shall deliver it to (a son subsequently) born.

"15. Therefore, the half brother, who is again associated in coparcenary, shall not take the succession exclusively; but the whole brother (shares it), though not associated. Such is the meaning; and consequently, the whole brother, who is not re-united in parcenary, and the half brother who is associated, should divide the succession."[2]

2394. Thus, both by the text and on general principle, a brother of the whole blood is preferred to a brother of half blood, because the former offers oblations both to the paternal and maternal ancestors of the deceased, whereas the latter offers them only to the paternal ancestors, his maternal ancestors being different.[3] The preference of one over the other is, however, only limited to undivided property.[4]

A separated full brother is equal to a joint half brother, and they inherit in equal shares.[5]

Sister.

2395. It has been said before that the daughter is an heir, not because she confers any spiritual benefit, but because her son is an heir.[6] But the same argument does not bring in the sister whose son is an heir, though she herself is never the heir of her brother,[7] though in a case decided in 1830 it was held that a sister, *enciente* of a son, may take the heritage in trust for her son, to the exclusion of her paternal uncle's son.[8] In so holding, it was said: "The sister is the source of production of daughter's sons to the father and the medium of their relation. If, at the death of her brother Gorachand, no son of Chandra Mala existed, still (since the right of the father's daughter's son could not otherwise be established) she was entitled to enter on the succession and hold until production of her male issue. This, too, was analogous to the succession of the daughter to the estate of the father, who died leaving no male issue or widow. The sister's son, and not the sister, was entitled to the property; for he offered oblations (incompetent to the sister) at periodical obsequies."[9] Similar view was taken in another case decided in 1830, in which the sister was held

(1) Dayabhag, XI-V-1, 3.
(2) Dayabhag, XI-V-1, 3, 10, 15.
(3) *Neelkisto* v. *Beer Chunder*, 12 M.I.A. 523 (539-541); *Sheo Sundary* v. *Pirthee Singh*, L.R. 4 I.A. 147 (152), approving *Rajkishore* v. *Gobind*, 1 C. 27 F.B.; *Susheela* v. *Bishampada*, 60 C. 636 (639).
(4) *Ishen Chunder* v. *Bhyrub Chunder*, 5 W.R. 21; *Rajkishore* v. *Gobind*, 1 C. 27 F.B., approved in *Sheo Soondary* v. *Pirthee Singh*, L.R. 4 I.A. 147.
(5) *Raj Kishore* v. *Gobind*, 1 C. 27 F.B.; *Sheo Soondary* v. *Pirthee Singh*, L.R. 4 I.A. 147 (153).
(6) *Per* R. C. Mitter, J., in *Ganga Pershad* v. *Shunbhoonath*, 22 W.R. 393.
(7) *Kirpa Mayee* v. *Damodar*, 7 B.S.R. 226; *Ram Dayal* v. *Maynee*, 1 W.R. 227; *Kalee Pershad* v. *Bhoirabee*, 2 W.R. 180; *Anund Chunder* v. *Teetooram*, 5 W.R. 215; *Rukkni* v. *Kadarnath*, 5 B.L.R. (App.) 87.
(8) *Karuna* v. *Jai Chundra*, 5 B.S.R. 50.
(9) *Karuna* v. *Jai Chandra*, 5 B.S.R. 50 (54, 55): 7 I.D. (O.S.) 371 (375, 376).

entitled to hold possession as long as there was hope of her bearing a son.[1] But this view was not acceded to in later cases,[2] in which however, it was held that if the sister's son was conceived at the time the succession opened, he will succeed, but his mother had no right.

(10) Brother's Son.

2396. The right of the brother's son is provided by the following texts:—

Dayabhag.—"1. On failure of brothers, the brother's son is heir; for the text of Vishnu having declared, 'It goes to the brothers,' proceeds, 'After them it descends to the brother's sons.'

"2. Amongst these, the succession devolves first on the son of a uterine or whole brother; but if there be none, it passes to the son of the brother."[3]

Jagannath.—"The son of a uterine brother has the first claim because he confers benefit on the mother of the late proprietor; for it appears from a text cited by Jimut Vahan, Raghunandan and the rest that the father's natural mother also shares with her husband the funeral cake offered by a son's son; but those benefits cannot be conferred by the son of half brothers; however, on failure of other nephews, the son of a half brother may inherit."[4]

2397. As in the case of the brother, so in the case of the brother's son, a joint nephew is preferred to one separate,[5] and on the same principle, sons of brothers of the whole blood succeed before sons of brothers of the half blood,[6] and of two nephews of the whole blood, a re-united nephew succeeds before the one separated, and of the two nephews, one of the whole blood and the other of half blood, the latter, though united, succeeds equally with the former.[7] In other words, *mutatis mutandis*, the rules applicable to the brothers are equally applicable to the nephews, and it is so laid down in the Dayakram Sangrah:—

Dayakram Sangrah.—"3. Among brother's sons associated and unassociated, all of the whole blood, the succession devolves on the associated brother's son.

"4. In like manner, in the case of associated and unassociated brother's sons, all of the half blood, the succession devolves on the associated brother's sons of the half blood.

"5. But if the son of the whole brother were unassociated, and the son of the half brother associated, then they both inherit together."[8]

(11) Brother's Son's Son.

2398. The brother's grandson is preferred to the paternal uncle, as explained in the following text:—

Dayabhag.—"Accordingly (since superior benefits are conferred by such a successor) the brother's grandson, excludes the paternal uncle, for he is a giver of oblations to the deceased owner's father, who is the person principally considered.

"7. But the brother's great-grandson, though a lineal descendant of the owner's father, is excluded by the paternal uncle; for he is not giver of oblations, since he is distant in the fifth degree."[9]

In a competition between grand nephews of the whole and half blood, and those re-united and separate, the principle of preference is the same as is applicable to the brothers and nephews.

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(1) *Sumbochunder* v. *Ram Durga*, 6 B. S.R. 291: 7 I.D. (O.S.) 885.

(2) *Kesub Chunder* v. *Bishnu*, (1860) 2 B.S. D.A. 340. To the same effect, *Kalee Pershad* v. *Bhoirabee*, 2 W.R. 180.

(3) Dayabhag, XI-VI-1, 2.

(4) 3 Dig., 519.

(5) *Jandub* v. *Benodebehary*, 1 Hyde. 214; *Akshoy* v. *Haridas*, 35 C. 721 (724).

(6) Dayabhag, XI-VI-2; *Kylash Chunder* v. *Gooroo Churn*, 3 W.R. 43, affirmed on review *Gooroo Churn* v. *Kylash*, 6 W. R. 93.

(7) Dayakram Sangrah, I-VIII-3-5, (Setlur), pp. 114, 115.

(8) *Ib.*

(9) Dayabhag, XI-VI-6, 7.

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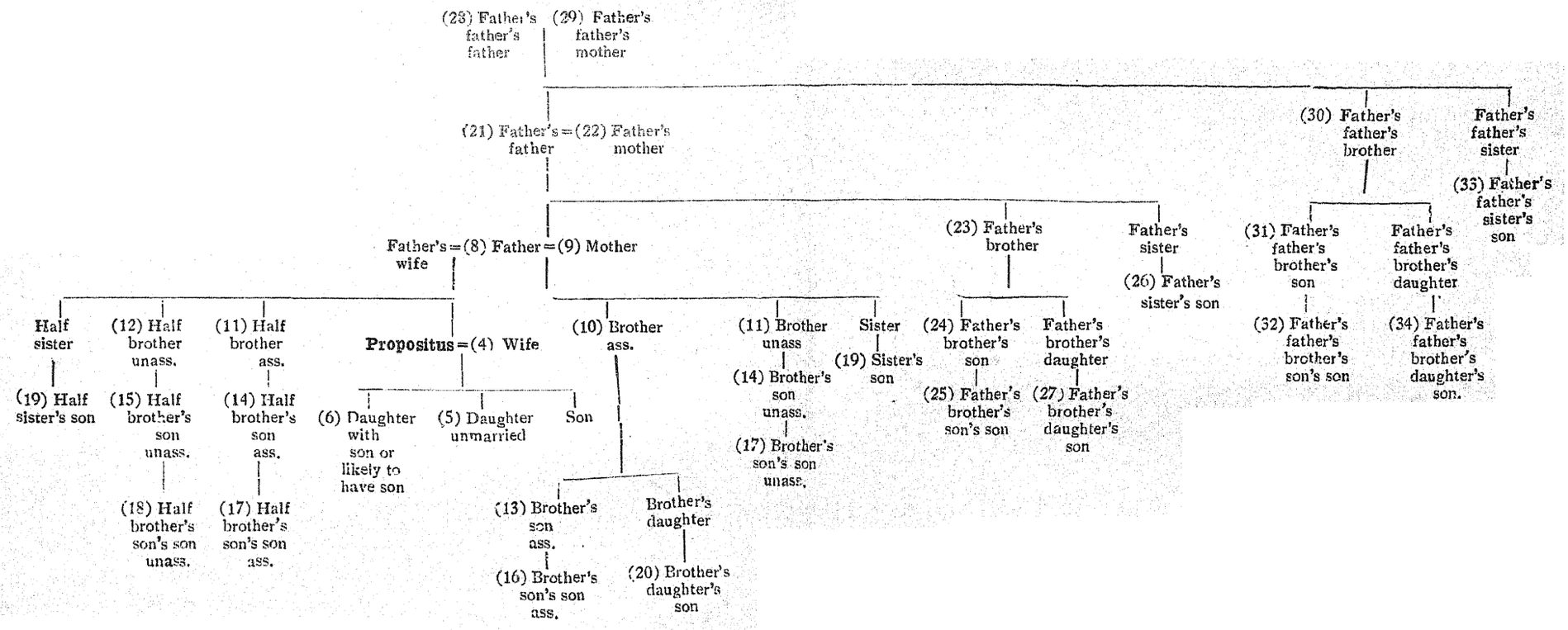
DAYABHAG SAPINDAS



Though a grand nephew is an heir, a grand niece (brother's son's daughter) is not an heir.[1]

A brother's son's son's son, being in the fifth degree, is a *sakulya* and not a *sapinda*. As such, he cannot inherit, in preference to a brother's daughter's son, who is a *sapinda*.[2]

(12) Sister's Son.

2399. The father's daughter's son is expressly named in Dayabhag as an heir, in the following text:—

Dayabhag.—"8. But on failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son (in preference to the uncle), in like manner as it descends to the owner's daughter's son (on failure of the male issue), in preference to the brother."[3]

The position of the sister's son in the line of heirs in both textually recognized and judicially acknowledged.[4] As in the case of sons of brothers, no distinction is made in the case of sons of sisters of the whole blood and those of the half blood, both being equally entitled to succeed as provided in the following text:—

Dayakram Sangrah.—"According to Acharya Chudamani, the son of the proprietor's own sister, and the son of his half sister have an equal right of inheritance."

Neither a sister's daughter nor a sister's daughter's son is an heir.[5]

2400. The brother's daughter's son and the brother's son's daughter's son[6] are said to be next to inherit, but judicial authority places them lower down after No. 26, *post*.[7]

(13) Father's father;
(14) Father's mother;
(15) Father's father's son;
(16) Father's father's son's son;[8]
(17) Father's father's son's son's son.

2401. The grandfather's great-grandson is mentioned in the Dayabhag as an heir, but the brother's daughter's son is not so mentioned; and, therefore, the latter would be postponed to the former.[9]

(18) Father's sister's son.

He is also mentioned in the Dayabhag.[10]

(19) Father's father's father;[11]
(20) Father's father's mother;
(21) Father's father's father's son;

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(1) *Radha* v. *Doorga*, 5 W.R. 131.

(2) *Digumber* v. *Motilal*, 9 C. 563 (567), followed in *Guru Gobind* v. *Anund Lal*, 13 W.R. 49 F.B.; *contra* in *Kashee* v. *Raj Gobind*, 24 W.R. 229 in which a *Sakulya* was held preferable to a cognate *sapinda*, dissented from as inconsistent with the Full Bench Case in 13 W.R. 49.

(3) Dayabhag, XI-VI-8.

(4) *Rajchunder* v. *Goculchand*, 1 B.S. R. 56: 6 I.D. (O.S.) 42; *Katuma* v. *Jaichandra*, 5 B.S.R. 50: 7 I.D. (O.S.) 371; *Lakhi Priya* v. *Bhairab Chandra*, 5 B.S. R. 369: 7 I.D. (O.S.) 612; *Sumbuchunder* v. *Gungachurn*, 6 B.S.R. 291: 7 I.D. (O.S.) 385; *Guru Gobind* v. *Anand Lal*, 13 W.R. 49 F.B.; *Seeta Ram* v. *Fukeerchand*, 15 W.R. 433; *Ganesh* v. *Nilkomul*, 22 W.R. 264.

(5) *Kalee Pershad* v. *Bhoirabee*, 2 W. R. 180; *Krishna* v. *Secretary of State*, 35 C. 631.

(6) Sarv. Inh., 822; *Bhattacharya*, H. L. (2nd Ed.), 504.

(7) *Prannath* v. *Surrut Chunder*, 8 C. 460: 3 Dig. 530.

(8) Dayabhag, XI-VI-9; *Jugut Narain* v. *Collector*, 4 C. 433-*n*; *Oodoychurn*, 4 C. 411 (413); *Gopal* v. *Haridas*, 11 C. 343.

(9) *Jugut Narain* v. *Collector*, 4 C. 413-*n*.

(10) Dayabhag, XI-VI-9.

(11) Sarv. Inh., 882, places before this the father's father's son's daughter's son, and the father's father's son's son's daughter's son.

(22) His son;[1]
(23) His son's son;[2]
(24) Paternal great-grandfather's daughter's son.[3]

2402. There is some conflict of views as to the order of the next following.[4]

(25) Son's daughter's son;
(26) Son's son's daughter's son;
(27) Brother's daughter's son;
(28) Brother's son's daughter's son.

As to these, Jagannath says: "It should be remarked that the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter, and so forth, claim succession, in the order of proximity, before the maternal grandfather; for they also confer benefits by the oblation of funeral cakes."[5]

(29) Paternal uncle's daughter's son;[6]
(30) Do. son's daughter's son;
(31) Paternal granduncle's daughter's son;[7]
(32) Do. son's daughter's son.

It has been held that the great-grandfather's son's daughter's son is entitled to succeed in preference to the maternal uncle.[8] They present an oblation to the deceased's paternal great-grandfather, in which the deceased participates.[9]

(33) The maternal grandfather.

Both the Dayabhag[10] and the Dayakram Sangrah place the maternal grandfather here.[11]

(34) Great-grandfather's son's daughter's son;[12]
(35) Mother's brother;
(36) Mother's brother's son;[13]
(37) Mother's brother's son's son.[14]

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(1) *Gopal Chunder* v. *Hari Das*, 11 C. 343.

(2) *Mahoda* v. *Kulcani*, 1 B.S.R. 82.

(3) Dayabhag, XI-VI-9; Sarv. Inh., 823, places here the great-grandfather's son's daughter's son (No. 31) and the great-great-grandfather's grandson's daughter's son (No. 32).

(4) Sarv. Inh., places them earlier (Inh. 821); Sarkar places them after the maternal relations provisionally (H. L., 3rd Ed., 307, 308), while Mr. Ghose places them as in the text (H.L., 3rd Ed., 137, 138); *Gobind Pershad* v. *Mohesh Chunder*, 23 W.R. 117; *Digumber* v. *Motilal*, 9 C. 563; *Huri Das* v. *Bama Churn*, 15 C. 780.

(5) 3 Dig., 530.

(6) *Gobindo* v. *Woomesh*, (1864) W.R. 176; *Guru Gobind* v. *Anand Lal*, 13 W.R. 49 F.B.; *Gopal* v. *Hari Das*, 11 C. 343; *Kedar* v. *Amrita Lal*, 17 C.W.N. 492. He is preferred to a great-greatgrandfather's great-grandson; *Kedar Nath* v. *Amrita Lal*, 17 C.W.N. 492: 17 I.C. 283.

(7) Dayakram Sangrah, I-X-13 (Setlur, 117).

(8) *Kailash Chandra* v. *Karuna*, 18 C. W.N. 477, followed in *Kedar Nath* v. *Hari Das*, 43 C. 1 (11).

(9) *Dayakram Sangrah*, I-X-13 (Setlur, 117).

(10) Dayabhag, XI-VI-20.

(11) Dayakram Sangrah, I-X-14 (Setlur, 117).

(12) Great-grandfather's son's daughter's son is preferred to the maternal uncle; *Kedar Nath* v. *Hari Das*, 43 C. 1, though the latter is specially mentioned in the Dayabhag as heir and the former is not, and his precise position is not laid down in the cases; *Kailash Chandra* v. *Karuna Kantha*, 18 C.W.N. 477: 19 I.C. 677.

(13) *Braja Lal* v. *Jiban Krishna*, 26 C. 285.

(14) Dayakram Sangrah, I-X-15 (Setlur, 117); *Padmakumari* v. *Court of Wards*, 8 C. 302 (310) P.C.

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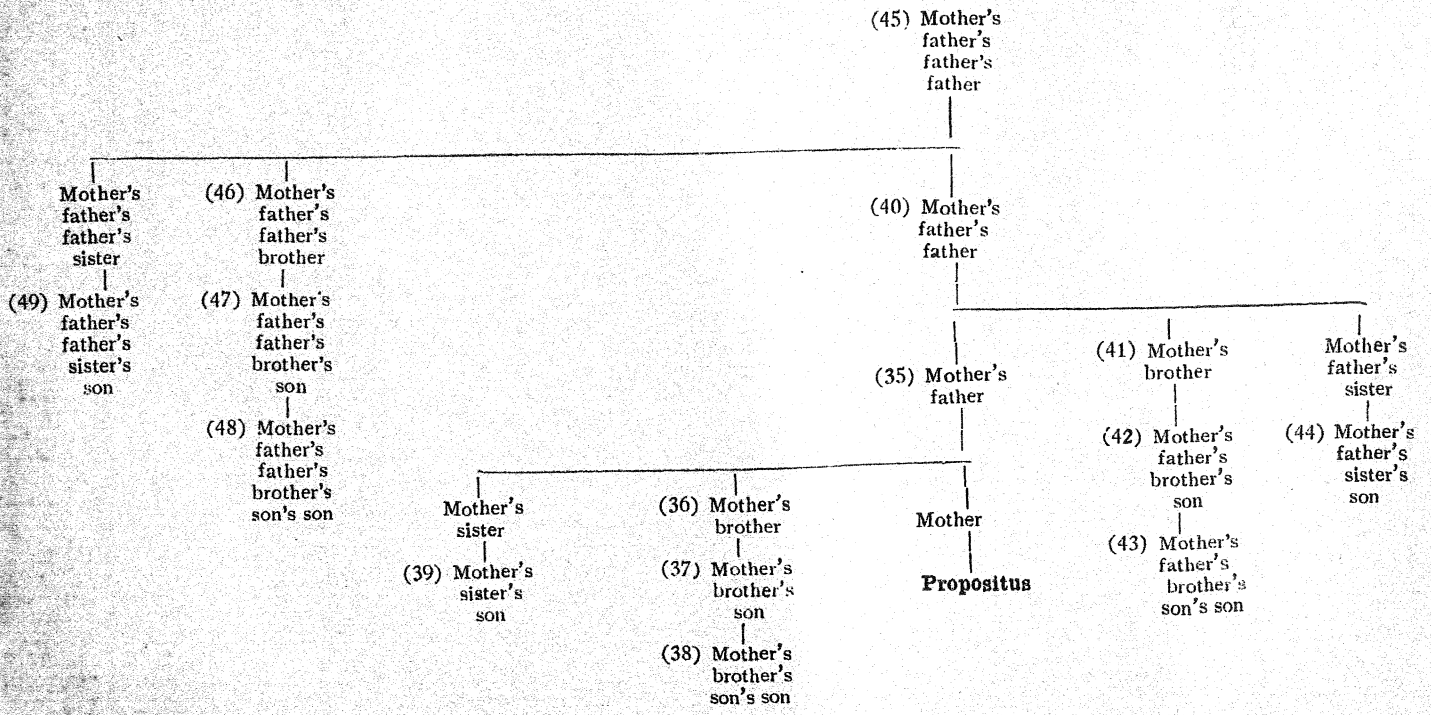
DAYABHAG INHERITANCE

[Maternal relations presenting oblations which the deceased was bound to offer.]



The last three are the agnate descendants of the maternal grandfather, and, as such, relations in whose oblations the deceased participates. They are, therefore, preferred to the *sakulyas*.[1]

(38) Mother's sister's son.

As the mother of the deceased and the mother of the heir were daughters of the same father, and as the deceased left no nearer kinsmen vested with the right of offering the funeral oblations offered by the heir to his maternal grandfather, and as the deceased had no *sapindas* within three degrees, the mother's sister's son has the preference over lineal descendants from a common ancestor beyond the third degree.[2]

(39) The maternal great-grandfather;
(40) His son;
(41) His son's son;
(42) His son's son's son;
(43) His daughter's son.

Nos. 38 to 42 are supported by their enumeration in the same order in the Dayakram Sangrah.[3]

(44) The maternal great-great-grandfather;
(45) His son;
(46) His son's son;
(47) His son's son's son;
(48) His daughter's son.

This is in accordance with the express text of Dayakrama Sangrah,[4] which closed the list of *sapindas* with the last. Consequently, the daughter's son's son is excluded and is not an heir at all.[5] But the following are also *sapindas*, though not so included in that work:—

(49) The maternal grandfather's son's daughter;
(50) Maternal grandfather's grandson's daughter's son;
(51) The maternal great-grandfather's son's daughter's son;
(52) The maternal great-grandfather's grandson's daughter's son;
(53) The maternal great-great-grandfather's son's daughter's son;
(54) The maternal great-great-grandfather's grandson's daughter's son.

2403. Sakulyas.—In default of all *sapindas*, whether *gotraj* or *bandhus* the inheritance goes to the *Sakulyas*, in accordance with the following texts:—

Dayabhag.—"14. Accordingly, since the succession devolves on heirs down to the maternal uncle and the rest, in the order of oblations in which the deceased may participate, or which he was bound to offer, Manu, considering that purport as sufficiently indicated by the two passages above cited. 'To the nearest *sapinda* the inheritance next belongs,' proceeds thus: 'Then, on failure of such kindred, the distant kinsmen shall be the heir,' or the spiritual preceptor or the pupil.

(1) *Roopchurn* v. *Anundlal*, 2 B.S.R. 45: 6 I.D. (O.S.) 392; *Kasee* v. *Goluck Chunder*, (1848) B.S.D.A. 28.

(2) *Deynath* v. *Muthoor Nath*, 6 B.S.R. 30: 7 I.D. (O.S.) 688. According to Sarv. Inh. p. 823, Nos. 48 and 49 should next follow; but, for the reason given in this case, they should be postponed till after No. 47.

(3) Dayakram Sangrah, I-X-17, 18 (Setlur, 117); *Braja Kishore* v. *Radha Gobind*, 12 W.R. 339; Sarv. Inh., 823, places here Nos. 50 and 51.

(4) Dayakram Sangrah, I-X-19, 20 (Setlur, 117); Sarv. Inh., 823, places here Nos. 52 and 53.

(5) *Nepal Das* v. *Probhas Chandra*, 42 C.L.J. 221: 90 I.C. 499.

"15. The distant kinsman (*sakulya*) is the descendant of the paternal grandfather's grandfather or other remote ancestor. Such relatives are denominated *samanodaks*. Their order of succession is in the series, as exhibited. On failure of such heirs down to the *samanodaks*, the succession devolves on the spiritual preceptor, the pupil, etc."[1]

Dayakram Sangrah.—"22. The *sakulyas*, or remote kindred, are of two descriptions, first descending and second ascending.

"23. The first includes the great-grandson's son, and the rest down to the third degree in the descending line. The second includes the great-grandfather's father and other ancestors up to the third degree in the ascending line.

"24. Here the distant kinsmen in the descending line first obtain the inheritance, according to their respective order, since the deceased owner partakes of the remainder of the oblations which they present.

"25. In thier default, the distant kindred, as far as the third degree in the ascending line inherits, in due order."[2]

2404. Samanodaks.—In default of *sakulyas*, the *samanodaks* take in the same order.

Other heirs.

The rest of the heirs here enumerated follow the order of the Mitakshara. In one case it was held that a priest may be the heir of his deceased disciple.[3]

2405. Hermit's Heirs.—The heirs of hermits follow the Mitakshara text.

2406. Inheritance on Re-union.—The rules of succession amongst re-united relations have already been stated in **S. 202.** There is no difference in this respect between the two schools, since even under the Dayabhag law "the reason for inheritance by a re-united coparcener is not spiritual benefit, but a *quasi*-contractual relation and affection for each other."[4] Both the Smriti Chandrika[5] and the Virmitroday contain an exhaustive chapter on re-union,[6] from which the following table of succession is drawn:—

(1) Re-united full brother;
(2) Separated full brother;
(3) Re-united half brother;
} both share equally;

(4) Re-united father;
(5) Re-united uncle;
(6) Separated half brother;
(7) Separated father;
(8) Separated mother;
(9) Widow;
(10) Sister;
(11) Nearest sapindas;[7]
(12) Samanodaks and the rest as in the case of ordinary succession.[8]

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(1) Dayabhag, XI-VI-14, 15; Dayakram Sangrah, I-X-21 (Setlur, 117).
(2) Dayakram Sangrah, I-X-23-25 (Setlur, 117, 118).
(3) *Jugdanand* v. *Kessubnund*, (1864) W.R. 146.
(4) *Akshoy* v. *Hari Das*, 35 C. 721, (726).
(5) Ch. XII (Setlur, 300, 307).
(6) Virmitroday, Ch. I-V (Setlur, 427, 438).
(7) Virmitroday, Ch. I-V (Setlur 434, 435).
(8) *Ib.* (Setlur, 436).

The heir to the estate of a re-united person must maintain his wives and support his daughters till they are married as well as perform the ceremony of their marriage.[1]

2407. No Heir.—Since, among the *samanodaks,* those only are entitled to the inheritance who are also *sakulyas* or allied to the family of the deceased; those allied *ex parte materna* do not inherit. Consequently, a person's cousin four degrees remote, *being* his maternal great-grandfather's daughter's son's son is no heir at all.[2]

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(1) Virmitroday, Ch. IV-13 (Setlur, 436).

(2) *Sambhu Chandra* v. *Kartic Chandra*, 54 C. 171.

CHAPTER XXV.

WOMAN'S ESTATE.

2408. Topical Introduction.—It has been stated before that Hindu Law regards woman as inherently incompetent to hold property. And such rights as are conceded to her bear the signs of the struggles which mark their course. To begin with, all Hindu females started as slaves in their husband's household. They could be bought and sold, and were conceivably let out for enjoyment.[1] As such, they had no rights of property. But in course of time, they had to be conceded such rights by the force of usage. This led to the adaptation of old texts to new conditions. The commentators dared not declare the disabling texts obsolete: they were too sacrosanct to be directly confronted. They have, therefore, resorted to the sholastic method of exposition, aided by alleged texts ascribed to Brihat Manu and the rest, the authenticity of which is, at least, doubtful.

In the primitive age, women and children were alike. They were classed as chattels and possessed no right of property (§§ **16, 17**). In course of time, the son's right was recognized, then the right of other male kinsmen, for they too contributed to the partriarchal strength. The one devouring passion, from which the ancient Aryan suffered, was the necessity of a son to continue his lineage. He was the priest of his soul. For this purpose, various devices were resorted to, and *niyog* was one amongst them: the appointment of a daughter (*putrika*) to procreate a son was another.

2409. At this stage of the social evolution, women were still chattels. They had still no rights of their own. The recognition of woman's right of inheritance is of comparatively recent origin. The Rigveda denied that the widow had any right to inherit to her husband. It gave the widow the right to inherit as the daughter to her parent.[2] But the daughter was made to beget a son by *niyog*.[3] The older lawgivers, such as Manu,[4] Gautam,[5] Vashisth[6] and Baudhayan[7] all give her the option of *niyog* but no inheritance, while Apastamb even forbids *niyog* though he recognizes the daughter's right of inheritance.[8] Visvarup, the commentator of Yadnavalkya who preceded the author of Mitakshara, denies that the widow, unless pregnant, had any right to succeed to her husband, or that the daughter, other than the appointed daughter, could succeed to her father. The practice of *niyog* limited the widow to obtain a son by her husband's younger brother, and failing him, by the nearest agnate. But in her dominating desire to beget a son, these restrictions were often disregarded. For the rule was that, on the husband dying issueless, the wife had merely the usufruct of her husband's property till she could

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(1) Narad, XII-19, 33 S.B.E. 169; Vishnu, VI-15: 7 S.B.E. 43.
(2) Rigveda, M. II, S. 11, § 7: M.I.A. S. 128.
(3) *Ib.*, M. III, S. 31, §§ 1, 2.
(4) Manu, IX-127, 130, 131, 133, 134, 136.
(5) Gautam, XXVIII-18, 19, 2 S.B.E. 301.
(6) Vashisth, XVII-16, 17.
(7) Baudhayan, P. 2, A. K. 3, S. 15.
(8) Apastamb, P. 2, P. 6, K. 14, S. 2-4: 2 S. B. E. 133.

beget a son. If she did, the son became the heir. If she could not, the estate passed to the husband's younger brother, or failing him, his nearest *sapinda* who was her guardian. The self-interest of these relations conflicted with their duty to the deceased to provide him with a son, with the result that *niyog* became, in course of time, a discredited institution, not because of its immorality but because of the jealousies it aroused.

2410. As the practice of *niyog* became obsolete, the hardship of the widow's lot became more manifest. Narad recognized the right of a daughter, though not appointed, to raise the issue to inherit to her father.[1] "A daughter, like a son," says Brihaspati, "springs from each member of a man. How then should any other person inherit her father's property while she lives."[2] The daughter's claim appears to have first come in for recognition, and she had precedence of the widow, presumably because she too, like the son, was born of the loins of her father.[3] But the widow could not be long ignored. She was already entitled to the usufruct of her husband's estate. By her steadfast perseverance she was obtaining a footing in society, and had obtained even the monopoly of certain callings, for, had not Vishnu ordained that "a debt contracted by the wife of a herdsman, distiller of spirits, public dancer, washer or hunter shall be discharged by the husband because he is supported by his wife."[4] But still Vishnu would not treat seriously any document "executed by a woman, or a child, or a dependent person, or one intoxicated or insane, or one in danger or in bodily fear."[5] A woman was an incompetent witness,[6] and was, in fact a chattel, and is so treated by Narad who says: "What is permitted, whether woman, beasts or the earth, that only should be enjoyed. He who enjoys them without leave, should be made to pay the profit of such enjoyment."[7] On the other hand, woman and the wife have been assigned an exalted position in the estimation of Manu, and Katyayan gave her the right to succeed to her husband,[8] and so did Harit.[9] And Yadnavalkya assigns her a place next only to the son, grandson, great-grandson, the son of the appointed daughter, such daughter herself, and the subsidiary sons. And this order is repeated in the Mitakshara, in which, however, the author enlarges her rights far beyond what even the Privy Council would accept. According to the Mitakshara, all property which the woman inherits, whether from a male or from a female, is designated her stridhan and should devolve upon her stridhan heirs. But the Privy Council have pointed out that property acquired by her from a male, whether by partition or by inheritance, cannot be so treated.[10]

2411. Woman's property thus became divisible into property over which she possesses only a limited power of disposal and that over which she possesses the absolute power of disposal. The former will be dealt with in this chapter; while the latter, which is spoken of as her own *peculium* or *stridhan*, will be the subject of another chapter. The two

(1) Narad, XIII-50.
(2) Brihaspati, XXV-56.
(3) Narad, XIII-50, 33 S.B.E. 201.
(4) Vishnu, VI-37, 7 S.B.E. 45.
(5) *Ib.*, VII-10, 7 S.B.E. 47.
(6) *Ib.*, VIII-2, 7 S.B.E. 48.
(7) Cited in Mayukh (Mandlik), p. 119.
(8) Cited in Mit., Ch. II, 1-57; Mayukh (Mandlik), p. 77.
(9) Cited in Mit., Ch. II, 1-59; Mayukh (Mandlik), p. 77.
(10) *Thakoor Rai* v. *Deyee Baluk Ram*, 11 M.I.A. 139 (173); *Bhugwandeen* v. *Myna Baee, ib.*, 487 (509); *Sheo Shankarlal* v. *Debi Sahai*, 25 A. 468 P.C.; *Sheo Pertab* v. *Allahabad Bank, ib.*, 476 P.C., and cases cited *post*.

species of property differ throughout in their origin, enjoyment and ultimate devolution. The woman's rights at the present moment stand highest in Bombay and lowest in the orthodox Mitakshara country, Madras and Bombay take an intermediate place, but the general rule that women take only a limited estate applies equally to all. But as their Lordships have pointed out, this does not mean that woman is not the owner of her estate. All it means is that her power of alienation is limited,[1] whether she has or has not any heirs.[2]

2412. The conception of unqualified ownership with a limited power of alienation may not be consonant with the general law. But it is a necessary incident of a woman's estate. As such, it has given rise to certain rights which the reversioner may enforce during the lifetime of the female heir. What these rights are will be found set out in the sequel.

335. **In the absence of an express grant, women are presumed to acquire only a limited estate in property acquired by partition and inheritance.**[3]

Quality of a woman's estate.

2413. Analogous Law.—This section is drawn from decided cases which depart from the rule stated in the following text of the Mitakshara on the subject:—

Mitakshara.—That which was given by the father, by the mother by the husband, or by a brother . . . and also property which she may have acquired by inheritance, purchase, partition, seizure, or finding are denominated by Manu and the rest, woman's property."[4]

According to this text, all property inherited by a woman becomes her *stridhan*, over which she has unlimited power of disposal. This rule conflicts with the policy of the Mitakshara interpreted to exclude women, as far as possible, and, consequently, it has been held that, in spite of this text, women acquire only a limited estate in their inherited property.[5] In any other view, the estate in their hands would devolve upon their *stridhan* heirs, who are preferably female relations—which would be subversive of the entire scheme of Hindu Law, which places woman in a position of subordination and dependence, and gives her no more than a life-estate even when she succeeds to her husband or father.[6] The same rule applies to property obtained by a woman, whether by gift, devise or partition—the presumption being that they take only a limited estate, though, of course, that presumption may be

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(1) *Collector of Masulipatam* v. *Cavaly*, 8 M.I.A. 529 (550).

(2) *Ib.*, p. 553.

(3) *Debi Mangal Prasad* v. *Mahadeo Prasad*, 34 A. 234 P.C.; *Thakoor Deyee* v. *Rai Baluk Ram*, 11 M.I.A. 139 (173-175); *Bhugwan Deen* v. *Myna Bai*, *ib.*, 487 (504-514); *Chotaylal* v. *Chunnoo Lal*, 4 C. 744 (753-756) P.C.; *Muttu* v. *Dorasingh*, 3 M. 290 (301, 302) P.C. (Inheritance). *Ramchandra* v. *Ramchandra*, 45 M. 320 (327, 328) P.C. (Gift or devise), and *see* S. 245 and cases there cited.

(4) Mit., II-XI-2.

(5) *Thakoor Deyee* v. *Rai Baluk Ram*, 11 M.I.A. 139 (173-175); *Bhugwandeen* v. *Myna Bai*, *ib.*, 487 (504-514).

(6) *Chotaylal* v. *Chunnoolal*, 4 C. 744 (753-756) P.C.; *Muttu* v. *Dorasingha*, 3 M. 290 (301, 302) P.C.

rebutted by the use of words of sufficient amplitude conferring on them an absolute estate.[1]

2414. Woman's Estate.—The general quality of a woman's estate is its limited character, her restricted power of alienation and, on her death or surrender, its reverter to the line of the last male owner. These restrictions are imposed on women because of the state of their weakness, ignorance and dependence. The presumption as to a gift or devise in her favour conveying only a limited interest, has already been the subject of a previous discussion. The next section sets out the nature of restrictions upon her acquisitions by partition or inheritance. The question is independent of the nature of the property acquired or the person from whom she acquires it. If the property acquired be the self-acquisition of the husband, the widow will, nevertheless, acquire only a limited estate upon his dying issueless. If the property be the *stridhan* of her mother, the right she acquires is equally limited.

The only exceptions to which this rule is subject, are those set out in the next section.

Restrictions on woman's estate.

336. Subject to the provisions of section 315 the rights of a woman in her property acquired by partition or inheritance are limited as follows:—

(1) Her inherited[2] estate is liable to be devested upon the subsequent birth or adoption of a son[3] or upon her remarriage[4] but not for unchastity;[5]

(2) She is not entitled to alienate the corpus except for legal necessity or benefit as hereinafter provided,[6] but she is entitled to appropriate all its income and accumulations which she may dispose of at her discretion;[7]

(3) On her death her estate devolves on the next heir of the last male owner.

Exception 1.—**Under the Bombay school of law females, belong to the family of the propositus by birth, take an absolute interest, while those who come into it by marriage take only a limited estate.[8]**

Exception 2.—**A Jain widow has absolute power of disposal over the self-acquired property of her husband inherited by her.[9]**

Exception 3.—**Nothing in this section applies to an estate acquired by a woman by deed or devise conferring on her an absolute estate.**

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(1) *Ramchandra* v. *Ramchandra*, 45 M. 320 (327, 328) P.C.

(2) *Basant Kumar* v. *Ram Shankar*, 59 C. 859 (880); *Manek Lal* v. *Keshav*, (1938) B. 71.

(3) *Bhoobun Moyee* v. *Ram Kishore*, 10 M.I.A. 279 (312), followed in *Basenk Kumar* v. *Ram Shanker*, 59 C. 859 (880). *See* Ss. 62, 299.

(4) *Bhola Umar* v. *Kausilla*, 55 A. 24 F.B. (and cases cited) contra *Matungini* v. *Ram Button*, 19 C. 289 F.B. *see* S. 316 (4) and comm.

(5) *Moniram* v. *Keri Kolitani*, 5 C. 776 (791, 792) P.C. *See* S. 299.

(6) *See* Ss. 122-124.

(7) *Saodamini* v. *Administrator-General*, 20 C. 433; *Isri Dutt* v. *Hansbutti*, 10 C. 324 P.C.; *Sri Ram Jankiji* v. *Jagdamba*, 43 A. 374 F.B.; *Nirmala* v. *Deva Narayan*, 55 C. 269; *Dulhin Parbati* v. *Baijnath*, 14 Pat. 518 (542, 543); *Jagannadham* v. *Vighneshwarudi*, 55 M. 216.

(8) *Bhau* v. *Raghunath*, 30 B. 229; *Dhondi* v. *Radhabai*, 36 B. 546.

(9) *Madanji* v. *Tribhuwan*, 36 B. 396.

Illustrations.

(*a*) *A* bequeaths his estate to his widow *B* whom he authorises to adopt. She adopts *B*. *B* cannot devest *A* of her bequest since *B* takes by inheritance and cannot defeat *A's* bequest to B.[1]

(*b*) *A* inherits an impartible estate from her husband. She takes a limited estate.[2]

(*c*) *A*, the mother, succeeds as heir to her son. *A* takes only a limited estate.[3]

(*d*) *A*, the daughter, inherits her father's estate. *A's* estate is limited.[4]

(*e*) *A*, a sister, inherits her brother's estate in Bombay. *A* takes an absolute estate, though elsewhere her estate would be limited.[5]

(*f*) *A* devises his estate to his wife *B*, expressly conferring on her the power of alienation. *B* takes an absolute estate.

2415. Analogous Law.—The position of women is summed up in the two texts one from the Veda and another from Katyayan, which are cited by all later commentators as the last word on woman's capacity and her rights:—

Baudhayan.—"The Veda declares: 'Therefore women devoid of the senses and incompetent to inherit.'"[6]

Katyayan.—"Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her death, let the heirs take it. But she has not property therein to the extent of gift, mortgage or sale."[7]

Later texts emphasize her dependence and worthlessness except for the purpose of procreation. Her right of property has been of slow growth, and the present law is stated in the section.

2416. Woman Acquires a limited Estate.—Woman generally takes a limited estate. It is immaterial whether she takes as widow,[8] daughter[9] (except in Bombay),[10] mother,[11] or a grandmother[12] (except

(1) *Basant Kumar* v. *Ram Shankar*, 59 C. 859 (876-878).

(2) *Muttu* v. *Dorasingha*, 3 M. 290 P. C.; *Venkayamma* v. *Venkata*, 25 M. 678 P.C.

(3) *Vrijibhukan Das* v. *Parbati*, 32 B. 26.

(4) *Chotaylal* v. *Chunoo Lall*, 14 B. L.R. 235, affirmed O.A. 4 C. 744 P.C.

(5) *Bhaskar* v. *Mahadeb*, 6 B. H. C. R. (O.C.) 1.

(6) Baudhyayan, II-II-3-§ 46, 14 S. B. E., p. 231; Virmitroday (Setlur), 406; but West, J., in *Vijiasarangam* v. *Lakshmen*, 8 B. H. C. R. (O. C.) 244 (258), considered the Vedic text as probably an interpolation. *See* Topical Introduction, Ch. XXVIIII.

(7) Cited in Dayabhag, XI-I-56; Mayukh, IV-VIII-4 (Mandlik, p. 77); Vivad Chintamani (Setlur), 256; Smriti Chandrika, XII-1-28 (Setlur), 279; Virmitroday (Setlur), 406.

(8) *Keerut Singh* v. *Koolahul Singh*, 2 M.I.A. 529; *Thakoor Deybee* v. *Rai Baluk Ram*, 11 M.I.A. 139; *Bhugwandeen* v. *Myna Boee*, 11 M.I.A. 487; *Maniram* v. *Keri*, 5 C. 776 (789, 790) P.C.

(9) *Chotay Lal* v. *Chunnolall*, 14 B. L. R. 235, affirmed O.A. 4 C. 744 P.C.; *Muttu* v. *Dorasingha*, 3 M. 290 P.C.; *Venkayamma* v. *Venkata*, 25 M. 678 P. C.

(10) *Vinayak* v. *Luxumeebai*, 1 B. H. C. R. 117, affirmed O.A. 9 M.I.A. 520; *Bhaskar* v. *Mahadev*, 6 B. H. C. R. 1; *Haribhat* v. *Damodarbhat*, 3 B. 171; *Bharmangavda* v. *Rudrapgavda*, 4 B. 181 (187); *Bulakhi Das* v. *Keshav Lall*, 6 B. 85; *Jankibai* v. *Sundra*, 14 B. 612; *Kindabai* v. *Anacha*, 15 B 206; *Madhavram* v. *Dave*, 21 B. 739 (745); *Virupaksha* v. *Ganap*, 34 B. 510.

(11) *Vinayak* v. *Luxmee Bai*, 1 B.H. C.R. 117, affirmed O.A. 9 M.I.A. 520; *Sakharam* v. *Sitabai*, 3 B. 353; *Bharmangavda* v. *Rudrapgavda*, 4 B. 181 (187); *Tuljiram* v. *Mathuradas*, 5 B. 662 (670); Virmitroday, IV-VIII-4, (Setlur) 97; *Poorendra* v. *Hemangini*, 36 C. 75 (84); *Bachiraju* v. *Venkatappada*, 2 M. H. C. R. 402; *Kutti* v. *Radakrishna*, 8 M. H. C.R. 88; *Punchanund* v. *Lolshan*, 3 W. R. 140 (Mithila case); *Bijya* v. *Unpoorna*, 1 B.S.R. 215: 6 I.D. (O.S.) 159; *Nufur* v. *Ram Koomar*, 4 B.S.R. 393: 7 I.D. (O.S.) 293; *Hem Lutta* v. *Goluk Chunder*, 7 B.S.R. 127: 8 I.D. (O. S.) 97; *Jullesur* v. *Uggur Roy*, 9 C. 725.

(12) *Plukar* v. *Ranjit*, 1 A. 661.

in Bombay),[1] it being immaterial whether the property is inherited from a male[2] or a female,[3] or whether the property is movable or immovable,[4] partible or impartible,[5] ancestral or self-acquired[6] or whether it is acquired by partition[7] or inheritance. As Lord Hobhouse put it: "It is not necessary now to state in any detail how impossible it is, whether with regard to the authority of other commentators or to other parts of the Mitakshara itself, to construe this passage[8] as conferring upon a woman, taking by inheritance from a male, a stridhan estate transmissible to her own heirs. The point is now completely covered by authority. In the case of *Thakur Deybee* v. *Rai Baluk Ram*,[9] such an interest was claimed on behalf of a widow in her husband's immovable property. In the case of *Bhagwandeen Doobey* v. *Myna Baee*[10] such an interest was claimed on behalf of a widow in her husband's movable property. In the case of *Chotaylall* v. *Chunnoolall*,[11] such an interest was claimed on behalf of a daughter in her father's property. All these cases were governed by the Mitakshara law. And in all it was held that the woman took only a restricted interest, and that, on her death, the property devolved on the line of the last male owner."[12] While, then, the widow can ordinarily inherit only a limited estate, there are instances of local custom which permits of her inheriting an absolute estate. Such a custom was proved in the case of Jain widows of Mangrole and Uplata.[13]

2417. Share on Partition.—Then as regards partition, the share obtained by a female on partition is presumed to be allotted to her in

(1) *Gandhi* v. *Jadab*, 24 B. 192; contra, *per* Ranade, J., in *Madhavram* v. *Dave*, 21 B. 739 (744).

(2) Dayabhag, XI-56-61; Mayukh, IV-VIII-4, (Setlur, 97; Virmitroday, III-I-3 (Setlur 376-380); Smriti Chandrika, XI-I-28 (Setlur, 279); Vivad Chintamani (Setlur, 256); Dayakram Sangrah, I-II-3-5 (Setlur, 110); Vyavastha Darpan (2nd Ed.), 124; *Keerut Singh* v. *Koolahul Singh*, 2 M.I.A. 331; *Collector of Masulipatam* v. *Cavaly*, 8 M.I.A. 529; *Thakoor Deybee* v. *Rai Baluk Ram*, 11 M. I.A. 139; *Bhugwandeen* v. *Myna Baee*, 11 M. I.A. 487; *Moniram* v. *Kerry*, 5 C. 776 (789, 790) P.C.; *Jamiyatram* v. *Jamna*, 2 B.H.C.R. 10; *Lakshmi Bai* v. *Ganpat*, 4 B.H.C.R. (O.C.) 150 (163); *Bhaskar* v. *Mahadev*, 6 B.H.C.R. 1; *Bharmangavda* v. *Rudrapgavda*, 4 B. 181 (187); *Vrijbhukandas* v. *Parvati*, 32 B. 2; *Kattama* v. *Dorasagar*, 6 M.H.C.R. 310; *Vasudevan* v. *Secretary of State*, 11 M. 157 (165); *Gurunath* v. *Krishnaji*, 4 B. 462; *Tuljiram* v. *Mathuradas*, 5 B. 662; *Madhavram* v. *Dave*, 21 B. 739.

(3) Dayakram Sangrah, II-III-6; *Thakoor Deybee* v. *Rai Baluk Ram*, 11 M. I. A. 139; *Bhagwan Deen* v. *Myna Baee*, 11 M.I.A. 487; *Sheo Shankar* v. *Debi Sahai*, 25 A. 468 P.C., reversing O. A. *Debi Sahai* v. *Sheo Shankar*, 22 A. 353; *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 P. C.; *Chotay Lal* v. *Chunnoo Lal*, 4 C. 744, affirmed O.A. 14 B. L. R. 235 (237); *Senkamalathammal* v. *Velayuda*, 3 M. H. C.R. 312; *Venkatarama* v. *Bhujanga*, 19 M. 107; *Virsangappa* v. *Rudrappa*, 19 M. 110; *Raju* v. *Ammani*, 29 M. 358; *Prankishen* v. *Bhugwutte*, 1 B. S. R. 4: 6 I.D. (O. S.) 8; *Bhoobun* v. *Mudden*, 1 Shome 1; *Prankissen* v. *Nayanmoney*, 5 C. 222; *Hurr Dayal* v. *Grishchunder*, 17 C. 911; *Jagendra* v. *Phani Bhushan*, 43 C. 64; *Maddumala* v. *Lakshman*, 20 C. W.N. 627.

(4) *Thakoor Deybee* v. *Rai Baluk Ram*, 11 M.I.A. 139 (175); *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Durga Nath* v. *Chintamoni*, 43 C. 214; *Narasimha* v. *Venkata*, 8 M. 290.

(5) *Muttu* v. *Dorasingha*, 3 M. 290 P.C.

(6) *Namasivaya* v. *Sivagami*, 1 M. H. C.R. 374.

(7) *Debi Mangal Prasad* v. *Mahadeo*, 34 A. 234, reversing O.A. 32 A. 253 and *contra* in *Chhiddu* v. *Naubat*, 24 A. 67; *Sripal* v. *Surajbali*, *ib.*, p. 82.

(8) Mit., II-XI-2, cited for the appellant.

(9) 11 M.I.A. 139.

(10) 11 M.I.A. 487.

(11) 4 C. 744 P.C.

(12) *Muttu* v. *Dorasingha*, 3 M. 290 (301) P.C.

(13) *Maduji* v. *Tribhowan*, 36 B. 396.

lieu of her right to maintenance, and is, therefore, subject to the same limitation incident to a woman's estate. This had been the subject of some conflicting decisions of the Indian courts, for, while in some cases[1] this view was followed, there were cases[2] in which the courts held the female to take an absolute estate. The question was examined and decided by the Privy Council, who held the rule applicable to the estate acquired by inheritance equally applicable to partition. "Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her stridhan, so as to constitute a provision for her stridhan heirs, but in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on partition of joint estate, upon a footing different from that on which property coming to her by way of inheritance, has been placed."[3]

2418. This was a Mitakshara case, but the same rule applies equally to Bengal.[4] As Wilson, J. said: "The nature of her, *i.e.*, mother's right in the share, when allotted, was long a subject of controversy. Writers of high authority maintained that it vested in her absolutely and passed, after her death, to her heirs as *stridhan*. It is now settled in Bengal that this is not so, but that, on her death, it goes back, in some sense, to her husband's family."

This branch of the law has now been settled by a long course of decisions, which the courts will not unsettle by any appeal to the original texts.[5]

2419. But though a woman takes a limited estate, it is a proprietary estate in no way limited in interest,[6] though it is limited in use. She does not hold in trust for her reversioners.[7] "Her right is of the nature of a right of property, her position is that of owner, her powers in that character are, however, limited, but so long as she is alive, no one has any vested interest in the succession."[8] The interest which her reversioners possess in her estate is contingent and a mere *spes successionis* which, by relinquishment in her favour, has not the effect of enlarging her estate by converting it into an absolute estate,[9] the reason

(1) *Baldeo* v. *Mahabir*, 1 Agra, 155 (157); *Judoonath* v. *Bishonath*, 9 W.R. 61; *Laljeet* v. *Raj Coomar*, 20 W.R. 326; *Beni Pershad* v. *Puran Chand*, 23 C. 262 (279).

(2) *Chhiddu* v. *Naubat*, 24 A. 67 (74, 76); *Sripal* v. *Surajbali*, ib., p. 82.

(3) *Debi Mangal* v. *Mahadeo*, 34 A. 234 (243) P.C. overruling O. A. 32 A. 253 and *contra* in *Chhiddu* v. *Naubat*, 24 A. 67 (74, 76); *Sripal* v. *Surajbali*, ib., p. 82; *Bhagwant Rao* v. *Punjaram*, (1938) N. 1 (3).

(4) *Sheo Dayal* v. *Judoonath*, 9 W. R. 61 (62); *Nobin Chunder* v. *Guripersaud*, 9 W.R. 505; *Unnopoornah* v. *Bhoobun*, 15 C. 292 (307); *Sashi Bhusan* v. *Hari*, 25 C.W.N. 990.

(5) *Chotay Lal* v. *Chunnoo Lall*, 4 C. 744 (755, 756) P.C., affirming 14 B. L.R. 235.

(6) *Vasonji* v. *Chandabibi*, 37 A. 369 (378, 379) P.C.

(7) *Hurrydoss* v. *Opoornath*, 6 M. I. A. 433.

(8) *Janaki* v. *Narayanasami*, 39 M. 634 (637) P.C.

(9) *Hemchunder* v. *Saramoyi*, 22 C. 354 (363); *Narasimham* v. *Nadhavaraduya*, 13 M.L.J. 323; *Dhoorjeti* v. *Dhoorjeti*, 30 M. 201; *Sham Sundar* v. *Acchan Kaur*, 21 A. 71; *Hargawan* v. *Baijnath*, 32 A. 88. In *Olati* v. *Varadarajulu*, 31 M. 474 (478), a release, by a reversioner, of his reversionary right was held as not obnoxious to the provisions of S. 7 (*a*) of the Transfer of Property Act; but it was a case of compromise. In *Kanuram* v. *Kashichandra*, 14 C.W.N. 226: 2 I. C. 660, the reversioner had purchased half the estate from the daughter and relinquished his right on the other moiety, which was upheld *inter partes;* but such arrangement cannot, it is submitted, enlarge the female heir's limited estate by converting it into her *stridhan*.

being that her estate is limited because of her historical incompetence, and not because of the necessity of safeguarding the rights of her reversioners. Consequently, her estate is not enlarged by the fact that she has no reversioners, or that the Crown does not claim her estate, on her death, by escheat.[1]

2420. The widow is not in the question of a manager, because, she represents no one, and is in possession of an estate which is her own, whereas the manager of a joint family, is merely a co-parcener in an estate in which others are equally interested, and of whom he is a representative. Whatever, therefore, he does, he does with the assent, or implied, of the body of coparceners. In the widow's case, the coparceners are reduced to herself, and the estate centres in her. She can do what the body of coparceners can do subject always to the condition that she acts fairly to the expectant heirs.[2] But, all the same, she does not hold her estate for them. The latter do not get the estate through her.[3]

2421. Devesting of her Estate.—The estate which a Hindu woman takes, cannot be devested by any subsequent event. (§ **299.**) The only case in which it is liable to be devested, is the subsequent birth of adoption of a son. Even in the latter case, where the husband is competent to make a valid bequest of his property, as where he is subject to the Dayabhag school, or is otherwise competent to dispose of his property by will, his devise of property to his widow cannot be devested by her adoption of a son, since the son succeeds by inheritance and cannot defeat his father's bequest, whether to his wife or to any other relation.[4] But of course, it is open to the testator to make a bequest liable to be devested upon the subsequent birth or adoption of a son to him.[5]

Clause (1) On birth or adoption of a son.

The estate of a Hindu widow may be devested on her re-marriage (§ **316 (4)**) or retiremtnt from the world, as by turning a *bairagi*, or the like,[6] which amounts to her civil death. But if on her devesting she still continues to remain in possession such possession would continue to be treated as qualified and limited as it was before that event.[7]

2422. Her Alienation.—The provisions of his clause are general and apply equally to a female heir who is generally speaking, entitled to alienate the estate for legal necessity or benefit, as defined in Ss. 122-124. But within the ambit of these sections, there is room for the exercise of wide discretion, as already observed, the father being allowed the largest and the widow by no means the least; since, while the father and the manager are merely coparceners, the heiress is the sole owner for the time being, and, as such, she possesses absolute power of disposal over the income, which she does not hold in trust for any one. Even as regards the corpus, she is its absolute owner, but an owner shorn of some of the

Clause (2).

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(1) *Janardhan* v. *Anu*, 10 I.C. 51.
(2) *Chimmaji* v. *Dinkar*, 11 B. 320 (324).
(3) *Shib Shankar* v. *Soni Ram*, 32 A. 33; affirmed O.A. 35 A. 227 P.C.
(4) *Basant Kumar* v. *Ram Shankar*, 50 C. 859 (878, 880); *Manek Lal* v. *Keshav*, (1938) B. 71.
(5) *Bhupendra* v. *Amarendra*, 43 C. 432 (439) P.C.
(6) *Ameena* v. *Radhabinode*, (1856) 12 S. D. A. B. 595 (602); 15 I. D. (O.S.) 78 (83, 84).
(7) *Parbati* v. *Ram Prasad*, 7 Luck. 320; § 2637.

attributes by reason of her sex and her position of perpetual dependence.[1] Nevertheless, she is entitled to alienate the corpus, when impelled by "necessity" or justified by "benefit" to the estate or to the spiritual needs of her husband. The father and the manager have to consider the needs of the coparceners. She has to consider no one's needs except her own; for though she may have a reversioner, he is entitled to no rights *in praesenti*, not even to maintenance. His right is merely a *spes successionis*, which depends upon his surviving the widow. As one with a possibility of succession he is entitled to the protection of his reversion, prevent its waste and restrain her acts prejudicing it; but beyond these rights elsewhere set out, he has no control over the management of the estate, and none at all over its income.

2423. All the same, her right of alienation has become more or less crystallised into definite principles, which, when applied to the case of the heiress, have acquired a special significance. As Lord Philimore remarked: "The word 'necessity,' when used in this connection, has a somewhat special, almost technical meaning."[2] "Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient."[3] Such compulsion may be the result of her own mismanagement, but it is nonetheless a justifying necessity.

Generally speaking, the heads of necessity, justifying an alienation by the widow are the same as apply to the manager of a joint family, added to which there are some which are peculiarly her own. The former have already been the subject of a general discussion. (§§ **1177-1182.**)

As to the latter, the Privy Council recognised, as far back as 1861, that the widow possesses larger powers of dispositions upon acts which are supposed to conduce to the spiritual welfare of her husband,[4] and larger still upon acts which Hindu Law regards as spiritual necessity as distinct from those which are merely spiritually beneficial.[5]

2424. The right of female heirs is absolutely limited and not merely qualified by the existence of reversioners. Whether these do or do not exist, the qualification remains, because her estate is limited not by the rights of others but by the peculiar nature of her estate. Consequently, a transferee from her takes a qualified estate, because her power to transfer is limited. If there are reversioners, they may object, because her act prejudices their right. But if she has left no heirs, and her estate escheats to the Crown, it has the same right,[6] since the fetter upon her right is not placed for the protection of the material interests of her

(1) *Bijia Gopal* v. *Krishna Mahishi*, 34 C. 329 (333) P.C.; *Collector of Masulipatam* v. *Cavalry*, 8 M. I.A. 529; *Bahadur Sing* v. *Sultan Hussain*, 66 I.C. 455: (1922) O. 171; *Mirza Sadiq Husain* v. *Mhd. Karim*, 9 O.L.J. 456: (1922) O. 289.

(2) *Ramsumran* v. *Shyam Kumari*, 1 P. 741 P.C.

(3) *Ib.*

(4) *Collector of Masulipatam* v. Cavaly, 8 M. I. A. 529 (552).

(5) *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (511) P.C., affirming O. A. 41 A. 130.

(6) Two cases relating to this Zemindari went up to the Privy Council. The right of the Crown to take by escheat and the question of improper alienations were decided in the *first*, *Collector* v. *Cavaly*, 8 M.I.A. 529 (551); while in the *second*, the Crown was held to hold the estate subject to all valid charges created by the widow, *Cavaly* v. *Collector*, 11 M.I.A. 619; *Vijayarangam* v. *Lakshuman*, 8 B.H.C.R.(O.S.) 244 (265); *Pandharinath* v. *Govind*, 32 B. 59 (71); *Tirath Ram* v. *Kanhan*, 1 L. 588.

husband's relations,[1] but is dependent upon her sex. Consequently, the fetter on her power of alienation is not withdrawn by reason of a release of their right by all her reversioners in her favour. It does not amount to a surrender and a regrant alone can remove her restraint.[2] The power of the Hindu widow to alien her husband's property for religious or spiritual purpose is, therefore, equally circumscribed, though it should not be too rigidly construed. As such, the Privy Council have upheld her gift of a small portion of her inherited estate to an idol as being reasonable and proper according to the common notion of the Hindu community. They held that the gift, though not obligatory, was still a pious act such as the reversioner cannot challenge.[3] On the same ground, a sale by a woman of a reasonable portion of her husband's estate to pay off a debt incurred on the thread and marriage ceremony of her daughter's son was upheld even though the daughter's son was not so poor as to need her help.[4] But in some earlier cases, it is held that she has no power of alienation for any religious or spiritual purpose, but only for those which are recognized as conducive to her husband's good.[5] The fact that the property alienated was only of inconsiderable value would not legalize the transfer not otherwise legal.

2425. Restriction Applies to Movables.—The restrictions placed upon a woman's estate apply equally whether the property she has inherited is movable or immovable. It was decided by the Privy Council as far back as 1867[6] and their view has, of course, been since followed in all cases since decided both under the Mitakshara[7] and the Dayabhag *law*.[8]

2426. The question remains whether she has no larger powers in the Mayukh country. The question was adverted to by the Privy Council, who said: "The result of the authorities seems to be that although, according to the law of Western school, the widow may have a power of disposing of movable property inherited from her husband, which she has not under the law of Bengal, she is by the one law, as by the other, restricted from alienating any immovable property which she has so restricted, and that on her death, the immovable property, and the movable, if she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the Pandit between ancestral and acquired property. In some of the earlier cases cited, the property was not acquired."[9] The Privy Council thus left the question

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(1) *Collector* v. *Cavaly*, 8 M. I. A. 529 (550-552); *Lalchand* v. *Manohri*, 78 I.C. 717; (1925) L. 108.

(2) *Nayakammal* v. *Munuswami*, (1924) M. 819.

(3) *Sardar Singh* v. *Kunj Behari*, 44 A. 503 P.C., approving *Tapayya* v. *Ramakrishna*, 34 M. 288 (291).

(4) *Venkatasubba* v. *Ananda Rao*, 57 M. 772.

(5) *Sham Dei* v. *Birbhadra*, 43 A. 463.

(6) *Bhagwandeen* v. *Myna Baee*, 11 M. I.A. 487 (513, 514).

(7) *Goolap* v. *Phool*, 1 Borr. 173; *Bechur* v. *Lukmee*, 1 B.H.C.R. 56; *Vinayak* v. *Luxmee Bai*, 1 B.H.C.R. (O.C.) 117; *Narsappa* v. *Sakharam*, 6 B.H.C.R. (A.C.) 215; *Nana* v. *Manobai*, 7 B. H. C. R. (A.C.) 153; *Balvantrao* v. *Purushottam*, 9 B.H.C.R. 99; *Tuljaram* v. *Mathura Das*, 5 B. 662; *Harilal* v. *Pranvalabdas*, 16 B. 229; *Gadadhar* v. *Chandrabhaga*, 17 B. 690 F.B.; *Narasinha* v. *Venkatadhri*, 8 M. 290; *Buchi* v. *Jagapathy*, 8 M. 304; *Gopala* v. *Gopala*, 44 M. 984 (988).

(8) *Cassinaut* v. *Hurrosoondery*, 2 Mor. Dig. 198; *Durga Nath* v. *Chintamoni*, 31 C. 214.

(9) *Thakoor Deybee* v. *Baluk Ram*, 11 M.I.A. 139 (175).

open, and it was considered by a full bench, who had to consider her disposing power by will, which it negatived,[1] though it was recognized that the trend of cases in the Presidency was conflicting, for, while in some she was held to take an absolute interest in the movables,[2] there were cases in which she was held to possess no power to devise them by will.[3] The full bench case deciding against the validity of her testamentary alienation of movables, left the question of her alienation by a transfer *inter vivos* untouched, and this was considered and decided against her by a bench in 1907, who saw no distinction between a gift *inter vivos* and a gift by will,[4] adding. "Seeing the enormous wealth which Hindus in India hold in the form of movable property, *e.g.*, Government paper, stocks and shares, which was unknown to the ancient text-writers and commentators, it is perhaps as well that the law should be as we hold it is, and that their widows should not have an uncontrolled power of disposition in respect thereof after the death of their husbands. Possibly, with the spread of education and the general emancipation of their women, they may be led to call in aid of the relief of the Legislature."[5] But in a more recent case, Tyabji, J., has upheld the woman's power of alienation by an act *inter vivos* on the ground that her absolute power over inherited movables cannot be larger than her power over movables, acquired in partition.[6]

In this view, a woman in Bombay is no exception to the general rule that women's estate in all inherited property, whether movable or immovable, partible or impartible, is qualified and limited.

In Sindh, however, which generally follows the view of the Bombay court, a woman is still held to possess an unfettered power of disposal in such such case.[7]

2427 Mithila Widow—Her Customary Rights.—Under the Mithila law, a childless widow, although she cannot alienate the immovable property, has an absolute right over the movable property inherited from her husband, and can alienate it in any manner she pleases, and she has also an absolute power to dispose of the profits of the estate during her life-time.[8]

2428. Power over Income and Accumulations.—But though a Hindu heiress is not entitled to impair the corpus, she possesses absolute power

(1) *Godadhar* v. *Chandrabhaga*, 17 B. 690 (710, 711) F.B.; *Chamon Lal* v. *Doshi Ganesh*, 28 B. 453.

(2) *Mayaram* v. *Motiram*, 2 B.H.C. R. 313; *Chandrabhaga* v. *Kashi Nath*, 2 B.H.C.R. 323; *Lakshmi Bai* v. *Ganpat*, 4 B.H.C.R. (O.C.) 162; *Bechar* v. *Lakshmi*, 1 B. H. C. R. (A. C.) 56; *Vinayak* v. *Lakshmibai*, 1 B.H.C.R. (O.C.) 117 (124); *Pranjivan Das* v. *Davkuverbai*, 1 B. H. C. R. (O. C.) B. 285; *Harila* v. *Pranvalav Das*, 16 B. H. C. R. (O. C.) 244 (260, 271); *Balwant Rao* v. *Purshottam*, 19 B.H.C.R. (111) F. B.; *Tuljiram* v. *Mathura Das*, 5 B. 562; *Bhagirathi* v. *Kunhujirao*, 11 B. 285; *Harila* v. *Pranvalav Das*, 16 B. 229; *Damodar* v. *Purmandas*, 7 B. 155.

(3) *Choonee Lal* v. *Jussoo*, 1 Bor. 60; *Dhoolubo* v. *Jeevee*, 1 Bor. 75; *Umroott* v. *Kulyandos*, 1 Bor. 314.

(4) *Pandhari Nath* v. *Govind*, 32 B. 59 (74).

(5) *Ib.*, p. 75.

(6) *Chaman Lal* v. *Parvati*, 58 B. 246 (253, 254), dissenting from *Pandharinath* v. *Govind*, 32 B. 59 (74).

(7) *Halima* v. *Asibai*, 4 S.L.R. 77; 8 I.C. 214; *Ratnase* v. *Amerbabai*, 9 I. C. (S.) 997.

(8) Vivad Chint. (Tagore), 261, 262, followed in 3 Dig. 468; *Sreenarain* v. *Bhya Jha*, 2 B. S. R. 29: 6 I.D. (O. S.) 380 (384); *Dorga Dayee* v. *Poosun Dayee*, 5 W.R. 141; *Birajun* v. *Luchmi*, 10 C. 392 (393); *Suressur* v. *Mohesh Rani*, 20 C.W.N. 31: 33 I.C. 983; *Pheku* v. *Gena Lal*, 96 I.C. 161; (1926) Pat. 481; *Jagarnath* v. *Surajdeo*, (1937) Pat. 483.

over all accumulations and income of her inherited estate. This is so, not because her estate is limited only to the personal enjoyment of the usufruct but because she has an estate vested in her life and, as such, she is entitled to the absolute usufructuary enjoyment of the whole of such property.[1] She has the right to assign or otherwise dispose of such accumulations,[2] which she may, of course, invest in the acquisition of other property which would *prima facie* be her *stridhan*, unles it is shown that despite such acquisition, she had intended to treat it as an accretion to her heritage.[3]

2429. But accumulations from income made by her are distinguishable from accumulations which she has inherited as part of the corpus. As already stated, these being a part of her inherited estate, she has no greater power of disposal over them than over the rest of her inherited estate.[4] But the case is widely different when they are her own savings, over which she doubtless possesses an absolute power of disposal. So, where the executor of the will of a testator made over to the widow of the latter an aggregate sum, consisting of accumulations of income accrued during eight years from her husband's death, undisposed of by his will, of which a greater part she invested, and after a lapse of 20 years she disposed of it as her own, the Privy Council held that the accumulations belonged to her as income derived from her widow's estate, over which she had full power of disposal.[5] The case would, however, have been different if the accumulation had been made under the will of her husband, in which case it would have devolved upon her as a part of the corpus. The case was decided on the ground that, on her husband's death, the estate vested in her, and that all income therefrom became hers which, though it passed to her with the estate when it was reduced to possession, was, nevertheless, the income of her estate and, as such, her own property.[6]

So, a decree obtained by a separated sister, in respect of certain payments made by her on account of her sister's sons and another, was held to be executable by her own personal representatives, and was not one which would pass to her sister by inheritance.[7]

The test, in such cases, would seem to be that any accumulation of income, made after the estate vested in the widow, still remains its accumulated income, over which the widow has full power of disposal. But if on the other hand, the accumulation was made before the estate vested in her, then it would be treated as a part of the corpus. This

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(1) *Kamavadhani* v. *Joysa*, 3 M. H. C.R. 116.

(2) *Kailasnath* v. *Biswanath*, (1153) B.S.C.C., reported in *Grose* v. *Amritamayi*, 4 B. L.R. (O. C.) 1 (41-*n*).

(3) *Ishri Dut* v. *Hansbutti*, 10 C. 324 P.C.; *Saodamini* v. *Administrator-General*, 20 C. 433 P.C.; *Nirmala* v. *Deva Narayan*, 55 C. 269; *Parbati* v. *Baijnath*, 14 Pat. 518; *Jamuna Prsad* v. *Ram Padarath*, (1937) Pat. 619.

(4) *Grose* v. *Amritamayi*, 4 B. L. R. (O.C.)1 (42); *Soorjeemoney* v. *Denobundoo*, 9 M.I.A. 123. *See* these cases explained in *Ishri Dutt* v. *Hansbutti*, 10 C. 324 (335, 336) P.C.

(5) *Saodamini* v. *Administrator-General*, 20 C. 433 (441) P.C.; *Ramasami* v. *Mangai Karasu*, 18 M. 113 (119, 120); *Saminatha* v. *Manikasami*, 22 M. 356.

(6) *Ishri Dutt* v. *Hansbali*, 10 C. 324 (334) P.C., distinguishing *contra* in *Bhabul Das* v. *Bholanath*, L.R. 2 I.A. 256, as extrajudicial, *ib.*, p. 337 and overruling *Grose* v. *Amritamayi*, 4 B.L.R. 1 (42).

(7) *Sita Ram* v. *Dulam*, 41 A. 359 (354, 355).

distinction was ignored in a case[1] animadverted upon by the Privy Council.[2]

2430. Female Owners in Bombay.—The rule that female heiresses take only a limited estate, is subject to an exception in favour of certain female heiresses in Bombay, where they are held to take an absolute estate, the rule being that all females who belong to a family by birth take an obsolute estate,[3] while those who belong to it by marriage take only a limited estate. Consequently, a mother,[4] a grandmother,[5] and a widow of the propositus[6] his daughter-in-law[7] and the wives of gotraj sapinda[8] take only a limited estate, whereas a daughter,[9] a sister,[10] a niece and grand-niece, and, in fact, any female relation born in the family of the propositus take an absolute estate by inheritance to him, so as to become a fresh root of descent. This had been the long established rule in Bombay ascertained by the court as far back as 1859,[11] which the court will not now disturb on the principle of *stare decisis*.[12]

Exception (1).

2431. Jain Widow.—Another exception to the rule is afforded by the Jain custom which vests in a childless Jain widow an absolute right in her husband's separate property.[13] But, otherwise, she takes the ordinary limited estate,[14] though there are instances of local custom which entitles her to inherit an absolute estate. Such custom was proved in the case of the Jain community of Magrole and Uplata in Kathiawar, where a widow, on the death of her husband, was found to become entitled absolutely to the properties left by him, which she had the power to dispose of either *inter vivos* or by will.[15]

Exception (2).

2432. Deed or Devise Excepted.—The rule that a Hindu woman can only inherit a limited estate is not inconsistent with her otherwise acquiring an absolute estate. Indeed, the incompetence of a woman by reason of her sex is held to be limited only to an estate acquired by ordinary succession,

Exception (3).

(1) *Grose* v. *Amritamayi*, 4 B. L. R. 1 (42).

(2) *Ishri Dutt* v. *Hansbutti*, 10 C. 324 (334) P.C.

(3) *Bhau* v. *Raghunath*, 30 B. 229; *Dhondi* v. *Radhabai*, 36 B. 546.

(4) *Vinayak* v. *Lukmebai*, 1 B. H. C.R. 117; *Narsappa* v. *Sakharam*, 6 B. H.C.R. (A. C.) 215; *Sakharam* v. *Sitabai*, 3 B. 353; *Bharmangavda* v. *Rudrapgavda*, 4 B. 181 (187); *Tuljiram* v. *Mathuradas*, 5 B. 662 (670); *Madhavram* v. *Dave*, 21 B. 739 (744); *Vrijbhukandas* v. *Parvati*, 32 B. 2.

(5) *Dhondi* v. *Radhabai*, 36 B. 546; *contra* in *Gandhi* v. *Jadab*, 24 B. 192.

(6) *Janiyatram* v. *Jamna*, 2 B. H. C. R. 10; *Lakshmi Bai* v. *Ganpat*, 4 B.H. C.R. 160 (163); *Bhaskar* v. *Mahadeo*, 6 B.H.C.R. (O. C.) 1; *Gurunath* v. *Krishnaji*, 4 B. 462.

(7) *Gangadhar* v. *Chandrabhaga*, 17 B. 690 F.B.

(8) *Tuljiram* v. *Mathuradas*, 5 B. 662; *Gangadhar* v. *Chandrabhaga*, 17 B. 690 F.B.; *Dhondi* v. *Radha Bhai*, 36 B. 546.

(9) *Pranjivan Dos* v. *Dev Kuar*, 1 B. H.C.R. 130; *Navalram* v. *Nandkishore*, 1 B.H.C.R. 209; *Janki Bai* v. *Sundra*, 14 B. 612; *Bhan* v. *Raghunath*, 30 B. 229 (236, 237); *Gulappa* v. *Tayava*, 31 B. 453.

(10) *Vinayak* v. *Lakshmi*, 1 B. H. C. R. 129; *Dhondu* v. *Gungabai*, 3 B. 369; *Biru* v. *Khondu*, 4 B. 214; *Bhagirathi* v. *Baya*, 5 B. 264.

(11) *Pranjivandas* v. *Devkuwarbai*, 1 B.H.C.R. 130 (133), followed in *Bhau* v *Raghunath*, 30 B. 229 (236, 237), approved in *Balwant Rao* v. *Baji Rao*, 48 C. 30 (43, 44) P.C.

(12) *Dhondi* v. *Radhabai*, 36 B. 546 (548); *Balwant Rao* v. *Baji Rao*, 48 C. 30 (43, 44) P.C.

(13) *Harmobh* v. *Mandil*, 27 C. 379 (390) (cases reviewed); *Sheo Singh* v. *Dakho*, 6 N.W. P. H. C. R. 382 (411), affirmed O.A. 1 A. 688 (705) P. C.; *Shimbu* v. *Gayanchand*, 16 A. 379; *Madanji* v. *Tribhuwan*, 13 Bom. L. R. 1121.

(14) *Shimbhu* v. *Gayan*, 16 A. 379.

(15) *Madanji* v. *Tribhowan*, 36 B. 396.

and not to one acquired by compromise,[1] gift, will[2] or by adverse possession. So, where on the death of her husband, his widow sued her husband's coparceners for possession of his estate, whereupon the coparceners compromised the suit by executing in her favour a deed of gift as a matter of favour, conveying to her certain properties, it was held that, though by suit she could only have obtained a life-estate, by the compromise she had obtained a larger estate which the language of the deed in her favour was susceptible of conveying.[3] The question is one of construction. In this case, the right of the widow was denied, and the property was conveyed as a matter of favour, which was held to distinguish cases in which the property was conveyed in settlement of her claim.[4] It has already been seen that it is open to a person to convey an absolute estate in favour of a female by gift or will, though the presumption is that they take a limited estate. But the natural presumption may be displaced by the use of such apt expressions as suffice to convey a heritable estate.[5]

Estate of joint heirs.

337. (1) Under the Mitakshara law, two or more joint female heirs take as joint tenants with the right of survivorship *inter se*;[6]

(2) But those subject to the Bombay[7] and the Dayabhag[8] laws as tenants-in-common;

(3) Any alienation by the former must be made either jointly by all or with their express or implied consent;[9]

(4) But an alienation by the latter may be made by any of the co-heiresses to the extent of her share.

2433. Analogous Law.—It has already been seen that one distinction between the Mitakshara and other schools is as to the interest taken by the heirs upon succession. Under the Mitakshara school, which favours and strives for joint estates, female heirs on succession take as joint tenants,[10] while those under the Mayukh[11] and the

(1) *Natha Lal* v. *Baboo Ram*, (1936) P.C. 103; *Sambasiva* v. *Venkateswara*, 31 M. 179; *Parshottam* v. *Kesav Lal*, 56 B. 164.

(2) Gift and wills are now subject to the general law enacted in the Transfer of Property Act, and the Succession Act respectively.

(3) *Sambasiva* v. *Visvam*, 30 M. 356 O.A. *Sambasiva* v. *Venkataswara*, 31 M. 179.

(4) *Rabutty* v. *Shibchunder*, 6 M. I. A. 1 (16); *Dino Nath* v. *Gopal*, 8 C.L. R. 571; *Ganpat* v. *Ram Chunder*, 11 A. 296; explained in *Sambasiva* v. *Visvam*, 30 M. 356 (360).

(5) *Surjamani* v. *Rabi Nath*, 30 A. 84 P.C.; *Bishnath* v. *Chandrika*, 55 A. 61 P.C.; *Bhaidas* v. *Gulab*, 26 C.W.N. 129 P.C.

(6) *See* S. 290, *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Venkayyamma* v. *Venkata*, 25 M. 675 (687, 688)) P.C.

(7) *Vithappa* v. *Savitri*, 34 B. 510 (513) and cases *post*.

(8) *Janaki* v. *Mothuranath*, 9 C. 580 (585) F.B.; *Durga Nath* v. *Chintamoni*, 31 C. 214.

(9) *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Sri Gajapati* v. *Maharani*, 16 M. 1 P.C.; *Durga Deb* v. *Gita*, 33 A. 443; *Govind* v. *Chandrabhaga*, 12 N. 100 (111, 112); *Gaya Dei* v. *Tulsha Dei*, 10 Luck. 587.

(10) *Bhagwandeen* v. *Myna Bai*, 11 M.I.A. 487 (515); *Radhamani* v. *Alakajeswari*, 16 M. 1 (10) P.C.; *Venkayamma* v. *Venkata*, 25 M. 678 (686-688) P.C.; *Bangbutty* v. *Radha Kissno*, Montr. 314; *Jioyiamba* v. *Kamakshi*, 3 M.H.C.R. 424; *Gajapathi* v. *Gajapathi*, 1 M. 290; *Kathaperumal* v. *Venkabai*, 2 M. 194 (195); *Gurivi* v. *Chinnamma*, 7 M. 93 (95); *Ariyaputri* v. *Alamelu*, 11 M. 304 (306); *Ramakkal* v. *Ramasami*, 22 M. 522; *Balagobind* v. *Ram Kumar*, 6 A. 431 (436); *Ram Piyari* v. *Mulchand*, 7 A. 114 (117); *Mula Bai* v. *Maharaj Singh*, 2 C.P.L.R. 166; *Khulroo* v. *Saraswati*, 5 C.P.L.R. 58; *Chander* v. *Murat Singh*, 7 C.P.L.R. 153.

(11) *Bulakhi Das* v. *Keshav Lal*, 6 B. 85 (88); *Bhagirati Bai* v. *Kahnujirao*,

Dayabhag[1] take as tenants-in-common in *quasi*-severalty. From the fact that the Mitakshara women inherit jointly, it follows that the right of enjoyment and alienation must till partition, remain joint. Consequently, one co-heiress cannot, without the consent of the other, alienate the join estate unless she does so agent or manager for the other. As was observed by the Privy Council: "They are, therefore, in the strictest sense, coparceners, and between the undivided coparceners, there can be no alienation by one without the consent of the other."[2] But this was not a case of alienation for legal necessity. In another case, their Lordships had to consider whether a mortgage by the senior co-widow, who managed the estate, which was presumably joint, for legal necessity but without the consent of the junior widow, was, on the former's death, enforceable against the estate, which the junior widow took by survivorship. Their Lordships found that the mortgage had not been executed by the senior widow *qua* manager, and that any mortgage executed by her, even for necessity, without the consent of the co-widow, could not be enforced against the latter, when the estate passed to her by survivorship.[3] These cases still left undecided the question whether a divided co-widow is entitled to alien her own interest for legal necessity, so as to bind the surviving co-widow. It has already been seen that no partition between co-widows can defeat their right of survivorship. (Section 181), from which it follows that no alienation by a divided co-widow, even if supported by legal necessity, can, on her death, bind her surviving co-widow. It has been so held in several cases, though the contrary has also been maintained on the analogy of coparceners, any one of whom may alien joint property for legal necessity.[4] But these cases happened to be cases of alienations by a co-widow, of her share, for legal necessity. But if the principle applicable to coparceners be followed, then a co-widow might alienate the whole estate for legal necessity, and even without her alienation, even her unsecured debts would be so recoverable.

In any case, it would be so where the co-widows have relinquished their right of survivorship, which they are entitled to do (§ **1504**), or where a co-widow has surrendered her interest to the other, in which case, the latter would take as on survivorship.[5]

Accretion.

338. (1) Any accretion made by an heiress partakes of the nature of the estate to which it is added;[6]

(2) The question whether any property is an accretion to the parent estate is one of intention to augment it by treating it as part thereof;[7]

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11 B. 285; *Hari* v. *Vital*, 31 B. 560; *Vithappa* v. *Savitri*, 34 B. 510; *Rukhmani* v. *Keshav Lal*, 9 Bom.L.R. 1293; *Chinnaku* v. *Utam*, 2 S.L.R. 59.

(1) *Janoki* v. *Mathuranath*, 9 C. 580 (585) F.B.

(2) *Bhagwandeen* v. *Myna Bai*, 11 M I.A. 487 (515).

(3) *Gajapati* v. *Pasupati*, 16 M. 1 (10, 11) P.C.

(4) *Jai Narain* v. *Mannalal*, 50 A. 489 (494), following *Thakurmani* v. *Dai Rani*, 33 C. 1079 (1089).

(5) *Ramakkal* v. *Ramasami*, 22 M. 522 (524); *Sadalai* v. *Gomathi*, (1912) 2 M.W.N. 911; *Judubunsee* v. *Asaman*, 14 W.R. 370; *Dulhin Parbati* v. *Baijnath*, 14 Pat. 518.

(6) *Ishri Dutt* v. *Hansbutti*, 10 C. 329 P.C.; *Naba Kishore* v. *Upendra Kishore*, 26 C.W.N. 322 : 65 I.C. 305 : (1922) P.C. 39.

(7) *Saodamini* v. *Administrator-General*, 20 C. 433 (442) P.C.; *Aviswarya* v. *Sivaji*, 49 M. 116; *Rukmabai* v. *Jaipal*, 23 N.L.R. 108 : 100 I.C. 457; (1927) N. 122.

(3) But in the absence of anything appearing to the contrary, any purchase made out of income of an estate and left undisposed of at her death may be presumed to be an accretion thereto.[1]

Illustrations.

(*a*) *A*, a female heiress, receives the income of her husband's estate from the executor of his will, who holds the estate in trust for her and his other heirs. *A* purchases property out of the income so received and devises it to her own relation. *A* is entitled to do so, and the estate not being in possession, there is no question of accretion.[2]

(*b*) *A* receives an estate by way of maintenance, out of the profits of which she purchases a village *B*. *B* is *A's* stridhan at her absolute disposal.[3]

(*c*) *A* devises an estate to his widow *B* for life. Out of the profits of this estate, *B* purchases a property *C*. *C* is her stridhan at her absolute disposal.[4]

2434. Analogous Law.—The rule as to accretion follows the general rule of Hindu Law regarding the nature of interest which women take, whether by inheritance, gift or otherwise, in all of which cases, they are presumed to take only a limited interest, an interest, which is erroneously spoken as a life estate, which it is not, since it is an estate of inheritance. Consequently, it follows as a natural corollary that the unexpended profits of the corpus, which remain undisposed of, and the property into which they might be invested, must form an accretion to the estate, unless the life-holder indicates that she intends to treat them as her own. That she is entitled to do so follows from the fact that, while the female heir is not absolutely entitled to the corpus, she is so entitled to its income; but, nevertheless, since the undisposed of income follows the corpus, the presumption of its so doing is justified in the absence of anything to show to the contrary. The case is, however, different where the female takes under a gift or devise, in which case, her right to the corpus or to its income would depend upon the terms of the grant. If it confers an absolute estate upon her, there can be no question of accretion. If the estate conferred is limited, but she is expressly given an absolute right over the income, then the income would be hers, and all, it is converted into, would be *prima facie* hers also. It may be asked: What difference is there between the two cases, since in either case, the income is absolutely hers, and why should the presumptions in the two cases be different? The answer is that in the one case the natural rule that *accessio cedit principale* applies, whereas in the other case, there can be no room for accession, since the grantor had himself separated the income from the corpus.

2435. In dealing with the subject of accumulations, it has been seen that the heiress is entitled to all accumulations from income made to her estate since the estate vested in her. These, being in the nature of income, are absolutely at her disposal. The subject of accumulations is allied to accretion, and the reports teem with cases in which the question for decision was whether the property acquired by the widow is to be taken as incorporated into her heritage or is to be treated as her own. The whole question is one of intention. Did she intend to augment the estate or to benefit herself? It is settled that the heiress is entitled to appropriate

(1) *Ishri Dutt* v. *Hansbutti*, 10 C. 329 (337) P.C.; *Sheolochan* v. *Saheb Singh*, 14 C. 387 (393) P.C.; *Saodamini* v. *Administrator-General*, 20 C. 433 (441) P.C.; *Krishnakumari* v. *Rajendra Bahadur*, 2 Luck. 43 : (1927) O. 240.

(2) *Saodamini* v. *Administrator-General*, 20 C. 433 (442) P.C.; *Subramania*, v. *Arunachalam*, 28 M. 1.

(3) *Subramaniam* v. *Arunachalam*, 28 M. 1 (8).

(4) *Guru Prasad* v. *Nafar Das*, 3 B. L.R. (A.C.) 121; *Mohini Mohan* v. *Rashbehari*, (1937) C. 229.

and dispose of at her discretion, the income from her estate, however large, from which it follows that whatever she may expend without let or hindrance, she may also save or invest for her own use. This is also conceded. But then arises the question, suppose a widow comes into possession of the property of her husband, and receives the income, and does not spend it, but invests it in the purchase of other property, what is the presumption? Now, the Hindu Law presumes that a Hindu woman is incompetent to possess more than a limited estate—that she may possess an absolute estate is in the nature of an exception—and as regards the purchase out of the savings of her limited estate, law presumes that such purchase is impressed with the same incidents to which her main estate was subject.[1] But it is only a presumption which may be rebutted by evidence of intention showing that the purchaser intended to treat the acquisition as her own. This appears to be the trend of the leading cases on the subject, though, at first blush, they do not all appear to be reconcilable.[2]

2436. In one case, the widow had made such purchases from the profits of her estate. She gifted them to her daughter, describing them as her self-acquired property. Her reversioners sued for a declaration that the gift conveyed nothing beyond the donor's limited estate, but the suit was thrown out on the ground that the widow could treat the property as her own, and the fact that she described it as her self-acquisition and conveyed it, as such, by a gift *inter vivos,* was evidence that she did intend to treat it as such.[3] The Privy Council observed: "that it was not possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow, as to which she has not determined whether or not she will spend it."[4]

2437. But in another case in which the widow's power of absolute disposal was negatived on the following facts: (*i*) The purchases were of shares of land, in which the husband was a shareholder to a large extent, and which showed that the purchases were intended to make the estate compact. ((*ii*) Though they were purchased a short time after his death in 1857, no attempt to alienate them was made till 1873, *i.e.*, for a period of 16 years. (*iii*) The object of the alienation was not the need or the personal benefit of the widow, but a desire to change the succession and to give the inheritance to her own heir in preference to her husband's heirs. (*iv*) Neither with reference to this object, nor, apparently, in any other way, had the widow made any distinction between the original estate and the after-purchases. "These are circumstances which, in their Lordships' opinion, clearly establish accretion to the original estate and make the after-purchases inalienable by the widow for any purpose which would not justify alienation of that original estate."[5]

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(1) *Ishri Dutt* v. *Hansbutti*, 10 C. 324 P.C.; *Sheolochan* v. *Saheb Singh*, 14 C. 387 P.C.; *Saodamini* v. *Administrator-General*, 20 C. 433 (443) P.C.; *Wahid Ali* v. *Tori Ram*, 35 A. 551 (554); *Upendra* v. *Nobo Krishna*, 23 C.W.N. 64: 48 I.C. 993; *contra* in *Akkanna* v. *Venkayya*, 25 M. 351; *Vikrama* v. *Vikrama*, 33 M.L.J. 665.

(2) *Bhagabati* v. *Sohodra*, 16 C.W.N. 834 : 13 I.C. 691.

(3) *Hansbutti* v. *Ishri Dutt*, 5 C. 512.

(4) *Per* Lord Hobhouse in *Ishri Dutt* v. *Hunsbutti*, 10 C. 324 (337) P.C.

(5) *Ishri Dutt* v. *Hansbutti*, 10 C. 324 (337) P.C.

2438. But in another case, in which the widow's power of absolute disposal was upheld by the same high tribunal, on the following facts. The wife had inherited her husband's estate under his will, the accumulations of which, amounting to Rs. 2,89,000, since her husband's death, were made over to her in 1866, most of which she soon afterwards invested in Government paper, which, 20 years later, she assigned to the Advocate-General and made a will, in which she described the rupee paper as her absolute property, whereupon the Privy Council held it to be her separate property even though she had blended it with other paper belonging to her husband.[1]

2439. What is the difference in principle between this case and the last, it may be asked.? The difference is clear. Since, while in the one case the *corpus* was in the hands of the widow, in the other case, it was in the hands of the executor, of which only the income was made over to the widow. Again, the nature of the investment in the one case gave a clear indication of augmenting the estate, whereas the investment in the other case was such as "any prudent person" would make of his savings. These two cases are, therefore, instructive in that they show what is an accretion and what is not.

2440. Evidence of Accretion.—In some cases, the Courts were inclined to the view that whatever acquisitions were undisposed of by the widow, must be taken to have been left as an accretion to the estate.[2] But the Privy Council reversed this decision upon other grounds without going into the legal question. It is often a question of some nicety to determine, in each individual case, whether the property in dispute is in the nature of accumulation, or is merely a saving held in suspense by the widow, intended to be appropriated for her personal use later on.

Clause (2).

2441. The question being, then, one of intention, evidence of such intention must be found in the circumstances of each case. But apart from intention the other way, the presumption is in favour of accretion, whether it comprises unexpended income, or the property acquired therefrom, or even additions made to the corpus by adverse possession.[3] Where, for instance, the widow constructed a house out of her savings upon land which she had inherited from her husband, it is a clear indication of her intention to treat the house as an accretion to the land.[4] The same presumption might arise where the widow purchases a share of land, of which she held a major portion as inherited from her husband, which would indicate an intention that the acquisition was made with the view of improving her estate by making it more compact and convenient for management.[5] So, where a *howdah* (seat on an elephant), which was originally a part of the estate of the husband, had been sold to a stranger in execution of a money-decree against the estate, but the widow re-purchased it, the court held the inference irresistable that she intended to treat it as a part of her husband's estate.[6] So, where the widow makes no distinction between the original estate and the after-purchase, the *prima*

(1) *Saodamini* v. *Administrator-General*, 20 C. 433 P.C.

(2) *Bhola Nath* v. *Bhagabatti*, 7 B. L.R. 93, reversed O.A. *Bhagbatti* v. *Bhola Nath*, 24 W.R. 168 P.C.

(3) *Lajwanti* v. *Safachand*, 5 L. 192 P.C.; *Chakradhar* v. *Shah Kant*, 88 I.C. 767 : (1925) P. 460; *Uhmrao Singh* v. *Pirthi*, 86 I.C. 445 : (1925) A. 369.

(4) *Fakira* v. *Gopilal*, 6 C.L.R. 66 (68); *Venkata* v. *Venkata*, 31 M. 321.

(5) *Ishri Dutt* v. *Hansbutti*, 10 C. 324 (334) P.C.; reversing *Hansbutti* v. *Ishri Dutt*, 5 C. 512.

(6) *Bhabati* v. *Sahodra*, 16 C.W.N. 834 : 13 I.C. 691.

facie presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate.

2442. This was the view taken in a case in which the widow, having made purchases out of the savings of her husband's estate, had gifted the whole estate including the after-purchases by a single deed "for the preservation of the *riasat* and name of her husband, for the worship of the *Thakur* and for her husband's *shradh.*" The court held that upon this deed of gift there was no doubt that the widow regarded herself as equally entitled to the two properties and in the same right as her husband's widow, which was only consistent with the after-purchases being treated by her as accretions to the original estate. "The transaction appears to indicate that her intention was not to create separate estates, one to go in one way, and another in another, but to keep the whole as one entire property."[1] So, there is a presumption that all unappropriated profits of the estate pass with the *corpus* to her reversioners. An Ainslie, J., said: "The fact that unappropriated profits do not pass as *stridhan* is to be explained on the theory that when the widow has left money accumulated, it was her intention to add such money to the estate and to abstain from exercising her full rights over them."[2]

But this presumption can only arise where the female takes by inheritance and not by devise. In the latter case, as grantee of the rents and profits for life, they vest in her absolutely as her own stridhan, and on her death, will go to her own heirs and not to the reversioner.[3]

2443. In one case, the widow, being in possession of her husband's estate, sued for and obtained a decree for pre-emption, whereupon the land acquired was, by reason of the mode of acquisition, held to become an accretion to her inherited estate.[4] But the mere facts that her right of pre-emption arose by reason of her inheritance and the pre-emption money was paid out of the income of her inherited estate, do not seem to be any evidence of her intention to treat her new acquisition as an accretion to the main estate. A case for accretion would, however, arise even where the widow, after her possession of her husband's estate for over fifty years, suffers it to be sold in execution of a money-decree against her and repurchases it herself out of the income of her husband's estate. Here it may be safely presumed that, inspite of the lapse of so long a period, the repurchase of the property belonging to her husband was, in the absence of other circumstances, presumably intended to restore the *status quo ante.*[5]

There can be no question but that the enlargement of the widow's estate from an inferior proprietary tenure to a full proprietary tenure, would not alter its incidents, to the derogation of other persons interested in the reversion,[6] and, contrariwise, the acquisition by her as proprietor of under tenures would not lead to the same result.[7]

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(1) *Sheolochun* v. *Saheb Singh,* 14 C. 387 (393, 394) P.C., following *Ishri Dutt* v. *Hansbutti,* 10 C. 324 P.C.

(2) *Hansbutti* v. *Ishri Dutt,* 5 C. 512 (525), followed in *Rivett Carnac* v. *Jiva Bai,* 10 B. 478 (482); *Bhagabatti* v. *Sahodra,* 16 C.W.N. 834 : 13 I.C. 691.

(3) *Guru Prasad* v. *Nafar Das,* 3 B. L.R. (A.C.) 121 (123).

(4) *Chela Ram* v. *Ishar Das,* (1916) P.W.R. 41 : 32 I.C. 831.

(5) *Niranjan* v. *Shib Prasad,* 41 I.C. (C.) 370.

(6) S. 90, Trusts Act; *Kashi Prasad* v. *Indar Kunwar,* 30 A. 490 (495, 496).

(7) *Shankar Singh* v. *Lal Bahadur,* 82 I.C. 637 : (1926) O. 277; *aliter*—where she inherits Akad Kar lands and acquires therein occupancy right; *Narain Singh* v.

The fact that a property, though purchased by the widow, was described as the estate of her husband shows the intention to treat it as an accretion.[1]

2444. No Accretion.—There can be no question of accretion where the heiress is in possession of no estate,[2] nor where, being in possession, she holds it otherwise than as an heiress. It is only when she owns it as such that any question of accumulation or accretion can arise. Even then, since the question of accretion is one of intention, it follows that the heiress possesses the unfettered power of disposal over purchases made by her during her lifetime.[3] She may, in fact, by her express declaration, act or conduct, show that she does not intend to incorporate her acquisitions in her inherited estate.[4] It is only when her act or conduct is equivocal that any question of presumption or of intention can arise. If she disposes of her acquisition by a transfer *inter vivos,* the question of intention is reduced to the question of construction of the deed, and if it is unambiguous, her power cannot be questioned.[5] Her conduct may sometimes afford a clue to her intention, as where she purchased her brother's property at a court sale and then immediately reconveyed it to him, which was held to be clear evidence of her intention to benefit her brother, and the property could not, therefore, be treated as an accretion to her husband's estate.[6]

2445. Properties purchased on the credit of the husband's estate do not necessarily become accretions, though it is equitable that he who takes them must pay the charge.[7] So, again, where a female is granted, for her life, the rents and profits of an estate by will, they vest in her absolutely by way of assignment, and whether they are collected or not, they pass, on her death, to the heirs of her stridhan.[8] Such case is distinguishable from a maintenance grant, in which case, all her savings therefrom are her stridhan,[9] and all arrear is treated as a debt due to her, which her stridhan heirs can recover, and to whom, consequently, pass all properties purchased out of her grant.[10]

2446. Where the widow, who had inherited her husband's house, rebuilt it and sold it during her lifetime, it was held that it must be presumed that she rebuilt it out of her own money over which she had full control, and the resale by her was evidence of her intention that she did not intend to treat it as an accretion to her inherited estate.[11]

After the title had vested in the widow, her reversioner took wrongful possession of her estate. She sued him and obtained a decree for mesne profits, which she assigned to another and then died. The assig-

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Sada Kaur, 6 L. 134; or acquires an occupancy right by payment of her own money; *Prem Lal* v. *Bhag Chand,* 19 N. L.R. 4 : 69 I.C. 669 : (1923) N. 34.

(1) *Upendra* v. *Nobo Kishore,* 23 C. W.N. 86 : 48 I.C. 993 (1002).

(2) *Saodamini* v. *Administrator-General,* 20 C. 433 (442) P.C.

(3) *Wahid Ali* v. *Tori Ram,* 35 A. 551; *Lokhan* v. *Dulari,* 11 O.C. 310.

(4) *Saodamini* v. *Administrator-General,* 20 C. 433 (443) P.C.

(5) *Ishri Dutt* v. *Hansbutti,* 10 C. 324 (337) P.C.

(6) *Keshav* v. *Maruti,* 46 B. 37.

(7) *Oodey Singh* v. *Phool Chund,* 5 N.W.P.H.C.R. 197.

(8) *Guru Prasad* v. *Nafar Das,* 3 B.L.R. (A.C.) 121 (123); *Bhagbutti* v. *Bholanath,* 1 C. 104 P.C.; *Hansbutti* v. *Ishri Dutt,* 5 C. 512 (521), reversed on facts O.A. *Ishri Dutt* v. *Hansbutti,* 10 C. 324 P.C.; *Shib Saran* v. *Kesho Prasad,* (1918) Pat. 86 : 42 I.C. 122 (126).

(9) *Jwala Prasad* v. *Sukhdev,* 51 I.C. (A.) 59.

(10) *Subramanian* v. *Arunachelam,* 28 M. 1 (8); *Jwala Prasad* v. *Sukhdei,* 57 I.C. (A.) 59.

(11) *Ram Dayal* v. *Sumer Singh,* 2 O.L.J. 466 : 32 I.C. 356.

nee sued out execution against the reversioner, in whom the estate became subsequently vested, and he contested the widow's right to alien her decree for mesne profits so as to enure beyond her lifetime; but the court held that the decree for profits was a decree for her income, which she was competent to assign and that, as there was no evidence that she had treated the decree as an accretion to the estate, the assignee was entitled to recover.[11]

2447. The fact that the purchase was made *benami* is clear indication of an intention to keep the purchases separate from the inherited estate.[2] The fact that the heiress acquires property by using no fund out of her inherited estate is a circumstance which must be taken into consideration in judging of her intention. But it is not conclusive of her intention one way or the other. A Hindu widow acquired a certain property by enforcing her right of premption, to which she was entitled by reason of her inheritance. She paid the price of pre-emption by mortgaging the pre-empted property. On the question arising whether this acquisition was an accretion to her husband's estate, the court held that *prima facie* it was not, as there was nothing to shew that she intended to incorporate it with her husband's estate.[3] The contrary intention was clearly evidenced by the purchase of her brother's estate at a court sale by a woman, who had inherited to her son, out of the savings of which estate she paid for her purchase, which, however, she reconveyed to her brother, which was evidence enough of her intention to present to her brother the estate which he had brought to the hammer.[4]

Income and its Savings.

2448. Since a woman cannot, outside the Mayukh country, acquire by partition[5] or inheritance,[6] anything beyond a limited estate, anything so acquired cannot be treated as her stridhan. But since she has an absolute right of disposal of its income, it follows that any savings made by her therefrom, would become her stridhan and devolve as such,[7] provided it does not become an accretion to the inherited estate. As has been seen before, the question is one of intention. (§§**2435-2438.**) Such intention may be inferred from the fact that the income was kept separate or otherwise appropriated in the purchase of property which the heiress treated as her own and as quite distinct from her inherited estate.[8] Apart from such intention, the income of an estate in her possession is not her *stridhan*, and if undisposed of, will go with the estate.[9] The

(1) *Saminatha* v. *Manikkasami*, 22 M. 356.

(2) *Upendra* v. *Nobo Kishore*, 23 C. W.N. 86 : 48 I.C. 933 (1002); *Nirmala* v. *Deva Narayan*, 55 C. 269 (275, 276).

(3) *Sri Ram* v. *Jagadamba*, 43 A. 375 F.B.

(4) *Keshav* v. *Maruti*, 23 Bom.L.R. 803 : 62 I.C. 954.

(5) *Debi Mangal* v. *Mahadeo*, 34 A. 234 P.C.; overruling O.A. *Debi Mangal* v. *Mahadeo*, 32 A. 253, also *Chhiddu* v. *Naubat*, 24 A. 67; *Mathura* v. *Ganga Ram*, 7 A.L.J. 69: 5 I.C. 519; *Krishnalal* v. *Nandeshwar*, 4 Pat.L.J. 38: 44 I.C. 146; *Vinayak* v. *Laxman*, 14 N.L.R. 56.

(6) *Thakur Deybee* v. *Rai Baluk Ram*, 11 M.I.A. 139 (172-174); *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487 (504, 513, 514); *Chotay Lal* v. *Chunnoo Lal*, 4 C. 744 P.C.; *Sheo Shankar* v. *Debi Sahai*, 25 A. 468 P.C.; *Lal Sheo Pertab* v. *Allahabad Bank*, 25 A. 476 P.C.; *Janak Setty* v. *Mariala*, 32 M. 521; *Ramji* v. *Durga*, (1918) P.R. No. 6 : 45 I.C. 90.

(7) *Ranika* v. *Jamma*, 15 A.L.J. 788: 42 I.C. 846.

(8) *Sasiman* v. *Sibnarayan*, 1 Pat. L. W. 375 : 39 I.C. 755.

(9) *Sitaram* v. *Dulam*, 41 A. 350; *contra* in *Malan* v. *Kishore Chand*, 71 I. C. 833 : (1923) L. 17.

fact that she bequeathed such property, describing it as her *stridhan*, was held to be clearly indicative of her intention to treat her savings as her own.[1] Property perchased out of savings becomes her stridhan, if it was so treated.[2]

It follows that the estate so acquired would descend to the acquirer's stridhan heirs.

2449. Presumption of Accretion.—It has already been stated before, that all additions made by a female to her limited estate, out of its savings, would *prima facie* be deemed to be accretions, unless there is anything to prove to the contrary. But, on this point, two views are possible, and both have the support of cases. The one view is that since a limited estate is the rule and an absolute estate an exception, all acquisitions must be presumed to partake of the character of the limited estate till the contrary is shown.[3] The other view is that the woman's incompetence only applies to her inherited estate, but has no reference to an estate acquired *aliunde*. Since a woman is not incompetent to acquire an absolute estate or title by deed, devise and adverse possession, there is no reason why any presumption should be made against her capacity to acquire an absolute estate out of saving, over which she possesses the absolute power of disposal.[4] In the view of the Madras High Court, an acquisition made by the heiress out of the income of her limited estate, must be presumed to be her stridhan in the absence of anything to show that she intended to treat it as an accretion. The income being her absolute property, so must be the estate into which it is converted.[5] But, of course, there can be no presumption of accretion where the widow is not in possession of her husband's estate.[6]

Clause (3).

2450. Referring to this question, the Privy Council said: "Where a widow comes into possession of the property of the husband and receives the income, and does not spend it but invests it in the purchase of other property, their Lordships think that *prima facie* it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would *prima facie* be intended to be accretions to the estate. There may be, no doubt, circumstances which would show that the widow had no such intention, that she intended to appropriate the savings in another way."[7] This case is, then, an authority that a purchase out of savings is presumably an accretion. The contrary was contended by the appellant in another case, which their Lord-

(1) *Sitaram* v. *Dulam*, 41 A. 350.

(2) *Bhagabutti* v. *Bholanath*, 1 C. 104 P.C.; *Ishri Dutt* v. *Hansbutti*, 10 C. 324 P.C.; *Saodamini* v. *Administrator-General*, 20 C. 433 P.C.; *Veeraraghava* v. *Kota*, 31 M.L.J. 465 : 33 I.C. 532.

(3) *Gonda Koer* v. *Oodey Singh*, 14 B.L.R. 159; *Bhagbutti* v. *Bholanath*, 24 W.R. 168 P.C.; *Ishri Dutt* v. *Hansbutti*, 10 C. 324 P.C.; *Sheo Lochun* v. *Sahob Singh*, 14 C. 387 P.C.; *Saodamini* v. *Administrator-General*, 20 C. 433 P.C.; *Ramanand* v. *Ramsaran*, 7 I.C. (C.) 28 (29); *Wahid Ali* v. *Tori Ram*, 35 A. 551 (554).

(4) *Akkanna* v. *Venkayya*, 25 M. 351 (359, 360); *Ramakrishna* v. *Rukmavati*, 11 M. L. W. 112, dissented from in *Ramanand* v. *Ramsaran*, 7 I.C. (C.) 28 (29).

(5) *Parthasarathy* v. *Venkatadri*, 45 M. 190 (220); *Aiyaswarya* v. *Sivaji*, 49 M. 116 (149, 150); *Akkanna* v. *Venkayya*, 25 M. 351; *Raja of Ramnad* v. *Sundara*, 42 M. 581 P.C.; but *contra* in *Nabakishore* v. *Upendra Kishore*, 42 M.L.J. 253 P.C.

(6) *Saodamini* v. *Administrator-General*, 20 C. 433 P.C.; *Kulachandra* v. *Bama Sundari*, 41 C. 870; *Rukhmabai* v. *Jaipal*, 23 N.L.R. 108 (115, 116).

(7) *Sheo Lochun* v. *Saheb Singh*, 14 C. 387 (393, 394) P.C.

ships did not concede. "It has been argued," they said, "that, assuming the purchases to have been made by the widow out of the proceeds of her husband's estate, nevertheless, they do not form an increment to that estate, but belong to the widow absolutely and are at her absolute disposal, either by gift in her lifetime or by will. It has been further argued that, even if the presumption be that such purchases are an increment to the husband's estate, it may be rebutted by clear proof of her intention to sever them from that estate and to treat them as made in her own right, whereupon she acquires the power to dispose of them, and that such intention is proved in this case.....In the present case, their Lordships are of opinion that Khushal Kuar, who always maintained the validity of her son's adoption as heir to her deceased husband, and treated him as entitled to succeed to her husband's property, must be presumed to have intended to make her purchase an accretion to that property; nor do they see any evidence to rebut this presumption."[1]

2451. In another case, the question of presumption being raised, the same high tribunal said: "The appellant's counsel contends that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions, it is sufficient to say that, in this case, there is no room for any such presumption."[2]

2452. But there are cases on the other side of the line, in one of which it was said: "The acquirer of property intends to retain dominion over it, and in the case of a Hindu widow, the presumption is nonetheless so, when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. In the case of property inherited from the husband, it is not by reason of her intention, but by reason of the limited nature of a widow's estate under the Hindu Law, that she has only a limited power of disposition. But her absolute power of disposition over the income derived from such limited estate being now fully recognized, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her, without any distinction, along with properties inherited from her husband, can in no way affect this presumption. She is the sole and separate owner of the two sets of properties, so long as she enjoys the same, and is absolutely entitled to the income derived from both sets of properties.[3]" The cogency of this reasoning was admitted by the Calcutta High Court who, however, felt constrained to hold that the subject was concluded the other way by authority."[4] It should be noted that the presumption will only arise when it is proved or admitted that the after-acquisitions were made with the savings of the inherited estate. There is no presumption that anything in the possession of the widow belongs to her husband, and he who claims the property as heir of the husband must show that any property so claimed by him belonged to the husband.[5] This was the underlying

(1) *Gonda Kuar* v. *Oodey Singh*, 14 B.L.R. 159 (164, 166) P.C., distinguishing *Soorjemoney* v. *Denobundoo*, 9 M.I.A. 123 P.C.

(2) *Saodamini* v. *Administrator-General*, 20 C. 433 (442) P.C.

(3) *Akhanna* v. *Venkayya*, 25 M. 351 (359, 366).

(4) *Ramanand* v. *Ramsaran*, 7 I.C (C.) 28 (29).

(5) *Bajai Bahadur* v. *Indarpal*, 26 C. 871 (875) P.C.; *Jadunath* v. *Ramnarain*, 11 I.C. 434; *Keshav* v. *Maruti*, 23 Bom. L.R. 803.

thought in the case in which the widow, who had succeeded as heir to her son, had purchased her brother's property at a court auction out of the savings of her income from her inherited estate. The property she had purchased she re-conveyed to her brother. On her death, this property was claimed to be an accretion to her son's estate, but the court overruled the contention, holding that there was no evidence of any intention, on the part of the widow, to treat her acquisition as an accretion, to her son's estate; and that the fact of her reconveying it to her brother, rather proved the contrary.[1] In another case, the widow had made some purchases, out of her savings, in the name of her daughter, whereupon the court held that, while the mere purchase did not raise the presumption that the widow intended to make a gift of her purchases to the daughter, still it would be so presumed if there was evidence that, since their purchase, the properties have been in the exclusive possession of the daughter.[2] But this rule, based on the analogy of advancement, has scarcely any application here, and it is apprehended that such purchase is, at any rate, good evidence of her intention to segregate her new acquisition.

2453. **Woman as Donee.**—It has been said that the presumption as to accretion is inapplicable to an estate acquired by the female as the legatee or donee, or otherwise than by inheritance (§ **2442**). If she is devised an estate, with express power to appropriate the profits, these and the purchases made therefrom will naturally by her *stridhan*, which she can dispose of at her pleasure and which, on her death, will pass to her own *stridhan* heirs.[3]

Testamentary incapacity.

339. (1) A woman has no power (even with the consent of her presumptive reversioner) to dispose of, by will, all or any of the limited estate inherited by her.[4]

(2) But she may bequeath its income both realised and unrealised[5] which is absolutely her own.

2454. **Analogous Law.**—The law of Wills is, as previously remarked, a development of the law of gifts. And as a woman has no power to make a gift, except to relations when supported by religious necessity, it follows that she can have no power to make a will of her limited estate, which does not survive her death.[6] This is manifest. But it was at one time held that, though she had an absolute power of disposal

(1) *Keshav* v. *Maruti*, 23 Bom.L.R. 803.

(2) *Charusila* v. *Mrinalini*, 64 I.C. (C.) 531 (533), following *Ram Narain* v. *Mhd. Hadi*, 26 C. 227 P.C.

(3) *Bhagbuti* v. *Bholanath*, 24 W.R. 168 P.C.; 1 C. 104. (Short note only); *Saodamini* v. *Administrator-General*, 20 C. 433 (441) P.C.; *Narsingh Rao* v. *Mahalakshmi*, 50 A. 375 (392) P.C. *Guru* v. *Nafar*, 11 W. R. 497; *Nagatkumaru* v. *Marakathammal*, 1 M. 166; *Subramania* v. *Arunachelam*, 28 M. 1 F. B.; *Veeraraghava* v. *Kola Reddi*, 3 M. L.J. 465; 33 I.C. 322; *Krishna Kumari* v. *Rajendra Bahadur*, 2 Luck 43: (1927) O. 240.

(4) *Gobardhan* v. *Onoop Roy*, 3 W.R. 105; *Sarat Chandra* v. *Charusila*, 55 C. 918 (933, 934).

(5) *Mahini Mohan* v. *Rashbehari*, I. L.R. (1937) C. 229 (232); *Akanna* v. *Venkayya*, 25 M. 325; *Vikrama* v. *Vikrama*, 33 M.L.J. 665; contra, *Sarat Chandra* v. *Charusila*, 55 C. 918 (933, 934). *Sridhar* v. *Kalipada*, 16 C.W.N. 106; *Wahid Ali* v. *Tori Ram*, 35 A. 551 (555); *Rivet* v. *Carnac Jevibai*, 10 B. 478; *Sasiman* v. *Sibnarayana*, 1 Pat. L.W. 375 : 39 I.C. 755.

(6) *Gobardhan* v. *Onoop Roy*, 3 W. R. 105.

over her income in her lifetime,[1] she could not, except in Madras,[2] dispose of it by will,[3] even with the consent of her reversioners.[4] But the case is, of course, different where the estate was received by her otherwise than by inheritance *e.g.*, a gift from her father, in which case her power of disposal must depend upon the nature of the estate gifted to her.[5]

Incidents of a woman's estate.

340. Except as otherwise provided by any law for the time being in force, the incidents of a woman's inherited estate are as follows:—

(1) She is entitled to absolute possession of the estate which vests in her by right of inheritance;[6]

(2) She is entitled to its beneficial enjoyment, its rents and profits and income which is her own and not liable for her husband's debts.[7]

(3) She may grant leases and do other acts in the ordinary course of management;[8]

(4) She may transfer all or any portion of the estate for her life or until her estate is determined earlier, as for example, by surrender or by her re-marriage;[9]

(5) Her interest therein may be seized and sold in execution of a decree against her.[10]

2455. Analogous Law.—From what has been stated before; it is obvious that a woman is, like any other heir, the owner of the estate which she acquires by inheritance, but with this difference that, she being a woman, her rights over her property are necessarily limited. This section lays down the extent of her rights. The next section will define the extent of her powers.

2456. 'Except as otherwise provided.'—Under S. 307 of the Succession Act,[11] an executor or administrator has, subject to the provisions of that section, power to dispose, as he thinks fit, of all or any of the property, for the time being vested in him under S. 211. As such, the court may permit him to dispose of any such immovable property by mortgage or sale, and without such permission he may not lease it for a term exceeding five years. As a woman may be appointed an executor or administrator under the provisions of this Act, she is competent to make an absolute alienation under S. 307, irrespective of the existence of legal necessity.[12] As administratrix, a Hindu female has the same power as any administrator under the law, and the fact that her powers

(1) *Saodamini* v. *Administrator-General*, 20 C. 433.

(2) *Vikrama* v. *Vikrama*, 33 M.L.J. 665; *Akanna* v. *Venkayya*, 25 M. 351.

(3) *Nihalkhan* v. *Hur Churn*, 1 Agra 219; *Sarat Chandra* v. *Charusila*, 55 C. 918 (933, 934), dissented from in *Mohini Mohan* v. *Rashbehari*, I.L.R. (1937) C. 229 (232), *See* cases cited *supra*.

(4) *Durga Sundari* v. *Ram Krishna*, 12 I.C. (C.) 591.

(5) *Mohini Mohan* v. *Rashbehari*, (1937) C. 229 (232) : I.L.R. (1937) 2 C. 97 (100), following *Guru Prasad* v. *Nafar Das*, 3 B.L.R. 121.

(6) *Karimuddin* v. *Gobind*, 31 R. 497 P.C.

(7) *Jagannadhan* v. *Vighneswarudu*, 55 M. 216; *Sarat Chandra* v. *Charusila*, 55 C. 918 (but she can bequeath her income), *Mohini Mohan* v. *Rashbehari*, (1937) C. 229 (232).

(8) *Ramsumarau* v. *Shyan Kumari*, 49 I.A. 342 : (1922) P.C. 356; *Rajendra* v. *Peyari Mohan*, 94 I.C. (C.) 321.

(9) *Moni Ram* v. *Kerry*, 5 C. 775 P.C.; *Ram Krishna* v. *Kausalya*, (1935) C. 689 (694).

(10) *Chidambaramma* v. *Hussainamma*, 39 M. 565.

(11) XXXIX of 1925.

(12) *Kamikhya* v. *Hari*, 26 C. 607. The law was the same under Act XXVII of 1860; *Bhugwan* v. *Luchmee*, 2 W. R. (M. A.) 19; *Loganada* v. *Ramaswami*, 1 M. H. C. R. 284.

are circumscribed by her personal law, does not stand in the way of her exercising her statutory powers.

2457. Entitled to Possession.—Possession is the first right of ownership, and being an owner, the heiress is entitled to possession. In other words, she owns and possesses the estate.[1] "Her absolute right to the fullest beneficial life-interest appears long to have been recognized. She takes, as heir, a proprietary estate in the land, absolutely for some purposes, although in some respects subject to special qualifications."[2] Her reversioners have no vested interest in her estate. All they have is a *spes successionis*.[3] Where there are more than one widow, the estate of their husband devolves upon all of them conjointly, and as a rule, all must act and sue together for its recovery from a stranger, though should one co-widow be recalcitrant, it is open to the other to sue for its recovery, impleading the other co-widow as a defendant, and if the latter is agreeable to be arrayed as a co-plaintiff, there is nothing to prevent the court from impleading her as a co-plaintiff. In any case, the estate cannot be suffered to be imperilled by her contumacy.[4]

Clause (1).

2458. Entitled to Beneficial Enjoyment.—From the fact that she is the owner of her estate it follows that she is entitled to its beneficial enjoyment, and to the fullest enjoyment of the movable and immovable property that she has inherited and all its income,[5] which is absolutely hers to spend as she likes, and except in the case of spoliation and waste destruction of the *corpus*, she cannot be restrained, if, in the ordinary course of her enjoyment, the property diminishes in value. The mere fact that her operation was novel does not show that it was an improper act destructive of the estate. She is entitled to make the most profitable use of her land, being entitled to it, to her own advantage, in the manner and for the purposes to which it is naturally best suited. She is entitled to lease all or any portion of the estate for her life, and in permanency, if justified by necessity. As such, the widow had, in one case, leased out two of her villages in which railway company quarried stones and paid Rs. 5,000 as compensation to the lessees. The reversioners sued for this money, on the ground that there had been a virtual conversion of a part of the *corpus* of the estate from land into money, to which they were entitled as the ultimate owners of the estate. But the court threw out their suit, holding that the villages belonged not to them but to the widow, who had the right to lease them out, which she did, and that the compensation paid to the widow's lessees was in the nature of profits from the lawful use of the land rather than the proceeds of the conversion of the landed heritage into money.[6]

Clause (2).

On the same principle, there can be no doubt that the widow would be entitled to extract minerals, cut down timber or make such other reasonable use of the estate as is not inconsistent with her beneficial enjoyment.

(1) *Karimuddin* v. *Gobind*, 31 A. 497 P.C., reversing O.A. 25 A. 546.

(2) *Venkata* v. *Narasingappa*, 3 M. H. C. R. 116 (117), citing *Collector* v. *Cavaly*, 8 M. I. A. 550; *The Shivaganga case*, 9 M.I.A. 604; *Chidambaram* v. *Meenakshiammal*, 52 I.C. (M.) 842.

(3) *Anandi Bai* v. *Rajaram*, 22 B. 984; *Janaki* v. *Narayanaswami*, 39 M. 634 (638) P.C.

(4) *Seshayyar* v. *Saraswati*, (1920) M.W.N. 721.

(5) *Sarat Chandra* v. *Charusila*, 55 C. 918.

(6) *Subba Reddi* v. *Chengalamma*, 22 M. 126 (131).

Right to Income.

2459. As a qualified owner of the estate, the widow is entitled to appropriate all its income, without being in any way accountable to her reversioners.[1] The fact that she wasted it upon extravagance, is not waste of the *corpus*, which alone the reversioner is entitled to restrain. She is not the executor or trustee of the estate or of any of its income. As such, she is not bound to pay thereout any debt which is not a charge upon the estate. Hence, where the husband died indebted to the wife, and the latter entered upon possession of his estate as his heir, she is under no obligation to pay herself out of the income which she receives as owner. Nor is there any case for merger.[2] It would seem, then, that if she alienated any portion of the *corpus* to pay herself, her reversioner could not challenge the alienation on the ground that she could have averted the sale by recouping herself out of its income. But, of course, this does not mean that the widow can appropriate all the gross receipts of the estate without paying thereout the assessment and all other charges which are payable by the owner. These she must meet out of her receipts, but if they do not leave her a surplus for her own maintenance, it is a case of necessity justifying an alienation of the *corpus*.[3] (§ **2489**.)

Clause (3).

2460. Right to Grant Lease.—As such; she has the right to grant leases for such term as may be reasonable or prudent, and in any case, for her own life.[4] The court has upheld a *patni* lease granted by her[5] but in each case the question is one of prudence or necessity[6] and general benefit,[7] which of course, is not proved by the mere proof of the fact that the lease[8] was given on a fair market rent, since the first question that arises in such cases is not so much whether the lease was fair as why it was necessary or beneficial to the estate.

2461. A Hindu widow has not less power to grant leases than the manager of an infant heir,[9] and it will not be set aside, if it is found to be for the benefit of the estate and one by which the reversioners are found to have been benefited.[10] The same principle applies alike to all qualified owners of property, whether a female heir, a Mitakshara father or the manager of an infant or the *shebait* of an idol. As the Privy Council observed: "Their Lordships in no degree depart from the principles laid down in the case of *Hanooman Pershad Pandey* v. *Mt. Babooee Munraj Koonwaree*,[11] which has been so often cited. They have applied these principles in recent cases, not only to the case of a manager for an infant which was the case there, but to transactions on all fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the

(1) *Saodamini* v. *Administrator-General*, 20 C. 433 P.C.; *Sheonandan* v. *Damodar*, (1924) Pat. 711 : *Bisunath* v. *Ramnath*, 89 I.C. 581: (1925) O. 529.

(2) *Jagannadham* v. *Visgneswarudu*, 55 M. 216; *Chidambaram* v. *Meenakshiammal*, 52 I.C. (M.) 842.

(3) *Ramsumram* v. *Shyam Kumari*, 49 I.A. 342: 69 I.C. 71 (72): (1922) P.C. 356; *Arura* v. *Shivdev*, (1922) L. 61; *Radha Ram* v. *Kushi Ram*, 66 I.C. 343: (1922) L. 204.

(4) *Palaniappa* v. *Devasikamoney*, 40 M. 709 (720) P.C., (case of *shebait* whose rights are similar) *Mohunkoomar* v. *Zoramun*, 1 Hay 272; *Raichurn* v. *Suroopchunder*, 9 W.R. 598.

(5) *Madhusudan* v. *Rocke*, 25 C. 1 (7) P.C.

(6) *Sankar* v. *Bejoy*, 13 C. W. N. 201; *Felaram* v. *Begalanand*, 14 C. W. N. 895.

(7) *Dayamani* v. *Srinibash*, 33 C. 842: *Bishwanath* v. *Ram Prasad*, 10 Pat. 572.

(8) *Naba Kishore* v. *Upendra Kishore*, 26 C.W.N. 322: 65 I.C. 305: (1922) P.C. 39.

(9) *Dayamani* v. *Srinibash*, 33 C. 842.

(10) *Ib.*, p. 845.

(11) 6 M. I. A. 393.

Mitakshara law, has made an alienation of ancestral family estate."[1]

2462. Even a lease in excess of her powers is only voidable and not void,[2] that is to say, it is good till it is avoided. "If it was *ipso facto* void, it could not, of course, be confirmed, and the acceptance of rent would be evidence only of the creation of a new tenancy. A Hindu widow is not a tenant for life, but is owner of her husband's property, subject to certain restrictions on alienation, and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it or he may, at his pleasure, treat it as a nullity without the intervention of any court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the court to set aside or cancel as a condition precedent to the right of action of the reversionary heir."[3]

2463. The article in the schedule to the Limitation Act, applicable to such suit, is Art. 141,[4] that is to say, the suit may be brought at any time within 12 years of the death of the limited owner.

2464.—Transfer Good for Life.—Being the owner entitled to possession for life, the heiress is entitled to transfer her right of possession to another at her discretion without reference to her reversioners,[5] upon which transfer the transferee acquires a good title for the term of her life, unless her estate is forfeited earlier by her re-marriage,[6] or abandonment of the word.[7]

Clause (4).

2465. Her Interest Attachable.—From the fact that she is entitled to transfer her estate for life, it follows that what she may voluntarily do, she may equally be coerced into doing by the process of law.[8] On such sale, her own heirs will be entitled to represent her and recover the surplus.[9]

Clause (5).

Valid alienation of the estate.

341. (1) A woman may alienate her estate so as to bind the reversioners for legal necessity or for its benefit;[10]

(2) In particular, and without prejudice to the generality of the foregoing provision, such alienation may be made for any of the purposes or objects stated in the next following clauses;

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(1) *Kameswar* v. *Run Bahadur*, 6 C. 843 (847) P.C.

(2) *Modhusudan* v. *Rocke*, 25 C. 1 P. C., explained in *Sadai* v. *Serai*, 28 C. 532 (539), followed in *Bijoy* v. *Nil Ratan*, 30 C. 990, reversed O.A., on the question of limitation, *Bijoy* v. *Krishna*, 34 C. 329 (333) P.C.

(3) *Bijoy* v. *Kirshna*, 34 C. 329 (333) P.C.

(4) *Ib.*

(5) *Venkata* v. *Narasingappa*, 3 M. H. C. R. 116; *Moniram* v. *Kerry*, 5 C. 776 P.C.

(6) *Moniram* v. *Kerry*, 5 C. 776 P. C.; *Sohodra* v. *Roy Jung*, 8 C. 224 P. C.; *Matungini* v. *Ram Rutton*, 19 C. 289 (291) F.B.; *Rasul* v. *Ram Sarun*, 22 C. 589 (595); *Murgayi* v. *Virama*, 1 M. 226; *Koduthio* v. *Medu*, 7 M. 321; *Sreeramulu* v. *Kristamma*, 26 M. 143; *Vithu* v. *Govinda*, 22 B. 321 (331).

(7) *Hobzoonissa* v. *Pulury*, (1856) B. S. D. A. 595.

(8) S. 60 (1), Civil Procedure Code, 1908; *Kanri* v. *Ammakannu*, 23 M. 504.

(9) *Chooney* v. *Ram Kinkur*, 28 C. 155.

(10) Ss. 122-124.

(3) For the performance of *shradh* and such other religious ceremonies as constitute spiritual necessity of the last full owner;[1]

(4) For the performance of such other pious or religious acts as are conductive to his spiritual benefit,[2] provided that the immovable property alienated for this purpose is in every case reasonable and of moderate extent;[3]

(5) For the payment of the debts of the last full owner even though barred by time;[4]

(6) The payment of Government revenue and all other public charges accruing due in respect thereof and any arrears of rent in default of payment of which the property may be summarily sold;[5]

(7) Cost of obtaining letters of administration or a succession certificate of the property of the last full owner;[6]

(8) Costs of litigation necessary for preserving and defending the estate;[7]

(9) Costs of its preservation and repairs;[8]

(10) Maintenance of herself and those whom the last full owner was bound to maintain;[9]

(11) Marriage of female relations of the last full owner whom he was bound to marry, such as his sister, daughter, son's and grandson's daughter, and the like;[10]

(12) Customary ceremonial gifts to a reasonable extent on the occasion of marriage of such relations;[11]

(13) Customary small gifts on other ceremonial occasions;[12]

(14) And generally on all such occasions and for such purposes as the circumstances of the disposition may warrant and is consistent with the law regulating it.[13]

Exception.—Nothing herein applies to a woman continuing the trade or business of her husband, who is entitled to incur debts and make alienations in the ordinary course of prudent management of her business, subject only to the further provisions of sections 148 and 153.[14]

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(1) *Collector* v. *Cavaly*, 8 M. I. A. 529 (550, 551); *Raj Lukhee* v. *Gokool Chunder*, 13 M.I.A. 209; *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (510-513) P.C.

(2) *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (510, 513) P.C. (case-law reviewed); *Tatayya* v. *Ramakrishnamma*, 34 M. 284 (case-law reviewed).

(3) Ib., *Panachand* v. *Manohar Lal*, 42 B. 136 (143) (case-law reviewed); *Kemblal* v. *Ajodhya*, 43 C. 574 (581).

(4) *Chimnaji* v. *Dinkar*, 11 B. 320; *Bhagwat* v. *Nivratti*, 39 B. 113; *Udaichunder* v. *Ashutosh Das*, 21 C. 190.

(5) *Srimohan* v. *Brij Behary*, 36 C. 753; *Lalta Prasad* v. *Darshan Singh*, 74 I.C. (A.) 839.

(6) *Srimohun* v. *Brijbehary*, 36 C. 753.

(7) *Karimuddin* v. *Gobind*, 31 A. 497 (506) P.C.; *Debi Dayal* v. *Bharn Pertap*, 31 C. 433 (441).

(8) *Bhoogaraju* v. *Addepalli*, 35 M. 560 (564); *Makhan Lal* v. *Gayan Singh*, 33 A. 255 (construction of a will).

(9) *Sailabala* v. *Baikuntha*, (1926) C. 486 (maintenance of her mother-in-law and the husband's widowed sister).

(10) *Sailabala* v. *Baikuntha*, (1926) C. 486.

(11) *Ib.*, (gift up to one-fourth of the husband's estate justifiable—Texts and cases cited); *Vuppueuri* v. *Garimilla*, 34 M. 288; *Churaman* v. *Gopi*, 37 C. 1; *Bhagwati* v. *Ram Jatan*, 45 A. 297 (dowry of whole estate worth Rs. 500 upheld).

(12) *Srimohan* v. *Brijbehary*, 36 C. 753.

(13) *Cossinath* v. *Hura Sundari*, 2 Morley's Dig. 198 P.C., cited in *Churaman* v. *Gopi*, 37 C. 1 (7); *Sailabala* v. *Baikuntha*, (1926) C. 486 (488).

(14) *Sakrabhai* v. *Maganlal*, 26 B. 206 F.B.

2466. Analogous Law.—The leading principle applicable to female heirs applies alike to all qualified owners, whether male or female, to the guardian of infant heirs, the *shebait* of an idol or temple, and to trustees generally.[1] The only difference between them is one of degree, but the cardinal principle is, in each case, identical. As such, they are all entitled to alienate the corpus of the estate owned or managed by them for legal necessity or benefit. But these terms must necessarily vary with the nature and purpose of the obligation and of the property and the character of the control. For instance, an elephant may be a prime necessity to an idol, but it would be voted a cumbrous luxury in the hands of a widow. Similarly, the widow is justified in charging the estate for an act done in discharge of the religious and pious obligation to her deceased husband, which would not be justified in any other relation. Subject to the necessary variations to be presently considered, her liability is generally on a par with those of other limited owners of property.

2467. Women's Legal Necessity.—The subject of legal necessity, with reference to a woman's estate, must not be understood as forming a class apart from the general law of necessity, which justifies an alienation of his estate by a limited owner. The same principles equally govern all transactions by a female heir, only modified by the peculiar religious obligations which Hindu Law casts on the female relations, both as regards their pious duty to the deceased, as also the mode of life enjoined on them in their widowhood. The question of legal necessity must, moreover, largely depend both upon the nature and extent of the estate taken by the heiress and the nature and extent of disposition. As Gifford, L.J., said, it is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition, whenever such disposition shall be made and must be consistent with the law regulating such disposition.[2] One thing is certain: the woman's authority to alienate the *corpus* of her heritage for legal necessity has nothing to do with its ordinary income, to which she is absolutely entitled. She is not a trustee of the estate and is not bound to expend one pice of that income to redeem an incumbrance of her husband's on the estate or to pay off his debts, though she is bound to pay them, being conducive to the spiritual benefit of the deceased,[3] but not out of the income of the estate any more than out of her *stridhan*. If, therefore, she has no other means of discharging them, she is entitled to alienate the estate.[4]

Clause (1).

2468. The law of legal necessity may be divided into two classes. The first is spiritual necessity, the necessity for worldly purposes falls into the other class. It is only in cases falling into the former class that the widow possesses larger powers. As observed by Turner, L.J.: "The widow cannot, of her own will, alien the property, except for special purposes. For religious and charitable purposes of those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes.

(1) *Sahu Ram* v. *Bhup Singh*, 39 A. 437 (443) P.C.

(2) *Cossinaut* v. *Hurrosoondry*, 2 Mor. Dig. 198, cited in *Khub Lal* v. *Ajodhya*, 43 C. 574 (584).

(3) *Udai Chander* v. *Ashutosh*, 21 C. 132

190; *Bhagwat Bhaskar* v. *Nivaritti*, 39 B. 113; *Kondappa* v. *Subha*, 13 M. 189; *Bishwanath* v. *Ram Ratan*, 12 O.L.J. 406 : 89 I.C. 581 : (1925) O. 529.

(4) *Bishwanath* v. *Ram Ratan*, 12 O. L.J. 406 : 89 I.C. 581 : (1925) O. 529.

To support an alienation for the last, she must show necessity."[1] But in one sense both are cases of legal necessity,[2] since both are recognized by and subject to the control of law, though the term "legal necessity," when applied to worldly purposes, doubtless involves some pressure from without, necessitating the raising of money for the protection or preservation of the estate.[3] But spiritual necessity involves no pressure, since the expenditure incerred thereon is purely optional. The question, in this case, is, therefore, only one of propriety. But this is rather the test of its legality, since all expenditure is not necessary, and all necessary expenditure is not legal. To be legal, it must receive the sanction of law.

Now, law recognizes and sanctions certain heads of expenditure, whether, because it is incurred on religious or charitable objects, or because it is incurred for worldly purposes. In each case, it is subject to the general rule that it must be moderate and reasonable, and incurred *bona fide* on the objects permitted by law. Law does not tolerate extravagance in the name of religion or piety. "The test, in cases of this description, where a deed by a limited owner, with a qualified power of alienation, is impeached, is, whether the purposes for which the alienation was made are proper or legitimate. . . . The test is: Is the transaction fair and proper, lawful and valid, and justified by Hindu Law? Necessity is only one of the phases of the test of propriety."[4] There is, however, one difference between necessity which is spiritual and that which is secular, since in the one case no pressure on the estate need be proved to justify the alienation. All that has to be proved is its validity. The purposes which constitute such necessity are enumerated in clauses 3 and 4. The remaining clauses deal with secular necessity, though some of them, as for instance, the case of marriage and customary ceremonial gifts, are other instances of religious necessity.

2469. It is laid down by the Privy Council that a widow, entering upon her husband's estate as his heir, has, as regards the management of his estate, not less powers than the manager of an infant's estate,[5] and referring to this dictum, Sergeant, C.J., said: "As widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided she acts fairly to her expectant heirs.[6] For example, she may pay off a mortgage before it is due,[7] and sell a portion of the estate rather than mortgage the whole, though the latter course might be more beneficial to her reversioners and though it would be prejudicial to her by reducing her income, since she does not hold the property for the benefit of the reversioners, nor is she bound to raise money on her personal security."[8] As Peacock, C.J., said: "If a widow elects to sell when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser, if the widow and the purchaser are both acting honestly."[9] If there is a necessity, it is for the widow to decide how to act, and there is no rule of law which obliges the widow to proceed in any particular way, and the only question for the court to consider is whether she has exceeded her power, and these are always to be measured

(1) *Collector* v. *Cavaly*, 8 M. I. A. 529.
(2) *Basangauda* v. *Basangauda*, 39 B. 87 (98-99).
(3) *Ganap* v. *Subbi*, 32 B. 577.
(4) *Khubal* v. *Ajodhya*, 43 C. 574 (584-585).
(5) *Kameswar* v. *Run Bahadur*, 3 C. 843 P.C.
(6) *Venkaji* v. *Vishnu*, 18 B. 534 (536).
(7) *Ib.*
(8) *Singam* v. *Draupadi*, 31 M. 153 (155).
(9) *Phool Chand* v. *Rughoobuns*, 9 W. R. 108.

by the necessities of the case.[1] Moreover, a sale is at times more advisable than a mortgage,[2] and it is not blot on the sale that the widow, having to raise Rs. 670 sold the property for Rs. 995,[3] or that she sold her father's house for Rs. 19,500 to pay off his debts amounting to Rs. 7,775, the house being, of course, unsaleable piecemeal.[4] The case is otherwise where the property is mortgaged, as she is not bound to borrow more than her actual wants,[5] and, in this matter, though she should not inticipate her wants, still, it does not mean that she must let the wolf in before she turns him off the door. It is merely a dictate of prudence, and she will be so judged.

2470. An alienation made by the widow as guardian of her adopted son, will be held valid against her, if the adoption is found to be invalid.[6] The heiress being the owner of her estate is entitled to do all acts in the course of her management, which, though not necessarily prudent or beneficial to the estate, are, nevertheless, incidental to her management by which her reversioner would be bound. The grant of leases by the settlement of new tenants on lands vacated by them is one such act. She may enter into a covenant for their renewal, but since such covenant operates as a future contract its validity will be judged by necessity and usefulness.[7]

2471. Benefit.—An alienation by an heiress for the "benefit" of the estate is subject to the general principles set out in section 119, with the modification that the heiress, having no coparceners and being the sole proprietor of her estate, the only benefit she has to study is that of the estate and of her reversioners.[8] The Privy Council have held the principle applicable to the manager of an infant equally applicable to alienations by a widow.[9] The title to her husband's estate having vested in his widow, she was dispossessed by her reversioners, with whom she effected a compromise granting a lease of some of her properties to one of them for 60 years. On her death, the next reversioner sued to eject the lessee, but the Privy Council upheld the lease as made for the benefit of the estate and intended to injure no one.[10]

2472. Spiritual Needs.—In the first place, she is entitled to charge or alienate her inherited estate for the performance of religious rites which are conducive to the spiritual welfare of the deceased.[11]

Clause (3) Shradh.

As the Privy Counsil said: "For religious or charitable purpose, or

(1) *Naba Kumar* v. *Bhabasundari*, 3 B.L.R. 375.

(2) *Kamikhaprasad* v. *Jagadamba*, 5 B.L.R. 508 (520).

(3) *Chatranarayan* v. *Uba*, 1 B.L.R. 201 (202); *Felaram* v. *Bagalonand*, 14 C. W.N. 895; so held in other cases; *Jainarain* v. *Bhagwan*, 44 A. 683; *Sanmukh* v. *Jagarnath*, 46 A. 531; *Daulat* v. *Sankatha*, 47 A. 355; *Medai* v. *Narain*, (1922) M.W.N. 804 P.C.

(4) *Balkrishna* v. *Hiralal*, 41 A. 338.

(5) *Lalit Pandey* v. *Sridhar*, 5 B.L.R. 176.

(6) *Parbhu Lal* v. *Mylne*, 14 C. 401 (418).

(7) Cf., *Mahendra* v. *Kailash*, 32 C. W.N. 439: 47 C.L.J. 376.

(8) *Dayamani* v. *Srinibash*, 33 C. 842 (845).

(9) *Kameswar* v. *Run Bahadur*, 6 C. 843 P.C.

(10) *Bijoy* v. *Nil Ratan*, 30 C. 990 remanded O.A. *Bijoy* v. *Krishna*, 34 C. 329 P.C.O.A. after remand *Bijoy* v. *Girindra*, 41 C. 793 P.C.

(11) Dayabhag, XI-1 61; *Collector* v. *Cavaly*, 8 M.I.A. 529 (551); *Junmejoy* v. *Russomoyee*, 10 W.R. 309; *Raj Lukhee* v. *Gokool Chunder*, 12 W.R. 47 P.C.; *Chumun Lall* v. *Gunpat Lall*, 16 W.R. 52; *Gunpat Lall* v. *Toorun*, 16 W.R. 52; *Muteeram* v. *Gopal*, 20 W. R. 187; *Lakshminarayan* v. *Dasu*, 11 M. 288; *Tatayya* v. *Ramakrishna*, 34 M. 288 (290).

those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity."[1] But there must be necessity in any case. If the late owner has left sufficient funds, out of which his spiritual wants could have been met, it will not justify an alienation of the estate, merely because the proceeds were spent on his *shradh*. But the gift of land or house, comprising only a small portion of the inherited estate, by the widow to the officiating priest on the occasion of *shradh* ten years after the demise of the husband, was, in one case, upheld on the ground of spiritual benefit.[2]

Assuming, however, that the heiress has no inherited funds for that purpose, the questions then arise: (*i*) What are the religious purposes which justify the alienation of his estate, and (*ii*) to what extent is it justifiable?

2473. First, as regards the religious purposes. On this point, the Dayabhag says: "Even a gift or other alienation is permitted for the completion of her husband's funeral rites."[3] The order in which these rites are performed, is as follows: Upon the death of a person his body is, as is well-known, consigned to the flames. At this time, gifts have to be made to Maha Brahmin, that is to say, a Brahmin of lower order who receives only funeral offerings. The nature of the gifts vary, but they consist of all such things as a man requires below—house, cattle, costs and clothes, ornaments and food. Those who are brought up within the pale of the orthodox creed, know too well the exactions of these priests.

On cremation of the body, the ashes are collected and required to be thrown into the Ganges. This is called the Gangajali ceremony and may take place on the 13th day of the death, or any time later as may be convenient. It is a religious necessity.[4]

The relation, who goes to the Ganges to consign to its holy waters the last remains of his departed relation, is enjoined to proceed to Gaya, a place where special merit attaches to the performance of *shradh*,[5] the feeding of Brahmins and gifts to the Gayawal priests.[6]

In the Maratha country, a similar sanctity attaches to a *shradh* performed at Pandharpur,[7] while Rajahmundry serves the same purpose to the people of the Dravid country.[8] While Sethubundh is mentioned as a place endowed with sanctity,[9] a pilgrimage to Benares is not conducive to the spiritual welfare of anyone but the pilgrim, and is, therefore, not a head of justifiable necessity.[10] And as regards Gaya, while a feast given there is necessary, a feast given upon one's return home has no religious significance and cannot be justified on the ground of necessity.[11]

(1) *Collector* v. *Cavaly*, 8 M. I. A. 529 (551); *Latur Rai* v. *Bhagwan Das*, (1936) Pat. 80.

(2) *Gopalji* v. *Manbirbi*, (1919) Pat. 396.

(3) Dayabhag, XI-I-6.

(4) *Nanak Singh* v. *Sant Singh*, (1907) P.W.R. 19.

(5) *Mahomed Ashruf* v. *Brijessuree*, 19 W.R. 426; *Tarini v. Bholanath*, 21 C. W.N. 190 (191); *Udaichunder* v. *Ashutosh*, 21 C. 190; *Mahadev* v. *Neelamani*, 20 M. 269 (272).

(6) *Bisen Dayal* v. *Jaiseri*, (1918) Pat. 323 : 48 I.C. 748; cf., *Puran* v. *Jai Narain*, 4 A. 482 (484).

(7) *Ganput* v. *Tulsiram*, 36 B. 88.

(8) *Vuppulari* v. *Garimilla*, 34 M. 288.

(9) *Tatayya* v. *Ramakrishnamma*, 34 M. 288 (291).

(10) *Hari* v. *Bajrang*, 13 C.W.N. 544 (547).

(11) *Makhanlal* v. *Gayan Singh*, 33 A. 255; *contra in Dinonath* v. *Harish*, 18 C. W.N. 1303 : 24 I.C. 670.

2474. It is not every relation that can perform these obsequial rites. The duty to perform them in the first instance devolves on and may be performed by the nearest relations, such as the son, widow, the daughter, her son, younger brother, sister's son, the father, the mother, elder brother, daughter-in-law, sister, then any other *sapinda* or *samanodak*, then follow the *sapinda* of the mother, or *samanodak* of the father, and then the *sagotra*, disciple, *ritwik* (priest) preceptor, son-in-law, and lastly, any friend.

Where a person is unable to perform the *shradh* personally, he may do so vicariously through another, who must, however, be eligible to perform it,[1] though amongst the Uriyas, a custom was proved to appoint a Brahmin to perform these rites.[2]

Shradh of the Other Relations.

2475. It is equally obligatory on the heiress not only to perform the *shradh* of the last owner but also the *shradh* of his other relations which he himself was under a duty to perform. So, the widow must perform the *shradh* of not only her husband but also the *shradh* of his other relations, such as, for instance, his grandfather, great-grandfather, mother,[3] including her own[4] paternal aunt, brother's wife and other relations whose maintenance was charged on his estate.

Justifiable Cost.

2476. The next question, one of some nicety, is the amount of such expenditure. It is evident that the amount must be reasonable and must not disappoint the just claims of other claimants and creditors. As observed by the Privy Council: "No case has gone the length of holding that the power of disposition for pious and religious purposes is unqualified."[5] In one case, out of the income of Rs. 6,000 a year the court allowed about a year's income for the peformance of all these ceremonies.[6] But the tendency of the courts is to check extravagance and reduce all such expenditure to a minimum, and it is apparent that if, in the last case, Rs. 6,000 had been the value instead of the income of the estate, the court would not have tolerated its annihilation for the spiritual benefit of the deceased.

Clause (4).

2477. Spiritual Benefit.—Spiritual necessity, often spoken of as the spiritual benefit of the husband, is another head of necessity which justifies the alienation of inherited immovable property. On this point the Mitakshara is silent, but the Mayukh contains the following text:—

Vyavhar Mayukh.—"The prohibition of sale or other disposition of immovable property by a widow, without the consent of takers of the heritage, is given on (the authority of) Madhav. As for the text of Katyayan, 'After the death of the husband, the widow preserving (the honour of the family) should obtain the share of her husband so long as she lives; but she has no ownership therein in respect of (its) gift, mortgage or sale,' that is a prohibition of gift of money to the *bandi*

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(1) *Tatayya* v. *Ramakrishnamma*, 34 M. 281 (291).

(2) *Lakshminarayana* v. *Dasu*, 11 M. 288 (289).

(3) *Jummejoy* v. *Russomoyee*, 11 B.L. R. 420-*n*; *Srimohan* v. *Brij Behari*, 36 C. 753.

(4) *Srimohan* v. *Brijbehary*, 36 C. 752 (756) following *Rajchandra* v. *Sheeshoo Ram*, 7 W.R 146.

(5) *Collector* v. *Cavaly*, 8 M. I. A. 529 (551).

(6) *Khublal* v. *Modhya*, 43 C. 574; *Dalal Kunwar* v. *Ambika Partap*, 25 A. 266 (271); *Ram Surat* v. *Hitanandan*, 10 Pat. 474.

(bards), *charan* (triflers) and the like. Gifts for religious or spiritual objects and mortgage, and the like, for that purpose, are, of course, permitted; (as is plain) from the aforementioned text (of Prajapati) commencing with *sthavaram jangamam, etc.*, and from the text of Katyayan, 'A widow always engaged in meritorious observances and fasts, constant in the duties of celibacy, intent upon restraining (her passions) and making holy gifts, shall reach the heavenly abodes even if she has no son.' "[1]

2478. It has been held that this text does not authorize the giving away of the bulk of the inherited estate to a Brahmin for the spiritual benefit of the deceased, and that "while the widow has wider powers of disposition over property inherited from her husband, in making gifts for religious purposes, which are calculated to benefit her husband spiritually, those powers must be exercised within the proper and reasonable limits in dealing with the immovable property of her husband."[2] For instance, it will not support an alienation amounting to a fourth of the estate,[3] though small gifts of land are customary and permitted.[4] It is also pertinent to observe that the term "spiritual necessity" must be strictly limited to purposes which the law recognizes as warranting such alienation. Any gift out of a religious or pious motive is not a gift constituting a spiritual necessity. Where the gift is of an inconsiderable portion of the estate, the court will not be too strict in examining the purpose, but where it forms a considerable portion of the estate the gift cannot be justified, unless it is brought strictly within the rule of spiritual necessity.[5] In some of these cases, a distinction is drawn between acts, of which the religious merit is solely acquired by the female heir, and acts, of which the religious merit accrues to the deceased or is shared by the female heir with him. But this distinction is not supported by the text and the sole ground, which justifies the heiress to alienate any portion of the inherited estate, is the spiritual necessity of the last owner.[6] In other cases, the alienation may be good if supported by legal necessity, but it cannot be supported under this head.[7] (§§ **2468 2469.**)

2479. The question then arises: What acts constitute the spiritual necessity of the deceased owner? The performance of his *shradh* and its

(1) Mayukh (Mandalik), 77, 78 cited and explained in *Panachand* v. *Manohar Lal*, 42 B. 136 (143, 144, 152).

(2) *Panachand* v. *Manoharlal*, 42 B. 136 (154); *Khublal* v. *Ajodhya*, 43 C. 574 (580): *Indar Bux* v. *Sheonaresh*, (1927) O. 450.

(3) *Munshi Lal* v. *Shiv Devi*, 4 L. 336, dissenting from *Ram Chandra* v. *Ganga*, 4 B.S.R. 147 (154): 7 I.D. (O. S.) 110 (115), in which an alienation of three-sixteenths of the estate was held justified.

(4) *Baldeo Prasad* v. *Raja Fatch Singh*, 46 A. 533; *Thal Kuar* v. *Amar Nath*, (1925) L. 2.

(5) *Mukhoda* v. *Kullcani*, 1 B.S.R. 82: 6 I.D. (O.S.) 62; *Ram Chunder* v. *Ganga Gobind*, 4 B.S.L.R. 7, I.D. (O.S.) 110; *Kartik Chunder* v. *Gour Mohun*, 1 W.R. 48; *Runjeet* v. *Mhd. Waris*, 21 W.R. 49; *Ram Kawal* v. *Ram Kishore*, 22 C. 506; *Churaman* v. *Gopi*, 37 C. 1; *Harmanage* v. *Ram Gopal*, 17 C. W.N. 782; *Khub Lal* v. *Ajodhya*, 43 C. 574 (581); *Jagiban* v. *Deo Shankar*, 1 Borr. 394; *Kupur* v. *Sebak Ram*, 1 Borr. 405 (448); *Chunilal* v. *Jussoo*, 1 Borr. 55 (60); *Bhaskar* v. *Mahadev*, 6 B.H.C. R. (O.C.) 1; *Panachand* v. *Manohar Lal*, 42 B. 136 (150, 151); *Gopalla* v. *Narayana*, (1850) M.S.D.A. 74; *Rama* v. *Ranga*, 8 M. 552; *Lakshminarayana* v. *Dasu*, 11 M. 288; *Vuppulari* v. *Garimalla*, 34 M. 288; *Gudimetta* v. *Ballozu*, 23 M. L.J. 233; *Puran* v. *Jai Narayan*, 4 A. 482; *Vishwanath* v. *Narayan*, 31 N. (Supp.) 18.

(6) *Khub Lal* v. *Ajodhya*, 43 C. 574 (581-583), approved in *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (512) P.C.; *Ram Kawal* v. *Ram Kishore*, 22 C. 506; *Puran* v. *Jai Narain*, 4 A. 482; *Sham Devi* v. *Birbhadra*, 43 A. 463; *Munshi Lal* v. *Shiv Devi*, 4 L. 336; *Chancal* v. *Chiman Lal*, 30 Bom.L.R. 655: (1928) B. 238.

(7) *Sham Devi* v. *Birbhadra*, 43 A. 463; *Gobind* v. *Lakrani*, *ib.*, 515.

attendant obsequial rites are, doubtless, such necessity. They are, in fact, a recognized head of necessity and have been dealt with in clause (3). But over and beyond these objects, there are other items of expenditure which, though not treated as of the same degree or urgency are, nevertheless, regarded as bordering on necessity. Such was held to be the excavation of a tank, to complete the equipment of a temple, which the deceased died leaving incomplete. His widow raised Rs. 520 by the grant of two perpetual leases, with a view to completing the walls of the temple buildings and to excavate and consecrate a tank in connection with the temple. The court held these leases to be supported by necessity, holding that excavation of the tank was itself a meritorious act,[1] but this alone, it is submitted, would not have justified the alienation of that estate apart from its utility to the estate.[2]

Religious and pious gifts.

2480. While the performance of *shradh* and *sapindkarm* are directly conducive to a man's spiritual benefit, Hindu Law does not require that such ceremonies should be accompanied by a gift of land to the priests. But where the performer of *shradh* delivered, as gift, an inconsiderable portion of land, the court upheld it as a disposition or expenditure which was reasonable or proper according to the common notions of the Hindus.[3]

2481. The question is one of custom. For instance, it is customary, amongst the Uriya Zemindars to appoint a Brahmin to perform funeral and annual ceremonies. The Brahmin so appointed is styled a "Puo Brahmin." As such, the widows of a Zemindar conveyed a small piece of land to him on a rent of Re. 1-8-0 per annum. It was conceded that the gift was made rather for future than for past services. The court upheld the gift as supported by an indispensable religious necessity. But the fact that the land was only small in extent was also emphasized.[4] But, all the same, there can be no doubt that the powers of an heiress to alienate property for the spiritual benefit of the last owner, cannot be weighed in golden scales. As was observed in a case: "It is unquestionable, then, that the widow has a larger power of disposition for religious or charitable purposes, or for purposes which are supposed to conduce to the spiritual welfare of her husband, than that which she possesses for purely wordly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary."[5]

2482. The Privy Council have upheld the dedication, by the widow, of a small portion of her husband's landed estate to the priests of a temple, though she was in affluent circumstances and could have endowed the temple out of her current income,[6] overruling the cases which had failed to distinguish spiritual from secular necessity.[7] Hindu Law

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(1) *Khub Lal* v. *Ajodhya*, 43 C. 574 (584), cited with approval in *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (512) P.C.; *Ram Surat* v. *Hitanandan*, 10 Pat. 474.

(2) *Runjeet* v. *Mhd. Waris*, 2 W.R. 49; *Makhanlal* v. *Gayansingh*, 33 A. 255.

(3) *Tatayya* v. *Ramakrishnamma*, 34 M. 288 (291); *Khublal* v. *Ajodhya*, 43 C. 574; *Vishwanath* v. *Narayan*, (1935) N. 217.

(4) *Lakshminarayana* v. *Dasu*, 11 M. 288.

(5) *Khublal* v. *Ajodhya*, 43 C. 574 (580).

(6) *Sardar Singh* v. *Kunj Bihari*, 44 A. 503 P.C.

(7) *Kartick Chunder* v. *Gour Mohun*, 1 W.R. 48; *Huro Mohun* v. *Aulak Monee*, 1 W.R. 252; *Raj Chunder* v. *Sheshoo*, 7 W.R. 146; *Mhd. Ashruf* v. *Brijassuree*, 19 W.R. 426; *Mutteram* v. *Gopal*, 20 W.R. 187; *Runjeet* v. *Mhd. Waris*, 21 W.R. 49, overruled in *Sardar Singh* v. *Kunj Bihari*, 44 A. 503 (509) P.C.

regards the gift of land as specially meritorious, and a gift, otherwise justifiable, does not depend for its validity upon the presence of pressure.[1]

2483. The only question that arises in such cases is, then, the purposes which Hindu Law regards as justifying such gifts. It seems clear that such gift must not be unconnected with the spiritual welfare of the husband or the deceased full owner.[2] She can make no alienation for her own spiritual benefit,[3] nor that of any other relation, *e.g.*, her mother-in-law.[4] Again, a distinction exists, and must be observed, between the spiritual necessity and the mere spiritual benefit of the deceased. This distinction was adverted to by the Privy Council in a case, to which reference has already been made.[5]

2484. This introduces the question: What is a spiritual necessity, as distinguished from a mere spiritual benefit of the deceased full owner? It is clear that all ceremonies in the nature of obsequial and post-obsequial periodical rites are of this nature. Such, for instance, is *shradh*, on the occasion of which the gift of land is not only commended but treated as a part of the ceremonial.[6] No other *post obit* ceremony is considered to be a spiritual necessity. But the question of spiritual efficacy remains. On this point, there is bound to be some divergence of views. To this class belong pilgrimages and sacrifices made by the widow or the daughter, which are unquestionably pious acts, and regarded as indirectly beneficial to the husband or the father, as the case may be, but they are not ceremonies which fall into first category as indispensable for his spiritual benefit. For this purpose, law allows alienation of only a small portion of the inherited estate.[7]

2485. The question what ceremonies must fall into this group, must largely depend upon Hindu sentiment and custom. In one case, the Pundits consulted defined religious purposes somewhat loosely as including "dowry to a daughter, building temples for religious worship, digging tanks and the like."[8] This case was followed in Calcutta, where the court upheld a mortgage by the widow to excavate a tank in connection with a temple founded by her husband.[9]

2486. But whatever the act, the courts insist that the allegation of land for this purpose must be confined within very narrow limits. In one case, the widow of a Raja, in possession of a large estate, yielding an

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(1) *Sardar Singh* v. *Kunj Bihari*, 44 A. 503 (510) P.C.; following *Collector of Masulipatam* v. *Cavaly*, 8 M. I. A. 529 (550, 551); *Rajlukhee* v. *Gokool Chunder*, 13 M.I.A. 209.

(2) *Ram Kaval Singh* v. *Ramkishore*, 22 C. 506, explained in *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (510, 511) P. C.

(3) *Puran Dai* v. *Jai Narain*, 4 A. 482, followed in *Tatayya* v. *Ramakrishnamma*, 34 M. 288 (291), cited under S. 119, *ante*, *q.v.*; *Thakur Prasad* v. *Mt. Dipa*, 10 Pat. 352; *Ram Lal* v. *Kunwar Rajpal*, 4 O.W.N. 498.

(4) *Ram Kawal Singh* v. *Ram Kishore*, 22 C. 506, explained in *Tatayya* v. *Ramakrishnamma*, 34 M. 288 (291).

(5) *Sardar Singh* v. *Kunj Bihari*, 44 A. 503 (511) P.C.

(6) *Vuppulari* v. *Garimilla*, 34 M. 288 (290); *Lakshminarayana* v. *Dasu*, 11 M. 288.

(7) *Rama* v. *Ranga*, 8 M. 552 (553, 554).

(8) *Cossinaut* v. *Hurrosoondry*, 2 Mor. Dig. 198 : 3 I.D. (O.S.) 907, affirmed on O.A. 1 I.D. (O.S.) 292 P.C.

(9) *Khublal Singh* v. *Ajodhya*, 43 C. 574, cited with approval in *Sardar Singh* v. *Kunj Behari*, 44 A. 503 (512) P.C.

annual income of Rs. 60,000, visited Puri where she made a vow, in fulfilment of which she gifted to its priests a small share in a zemindari valued at Rs. 2,500, half the income from which was to be expended on the *bhog* (food offering) of the god Jagannath and the other half to be appropriated by the two donee priests. She added: "I have made a charitable gift and *shankalp* of the property for the salvation of my husband and his family members and for my own salvation." The priests had since sold the land. On the widow's death, her reversioner sued the transferee for its possession on the sole ground that the widow had no power to make the gift, which both the High Court and the Privy Council upheld, on the ground that it represented only 1|75th of the estate and was made for the continuous benefit of the soul of the deceased owner and was in accordance with Hindu religious sentiment and religious belief,[1] but the gift of about one-third of the entire estate would in any case be treated as excessive.[2]

Pious Acts Authorized by the Owner.

2487. It was implied in these cases, and it is the law that if the last owner authorizes an act, the heir would be entitled to execute the power. For instance, where the testator authorized his wife to build a house, establish therein the god Mahadev, the widow was held entitled to carry out his wishes, and any alienation made of the *corpus* would be within her power and one which the reversioner could not avoid on her death.[3] As previously stated, in carrying out the behests of a testator, the donee of the power acts as an agent of the donor, and as such, his power is not his own, but that of the testator who authorized him.

Gift Disallowed.

2488. If regard be had to the principle already stated before (§ **122**), namely, that the power of the female heir to alienate the *corpus* of her inheritance is limited by the rule that it must, at least, be for the spiritual benefit of the husband or father, to whom she has inherited, and that, as such, it must be only a small portion of the estate, there will be no difficulty in seeing why the courts disallowed the following gifts: the gift of a house not for the spiritual benefit of her husband, but made only "in honour of the god Vishnu"[4] such was her endowment of an idol[5] or of a charitable institution[6] or digging a tank,[7] unless it be to complete an endowment which the husband had made.[8] Of course, she had no right to reduce the rent of her tenant, on the ground that he had assisted her in a litigation in which she had to defend her own title.[9] This was a gift inspired by no piety but made "at suggestion of her own will and pleasure."[10]

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(1) *Sardar Singh* v. *Kunj Bihari*, 44 A. 503 (513) P.C., affirming O.A. 41 A. 130.

(2) *Radha Madhab* v. *Rajendra*, 12 Pat. 727.

(3) *Hari Kumari* v. *Mohun Chandra*, 12 C.W.N. 412; *Bishwanath* v. *Durga*, 1 I.C. (C.) 260.

(4) *Puran Dai* v. *Jai Narain*, 4 A. 482, followed in *Tatayya* v. *Ramakrishnamma*, 34 M. 288 (291).

(5) *Kartick Chunder* v. *Gour Mohun*, 1 W.R. 48; *Harmange* v. *Ram Gopal*, 17 C.W.N. 782 : 19 I.C. 417.

(6) *Munshi Lal* v. *Devi*, 4 L. 336.

(7) *Runjeet* v. *Mhd. Waris*, 21 W.R. 49.

(8) *Khublal Singh* v. *Ajodhya*, 43 C. 574.

(9) *Lachmi Prosad* v. *Jugmohan*, 18 C.L.J. 633 : 22 I.C. 594.

(10) *Per* Lord Gifford in *Bysack* v. *Cossimaut*, 1 I.D. (O.S.) 292 P.C.

Clause (5).

2489. Payment of Debts.—The payment of debts of the last owner is another recognized head of justifiable necessity, for which the heiress may alienate the *corpus*. She is not bound to pay them out of its current income, which she has the right to appropriate to her own use.[1] But she cannot alienate the estate, if she has received sufficient other property wherewith to discharge them. (§ **2459.**)

2490. In the case of the heiress, whether she is the widow or daughter-in-law[2] or mother[3] of the last owner, it is a pious obligation which she is bound to discharge, even though the debt be barred by time[4] released by any enactment, such as the Deccan Agriculturists' Relief Act.[5] But she is not bound to pay debts which the deceased owner had repudiated before his death,[6] or which had been agreed to be discharged by a third party.[7] In other words, her liability must, in each case, be existing and legal, though the creditor's remedy for its enforcement may have been lost by reason of the law of limitation.[8]

Nor can she pay interest in excess of the principal, in the area subject to the rule of *damdupat*.[9]

2491. It has been seen that the manager of a joint family is not competent to revive or pay a time-barred debt (§§ **1192-1193**). In this respect the female heir has a greater liability by reason of her pious duty which, however, only arises *qua* heir[10] and, on the death of the last owner, and never in his lifetime.[11] Any payment, made by the wife, of the debt of her husband during his lifetime, is a voluntary payment,

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(1) *Jagannadhan* v. *Vighneswardu*, 55 M. 216; *Bhushan Rao* v. *Subbayya*, (1936) P.C. 283; *Boddu* v. *Goli*, (1913) M.W.N. 275: 18 I.C. 953; *Ramasami* v. *Mangaikarasu*, 18 M. 113.

(2) *Bhau* v. *Gopala*, 11 B. 325.

(3) *Rustam* v. *Moti Singh*, 18 A. 474; *Ramasami* v. *Vengidusami*, 22 M. 113.

(4) *Bhala* v. *Parbhu*, 2 B. 67 (73, 74); *Chimnaji* v. *Dinkar*, 11 B. 320; *Bhau* v. *Gopala*, ib. 325; (*obiter* in) *Bhagwat* v. *Nivratti*, 39 B. 113; *Kondappa* v. *Subho*, 13 M. 189; *Udai Chunder* v. *Ashutosh*, 21 C. 190; *Tarini Prasad* v. *Bhola Nath*, ib., 190-*n*; *Khogendra Narain* v. *Santo Lal*, 62 I.C. (C.) 669 (672); *Sheoram* v. *Sheoratan*, 43 A. 604 (606); *Ram Kishan* v. *Chedi Rai*, 44 A. 628; *Gajadhar* v. *Jagannath*, 22 A.L.J. 601 F.B. : 80 I.C. 684 (689); *Gauri Shankar* v. *Sheonandan*, 46 A. 384 (388).

(5) *Bhau* v. *Gapala*, 11 B. 325.

(6) *Lukmeeram* v. *Khooshalee*, 1 Borr. 412; *Bhola* v. *Parbhu*, 2 B. 67; *Lakshman* v. *Satyabhamabai*, 2 B. 494 (499); *Chimnaji* v. *Dinkar*, 11 B. 320; *Bhau* v. *Gopala*, 11 B. 325; *Bhagwat* v. *Nivrutti*, 39 B. 113; *contra* in *Melgirappa* v. *Shivappa*, 6 B.H.C.R. 270; *Hemchand* v. *Tara*, 1 B.S.R. 481; *Tibeck* v. *Poolman*, 7 W.R. 450; *Udaichunder* v. *Ashutosh*, 21 C. 190; *Tarini* v. *Bholanath*, 21 C. 190-*n*; *Mahesher* v. *Ratnasingh*, 23 C. 766 P.C.; *Debidayal* v. *Bhanpartap*, 3 I. C. 433; *Felaram* v. *Bhagalanand*, 14 C. W.N. 895; *Soorjoo* v. *Krishnan*, 1 N. W.P.H.C.R. 46; *Kalkasingh* v. *Sheoraj Singh*, 40 C. 347; *Kondappa* v. *Subbo*, 13 M. 189; *Subbammal* v. *Avudayammal*, 30 M. 3; *Kandasami* v. *Rajagopalasami*, 7 M.L.T. 363 : 5 I.C. 382.

(7) *Nathu* v. *Tulsha*, 16 A.L.J. 443; 45 I.C. 728; *Bhawani* v. *Himmat Bahadur*, 33 A. 342 P.C.

(8) *Kandasami* v. *Rajagopalasami*, 7 M.L.T. 363 : 5 I.C. 382; *Kondappa* v. *Subba*, 13 M. 189; *Santu Ram* v. *Dodan Bai*, 103 I.C. 706 : (1927) L. 657; *Govinda* v. *Krishnaji*, 94 I.C. 1002: (1926) N. 341.

(9) *Ramachandra* v. *Radha*, 10 N.L. R. 91 : 26 I.C. 598.

(10) *Namasivaya* v. *Sivagami*, 1 M.H. C.R. 374.

(11) *Himat Bahadur* v. *Bhawani*, 30 A. 352, affirmed O.A. *Bhawani* v. *Himmat Bahadur*, 33 A. 342 P.C.

and the husband's property cannot be made liable for payment of such debts after his death.[1]

Even where the wife takes the estate as a devisee under her husband's will, she may charge his estate, if he has directed that she should pay his debts out of his estate.[2] As already remarked, the trade debts of a joint family stand on the same footing. (S. 138), and the heiress is entitled to alienate the estate for the purpose of discharging them.[3]

2492. The duty of the wife to pay her husband's debts, rests upon the broad equity that he who takes the benefit must also bear the burden.[4] As observed in a Bombay case: "She took the estate as an aggregate, assets and debts together. Her first duty was to pay her deceased husband's debts, and to pay them, as far as she could, equally, according to the obligation with which the succession had devolved on her. She may be regarded as, in some degree, a trustee, or, at any rate, under a legal obligation for this purpose, and not at liberty to deal capriciously with the estate, which she may alienate at all only for some special purposes indicated by the law. She ought not in performing the duty cast upon her, to prefer one valid claim to another, as her husband might have done, because from him the favoured creditor could have obtained as much by his diligence. On the widow, no pressure could be exercised, except through the estate, and she was bound, pressure or no pressure, to distribute amongst the creditors. There could not here have been a legal necessity, such as is prescribed as an indispensable consideration by the Judicial Committee.[5] A purchaser from a widow must see that she exercise her power of sale strictly,[6] or at least, satisfy himself by reasonable enquiry, that a sufficient cause for alienation exists."[7]

2493. Payment of Barred Debt.—Hindu Law knows of no bar of limitation extinguishing the debtor's liability to discharge his debts. The payment of all debts of the last owner is, therefore, another recognized head of justifiable necessity for which the heiress may alienate the *corpus*. The principle underlying that rule is that she is under a pious obligation in a reasonable measure to promote the spiritual benefit of her husband whose estate she has inherited; and one of the ways in which this benefit can be promoted is by getting him released from the penalty or sin of leaving his debts unpaid.[8] And she is now entitled to bind her reversioner by her payment acknowledgment of such debts.[9] Though the heiress may pay the time-barred debts of the last owner,

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(1) *Himmat Bahadur* v. *Bhawani*, 30 A. 352, affirmed O.A. *Bhawani* v. *Himmat Bahadur*, 33 A. 342 P.C.

(2) *Panamchand* v. *Narayan*, (1894) B.P.J. 167.

(3) *Gogarnath* v. *Jaikishun*, (1916) 1 P.L.J. 16 : 34 I.C. 375.

(4) *Karimudin* v. *Gobind*, 31 A. 497 (506) P.C.

(5) *Raj Lukhee* v. *Gokool Chunder*, 13 M.I.A. 209; *Goolab Singh* v. *Kurun Singh*, 14 M.I.A. 176.

(6) *Rajchunder* v. *Buboram*, 1 Full. 133.

(7) *Rangilbhai* v. *Vinayak*, 11 B. 666 (679).

(8) *Tulshi Prasad* v. *Jagmohanlal*, 57 A. 422; *Tarini Prasad* v. *Bolanath*, 21 C. 190 note; *Ashutosh* v. *Chidam Mandal*, 57 C. 904; *Bhagwat* v. *Vivratti*, 39 B. 113; *Kondappa* v. *Subha*, 13 M. 189; *Santu Ram* v. *Dodan Bai*, 9 L. 85; *Gajadhar* v. *Jagannath*, 40 A. 775 F.B.

(9) S. 21 (3) (*a*), Limitation Act (as amended by Act I of 1927); *Daroga Rai* v. *Basdeo*, 16 Pat. 45 (51) superseding *contra* held in *Soni Ram* v. *Kanhayalal*, 35 A. 227 (234, 235) P.C.; affirming O.A. 32 A. 33.

a payment of interest or principal as required by S. 20 of that Act would have the same effect.[1]

2494. Payment of Public Charges.—The payment of land revenue cesses and other public charges is a case of general necessity[2] (§ **2469**), and arises out of the very necessity of preserving the estate from forfeiture and sale since such payments are ordinarily the first charge on the land and their non-payment renders the estate itself liable to extinguishment. As the Privy Council observed: "The preservation of the estate and the costs of litigation for that purpose are objects which justify a widow in incurring debt and alienating a sufficient amount of the property to discharge it."[3] Where, however, the amount of cess creates only a personal liability, as it does under the Public Demands Recovery Act in Bengal,[4] its payment would, nevertheless, be a justifiable necessity,[5] the more so, if a decree is passed against the heiress as representing the estate.[6]

Clause (6).

2495. It is immaterial that, with better management, the Government revenue need not have threatened the very existence of the estate.[7] All that is necessary is that there should be some pressure on the estate, and a danger to be averted.[8] The validity of sale for non-payment of revenue is not affected by any rule of Hindu Law,[9] and it is the duty of the heiress to sell a portion to save the rest. But she must not anticipate her wants. Necessity implies pressure, such as an attachment of the property or, at least, the presence of a decree or other coercive process of law making the alienation inevitable,[10] and the alienation must, of course, be *bona fide* and not a devise to defeat or deceive the reversioner.[11] Since the public charges are primarily payable out of current income, it is the duty of the heiress to pay them therefrom.[12] She cannot save the income of the estate, for her own benefit and charge the estate for assessment. If this were allowed, many an estate would never reach the hands of the reversioner. Such was held to be the case where the widow had sold her family land to pay for the rent due on an expropriatary tenure arising in her favour on sale of a zemindary. It was held that the tenure was no saving of the family estate, since its devolution was subject to a local Act, which would probably exclude the re-

(1) *Chegamull* v. *Govindaswami*, (1928) M. 972 (975).

(2) S. 110 (2), *ante*; *Lalta Prasad* v. *Darshan Singh*, 74 I.C. (A.) 839.

(3) *Karimuddin* v. *Govind*, 31 A. 497 (506) P.C.; reversing O.A. *Govind* v. *Abdul Qayyum*, 25 A. 546; *Srimohan* v. *Brijbehary*, 36 C. 753 (757).

(4) *Shekaat Hosain* v. *Sasi Kar*, 19 C. 783; *Mahanund* v. *Banimadhub*, 24 C. 27; *Rup Ram* v. *Iswar*, 6 C.W.N. 362.

(5) *Sri Mohan* v. *Brij Behary*, 36 C. 753 (757).

(6) *Karimuddin* v. *Gobind*, 31 A. 497 P.C.

(7) *Hunoomanpersad* v. *Mt. Babooee*, 6 M.I.A. 393 (423).

(8) *Horonath* v. *Indra*, (1859) S. D. A.B. 207; *Sreenath* v. *Ruttun*, (1859) S.D.A.B. 421; *Hurry Mohan* v. *Gonesh*, 10 C. 823 (837) F.B.; *Hurronath* v. *Randhir*, 18 C. 311 (315) P.C.; *Sri Mohan* v. *Brij Behary*, 36 C. 753; *Indar Kuar* v. *Lalta Prasad*, 4 A. 532; *Dhiraj Singh* v. *Mangaram*, 19 A. 300 (302); *Ghansham* v. *Badiya*, 24 A. 547.

(9) *Anundomoyee* v. *Mohendra*, 15 W. R. 264.

(10) *Gopaul* v. *Gour Monee*, 6 W. R. 52; *Baijnath* v. *Bissen*, 19 W.R. 79.

(11) *Phul Chand* v. *Jodha*, 6 A.L.J. 547.

(12) *Veerabadra* v. *Marudaga*, (1911) M.W.N. 799; *Ramanand* v. *Ram Saran*, 7 I.C. (C.) 27.

versioner. Moreover, the saving, if any, was onerous, and entailed the sale of other lands, to which the reversioner might have succeeded.[1]

2496. Costs of Litigation.—The cost of necessary litigation is another head of legal necessity, but the litigation must be necessary and the cost reasonable, for, as Sir Lawrence Jenkins, C.J., observed, though "costs of litigation are a recognized head of legal necessity, that does not mean that a widow, engaged in a litigation, has an unlimited power of borrowing."[2]

Clauses (7), (3).

The heiress is entitled to alienate the estate for defraying the cost of obtaining the Succession Certificate or Letters of Administration,[3] and reasonable cost of litigation[4] in recovering or preserving the estate or in defending her title.[5]

It would not justify a sale of land to embark on a speculative suit which the deceased owner had given up as lost,[6] though the case might be different where the reversioner had entered upon a litigation for which he was responsible.[7]

This aspect of the subject has been already considered (§§ **1058, 1059**)

2497. Preservation and Repairs.—The obligation of a person in possession of an estate to protect and preserve it, is cast even on mortgagees and trustees. As such, she has the right, and is subject to the duty, of alienating the estate, only when it is necessary for its preservation and repairs. She cannot charge the estate for the purpose of improving it,[8] or of constructing a new house, unless it was a necessity. She may, of course, construct such a house out of her current income, and may even charge her future income for it; but if she charges the estate, she must show that it was necessary to shelter the household, as that the old house had become uninhabitable, or the like.[9] Apart from such or similar pressing necessity she cannot alienate the estate for the purpose of building costly houses, and excavating tanks or wells, unless they were necessary for irrigation or were proved to be otherwise beneficial to the estate.[10]

Clause (9).

The question must, in each case, depend upon its own circumstances.[11]

2498. Self-maintenance.—Maintenance of the heirs herself and other dependent members of the family whom the deceased owner was bound to maintain, is another head of legal necessity, generally explained elsewhere.[12] Prima-

Clause (10).

(1) *Ishwari* v. *Babunandan*, 47 A. 563 (569).

(2) *Bhimareddi* v. *Bhaskar*, 6 Bom. L.R. 628, followed in *Radha* v. *Nauratan*, 3 Pat.L.J. 522 : 46 I.C. 627.

(3) *Sri Mohan* v. *Brij Behary*, 36 C. 753.

(4) *Bhimareddi* v. *Bhaskar*, 6 Bom.L. R. 628.

(5) *Karimuddin* v. *Gobind*, 31 A. 497 (506) P.C.; *Pannalal* v. *Bamasundari*, 6 B.L.R. 732; *Phool Coer* v. *Dobee Pershad*, 12 W.R. 187; *Ram Coomar* v. *Ichamayi*, 6 C. 36; *Amjad Ali* v. *Moniram*, 12 C. 52 *Debi Dayal* v. *Bhup Pertap*, 3 I.C. 433 (441).

(6) *Indar Kuar* v. *Lalta Prasad*, 4 A. 532.

(7) *Arjan Singh* v. *Indar Singh*, (1911) P.L.R. 233 : 12 I.C. 429.

(8) *Ganapa* v. *Subi Sanna*, 32 B. 577.

(9) *Bhogaraju* v. *Addepalli*, 35 M. 560.

(10) *Makhan Lal* v. *Gayan Singh*, 33 A. 255.

(11) *Bejoy* v. *Girindra*, 13 C. W. N. 236: 8 C.L.J. 458.

(12) S. 110 (2), *ante*.

rily, she must maintain herself out of its profits, and if her interest therein is so limited, sale cannot alienate the *corpus* in any case.[1] Otherwise, if the income is insufficient, she is entitled to sell the estate for her own maintenance.[2]

Her right to sell the estate depends upon the right in which she holds the estate. If she is entitled only to the rents and profits, she cannot charge or alienate the *corpus*. But if she has the woman's estate, then she is entitled to alienate it for all those purposes which law recognizes as legally necessary, amongst which her own maintenance is one such purpose. The fact that she was living with another man, who presumably maintained her, does not curtail her right to find her own maintenance in her heritage, since the estate having once vested in her, subsequent unchastity cannot curtail her right to its enjoyment. Of course, the fact that she was in the keeping of another man, who maintained her, might be proved as a fact to establish the absence of necessity.[3]

2499. The question of alienation raises the question of the quantum of maintenance. That the widow is entitled to maintain herself in a fair degree of comfort has been already seen. (§ **102**). The same rule applies to all female heirs. The term maintenance not only comprises the bare cost of living but also the cost incurred in the performance of such religious rites as are usual or might be customary. Such are, for instance, the performance of the annual *shradh,* the distribution of charities and the observance of fasts and festivals and, in fact, compliance with all such caste usages as might be reasonably expected from the heiress in her position.[4] The rule applies to all females heirs, whether a widow succeeding to her husband or daughter inheriting to her father.[5] The heiress must not forestall her wants, but this does not imply that she cannot alienate the estate except for her past maintenance. All it means is that she must not alienate it, except when there is urgent necessity in the near future.[6]

If the purpose is obvious, the means adopted by the widow may not be of the best. But they should not be too narrowly scrutinized. So, where the widow could not maintain herself, because she had no means to cultivate the land, she was held justified in mortgaging it, so as to enable her to resume cultivation and so maintain herself.[7]

2500. Maintenance of Dependants.—The heiress is not bound to pay for the maintenance and the marriage of relations of the last owner, out of the current income of the estate, for which the estate is legally chargeable.[8] Section 93 specifies the persons whom a person is personally

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(1) *Gobind Dass* v. *Ranchord,* 3 N.W. P.H.C.R. 324; *Jagat Ram* v. *Mohesh,* (1882) A.W.N. 57.

(2) *Santosh Kumar* v. *Ganesh,* 31 C. W.N. 65; *Sakharam* v. *Jankibai,* (1878) B.P.J. 139; *Nellaikumaru* v. *Marakathammal,* 1 M. 166; *Soorjoo* v. *Krishnan,* 1 N.W.P.H.C.R. 46; *Kuthalinga* v. *Shanmuga,* 50 M.L.J. 234 : 92 I.C. 989; (1926) M. 464; *Rajendra Nath* v. *Peary Mohan,* 94 I.C. 321 : (1926) C. 854.

(3) *Amjad Ali* v. *Moniram,* 12 C. 52.

(4) *Ratansi* v. *Umerbai,* 9 I.C. (S.) 997.

(5) *Gnalimetla* v. *Bollozu,* 23 M. L. J. 233 : 16 I.C. 139.

(6) *Vellappa, In re,* (1912) 1 M.W.N. 196 : 13 I.C. (M.) 640.

(7) *Oadey Singh* v. *Phoolchand,* 5 N. W.P.H.C.R. 197 (200).

(8) *Hurry Mohun* v. *Ganesh,* 10 C. 828; *Amjad Ali* v. *Moniram,* 12 C. 52; *Debi Dayal* v. *Bhan Pertab,* 31 C. 433 (443); *Baij Nath* v. *Mangla Prasad,* 90 I.C. (Pat.) 732.

liable to maintain. On his death, the liability to maintain them continues chargeable to his estate and the heiress is entitled to alienate the estate for that purpose.[1] So it has been held that the expenses incurred by the widow for the marriage of a daughter are recoverable from the father's estate[2] (§ 1049). The maintenance of the grandsons is also a moral, though not a legal obligation for which the heiress may alienate the estate.[3]

A man is not either legally or morally bound to maintain his mother-in-law. No more is his widow, who is not justified in alienating her husband's estate, in order to maintain her.[4]

Gift on Marriage. (Clause 12.)

2501. Marriage Gifts.—The mother is entitled to contract a debt for the marriage of her daughter, because marriage is a sacrament, and that of a daughter a necessity.[5] Since the gift of land on the occasion of marriage is customary,[6] and in accordance with Hindu sentiment, law upholds such alienation, provided it is a *bona fide* provision for marriage and is moderate in extent and value. The courts have, accordingly, upheld such gifts, even when made by the widow to the daughter[7] or the son-in-law[8] on the occasion of their marriage or *Gowna*[9] or *Dwiragaman* or second marriage,[10] upholding even post-nuptial gifts when otherwise justifiable.[11]

But the expenses of the marriage of the son,[12] a daughter's daughter[13] or a nephew[14] are not a legal necessity.

2502. The question what is a reasonable gift on these occasions, is a question of fact, which has to be decided with due advertence to all the circumstances of the case. Ordinarily, it must approximate not more than a fourth[15] of the father's estate; but it is the ordinary, and not the invariable rule, since there may be cases justifying a much larger expenditure. In one case, where the marriage was in accordance with the wishes of the father, and the ancestors of the reversioners took part in it and attested the deed of gift, the court upheld a gift of a twelve-

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(1) *Sailabala* v. *Baikuntha Nath*, 91 I.C. 186: (1926) C. 486.

(2) *Preaj Narain* v. *Ajodhya Pershad*, 7 B.S.R. 602: 8 I.D. (O.S.) 456; *Chunilal* v. *Gunput Lall*, 16 W.R. 52 (53); *Chudammal* v. *Nadamuni*, 6 M.L.T. 158: 3 I.C. 77; *Rustam* v. *Motising*, 18 A. 474.

(3) *Chumanlal* v. *Gunput Lall*, 16 W.R. 52; *Mokhan Lal* v. *Gayan Singh*, 33 A. 255.

(4) *Arjan Singh* v. *Indar Singh*, (1911) P.L.R. 233: 12 I.C. 429.

(5) *Gopalachariar* v. *Sami Reddi*, (1926) M. 517; *Kamla Prasad* v. *Lalji*, 9 Pat. 721. (§§ 1049, 1050.)

(6) *Tatayya* v. *Ram Krishnamma*, 34 M. 288 (291).

(7) *Churaman* v. *Gopi*, 37 C. 1 (12); *Udai Dat* v. *Ambika Prasad*, 100 I.C. 503: (1927 O. 110; *Madho Prasad* v. *Dhamraj*, 95 I.C. 574: (1926) O. 425.

(8) *Sundaram* v. *Krishnasami*, 28 I.C. (M.) 992; *Kudutamma* v. *Narasimha*, 17 M.L.J. 528; *Subba Naiker, Inre*, 30 I.C. (M.) 781; *Jowalaram* v. *Hari Kishen*, 5 L. 70; *Bhagwati* v. *Ram Jatan*, 45 A. 297; *Ram Sumran* v. *Gobind*, 5 Pat. 646 (697).

(9) *Churaman* v. *Gopi*, 37 C. 1; *Sailabala* v. *Baikuntha Nath*, 91 I.C. 186: (1926) C. 486.

(10) *Damodar* v. *Senabutty*, 8 C. 537.

(11) *Fugulia* v. *Vettor*, 13 I.C. (M.) 475; *Sundaramayya* v. *Sitamma*, 35 M. 628.

(12) *Rajagopalachariar* v. *Sami Reddi*, 50 M.L.J. 221: 93 I.C. 49 (51): (1926) M. 517.

(13) *Narainbati* v. *Ramdhari*, 20 C.W.N. (Pat.) 734: 34 I.C. 277.

(14) *Bhura* v. *Ramrao*, 8 N.L.R. 154: 17 I.C. 366.

(15) *Churaman* v. *Gopi Sahu*, 37 C. 1; Dayabhag, III-2-36, XI-1-66.

annas share of the estate.[1] The consent of the next reversioner to a gift would as much be evidence of its propriety as it would be evidence of the propriety of any other alienation though for value.[2]

Clause (13).

2503. **Other Ceremonial Gifts.**—Small customary gifts on other ceremonial occasions are sanctioned by the usages of all communities. Such is the gift of a small area of land on the occasion of the father's[3] or the performance of the mother's *shradh*.[4]

But such customary small gifts must not be confused with a general pious or religious gift, to a priest for instance, which a Hindu widow has no power to make beyond what is acknowledged as conducive to the spiritual benefit of her husband.[5] (§ **1041**.)

Exception.

2504. **Trading Business.**—The limitations on the woman's power of transfer do not extend to a trading business, which is only subject to the general rules stated in sections 148 and 153 (§ **1018**). As was observed in a case: "If the business of the husband was, let us say, that of a cloth merchant, the widow would be entitled to carry it on, and she could only do so, by selling, buying again, and again selling. The very existence of the business creates the necessity; it is inherent in its proper conduct."[6] So, where, in the course of her business, the widow acquires and transfers land, it must be regarded as an ordinary, and even at times, it may be the necessary, incident of her trade, and her alienations cannot be subjected to the scrutiny of Hindu Law and if, in such cases, the question of necessity is at all relevant, it is to be found in the prudent conduct of her business.[7]

In other respects also, the widow's alienations would be upheld if they were prudent and made in the course of beneficial management.[8] (§§ **2422-2423**.) But all such alienations must be judged upon their own merits. It vests her alienees with an uncertain title, but such is the law. The heiress cannot alienate the corpus of her estate because she is unable to manage it, even though its price might yield her a larger return.[9] But this is not an inflexible rule, since the widow would be well justified in selling off her estate if inconveniently situate, and purchasing another which gave her a better return.[10]

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(1) *Sailabala* v. *Baikuntha*, 91 I.C. 186: (1926) C. 486.

(2) *Kesho Prasad* v. *Chandrika Prasad*, 2 Pat. 217; *Kushi Bai* v. *Maura Khan*, (1923) N. 265; *contra* in *Ram Dayal* v. *Mithoo Lal*, 71 I.C. 287: (1923) A. 410.

(3) *Vapuluri* v. *Garimalla*, 34 M. 288; but see *Narainbati* v. *Ramdhari*, 20 C. W. N. (Pat.) 734: 1 Pat. L. J. 81.

(4) *Srimohan* v. *Brijbeary*, 36 C. 753.

(5) *Govind* v. *Lakhrani*, 43 A. 515.

(6) *Pahalwan* v. *Jiwan*, 42 A. 109 (114); *Radha* v. *Kanhaiya*, (1907) A. W. N. 156; *Petumdoss* v. *Ramdhone*, (1848) Taylor 279; *Ramlal* v. *Lakshmi Chand*, 1 B.H.C.R. (App.) 51; *Sakrabhai* v. *Magan Lal*, 26 B. 206 (211).

(7) *Ib.*, p. 115.

(8) *Dasrath* v. *Danvir Singh*, (1927) P. 219; *Sumitra Bai* v. *Hirbaji*, 97 I. C. 983: (1927) N. 25.

(9) *Srinivasa* v. *Alamelu*, 101 I.C. (M.) 571.

(10) *Mahalakshmamma* v. *Ramaswami*, 50 M.L.J. 651: 94 I.C. 950: (1926) M. 641; *Ramalinga* v. *Parvathammal*, 95 I.C. 759: (1926) M. 1122.

342. When heiress is a ward of court.

Where the Court of Wards or any other guardian is in possession of a woman's estate, its power of alienation is equally subject to the provisions of section 341.[1]

2505. **Analogous Law.**—The Court of Wards, of any other guardian of the female heir, can only possess the power which she could herself exercise if she were competent to contract. As her powers of alienation are those stated in section 341, her guardian possesses no greater power.

343. Surrender of woman's estate.

(1) The heiress may surrender her entire interest to the next reversioner, male or female,[2] **or to any one or more of such reversioners with the consent of the rest, provided that where the next reversioner is a female, it may be surrendered to the male reversioner next in order with her consent.**[3]

(2) Such surrender does not affect the validity of her prior alienations.[4]

Explanation.—**A surrender is not rendered invalid under this section merely because the surrender reserves a portion of the estate for her own maintenance or conveys a part thereof to another in compromise of his claim or otherwise, provided the transaction, considered as a whole, is not a device to divide the inheritance.**[5]

Illustrations.

(*a*) A Hindu widow conveys the bulk of her estate to her daughter, but inadvertently omits to convey an insignificant part thereof to her. The surrender is not invalid because the part conveyed was not her entire estate.[6]

(*b*) *A* claims the widow's estate by devise from her husband. She compromises his claim by conveying a small part of her estate to him and the residue to her reversioner. The surrender is not invalid because it is not a surrender of her entire estate.[7]

(*c*) A widow conveys her estate to the next reversioner conditional upon his maintaining her. The surrender is not invalid because it is conditional upon her maintenance.[8]

(*d*) A widow conveys her estate to the next reversioner who reconveys a moiety thereof absolutely to her. The surrender is invalid, being a device to divide the inheritance.[9]

2506. **Analogous Law.**—The power of a Hindu widow to surrender her estate was at one time the subject of judicial conflict, it being held in one set of cases that since surrender has the effect of altering the natural devolution of her husband's estate, the heir to which cannot be legally determined till after her death,[10] it is both illegal and opposed to the policy of law, while in others, the courts upheld the surrender as being the relinquishment of her own estate,[11] and this view has received

(1) *Ramajogayya* v. *Jagannadhan*, 42 M. 185 F.B.

(2) *Sitanna* v. *Viranna*, (1934) P.C. 105 (108), approving *Sartaji* v. *Ramjas*, 46 A. 59; *Ram Krishna* v. *Kausalya*, (1935) C. 689 (692).

(3) *Rangasami* v. *Nachiappa*, 42 M. 523 (533) P.C., approving *Debi Prasad* v. *Golap*, 40 C. 721 F.B.; *Shantikumar* v. *Mukundalal*, 62 C. 204; *Narayanaswami* v. *Rama Ayyar*, (1930) P.C. 297 (headnote erroneous—nothing decided).

(4) *Lachmichand* v. *Lachho*, 49 A. 334; *Prafulla* v. *Bhabani*, 52 C. 1018.

(5) *Angamuthu* v. *Varatharajulu*, 42 M. 854 F.B.; *Bhagwat Koer* v. *Dhanukdhari*, 47 C. 466 (483, 484) P. C.; *Ram Adhar* v. *Ram Manohar*, 45 A. 610.

(6) *Vadlamudi* v. *Vadlamudi*, 52 I.C. (M.) 749.

(7) *Sureshwar* v. *Maheshrani*, 48 C. 100 P.C.

(8) *Angamuthu* v. *Varatharajulu*, 42 M. 854 F.B.

(9) *Prafulla* v. *Birendra*, 97 I. C. 236: (1926) C. 1211.

(10) *See* cases set out in Hindu Code 3rd Edn.), *f.-n.* (18) at p. 1473.

(11) *See* cases cited in Hindu Code (3rd Edn.), *f.-n.* (19) at p. 1473.

the support of the Privy Council.[1] As such, it may vest the estate in a male or a female reversioner.[2]

2507. In other words, there can be no surrender, unless it relates to the whole interest in the whole estate.[3] The effect of such surrender is to vest in the next heir the inheritance which he would take if she, at the time, were to die.[4] A surrender by a widow to those who are entitled to the estate is looked upon, in the Hindu Law, as meritorious, since it restores the property in its natural channel.[5] A surrender is not an alienation,[6] and it does not require the presence of consideration or legal necessity to support it.[7] It is not a transfer, but a relinquishment by the heiress, of her anomalous estate. A full owner has nothing to relinquish. He can only alienate it by a formal transfer, executed in accordance with the provisions of the Transfer of Property Act.[8]

The various requirements of such surrender are noted in the section, but require to be more particularly emphasized.

2508. Surrender must Comprise the Entire Interest.—In the first place, the surrender must relate to the entire interest then vested in the heir. It cannot be made after reserving any portion by the widow.[9] As observed by the Privy Council, this is some security to the widow, from whom no reversioner can obtain the estate piecemeal. Of course, the fact that the heiress cannot surrender any but the whole estate does not limit her right of alienation. So, where a widow sold half the estate to the then reversioner, and he executed an instrument giving her the other half of the property, the court upheld the transaction by which each obtained absolutely a moiety of the estate.[10] But it is submitted that whatever might be the effect of such transfer *inter partes*, it could not affect the ultimate reversioner, or alter the heiress's estate into an absolute estate. Though the doctrine of acceleration of the inheritance by surrender by the widow primarily refers to a male, it makes no exception against a female reversioner, and the widow may, consequently, surrender her estate to her daughter, in the form of a gift[11] or otherwise, provided it conforms to the rule here stated. But this does not preclude the possibility of exclusion of a small and inappreciable portion of the estate,[12]

(1) *Beharilal* v. *Madholal*, 19 C. 236 (241) P. C.; *Bajrangi* v. *Manokarika*, 30 A. 1 P.C.

(2) *Sitamma* v. *Viranna*, 57 M. 749 P.C.

(3) *Marudamuthu* v. *Srinivasan*, 21 M. 128 F.B.; *Rangasami* v. *Nachiappa*, 23 C.W.N. 777 (808): 42 M. 523 (536) P.C.; *Debi Prasad* v. *Golap*, 40 C. 721 F.B.; *Shanti Kumar* v. *Mukund Lal*, 62 C. 204.

(4) *Noferdoss* v. *Modhu Soondari*, 5 C. 732 (735, 736).

(5) *Per* Jackson, J., argued in *Noferdoss* v. *Modhu Soondari*, 5 C. 732 (734); *Moti* v. *Lal Das*, 41 B. 93 (103); *Nachiappa* v. *Rangasami*, 28 M. L. J. 1 (8): 26 I.C. 757; *Chinnaswami* v. *Appaswami*, 42 M. 25.

(6) *Mulugu* v. *Mudigonda*, 31 M.L.J. 406: 36 I.C. 407; *Munugarra* v. *Munugara*, 34 M.L.J. 229: 42 I.C. 939; *Man Singh* v. *Nawlakhbati*, 2 Pat. 607 (635), O.A. 5 Pat. 290 P.C.

(7) *Moti* v. *Lal Das*, 41 B. 93 (105); *Sham Rathi* v. *Jaichha*, 39 A. 520.

(8) *Udebhan* v. *Rang Rao*, 59 I. C. (N.) 451.

(9) *Behari Lal* v. *Madho Lal*, 19 C. 236 P.C.; *Nobo Kishore* v. *Hari Nath*, 10 C. 1102 F. B.; *Kanu Ram* v. *Kashi Chandra*, 14 C.W.N. 226: 2 I.C. 660; *Mohananda* v. *Baikantha*, 45 I.C. (C.) 872; *Rangappa* v. *Kampti*, 31 M. 365 (369, 370); *Mulugu* v. *Mudigonda*, 31 M. L.J. 406: 36 I.C. 407; *Rangasami* v. *Nachiappa*, 42 M. 523 P.C.; *Janaki* v. *Debi Prasad*, 2 Pat. L. J. 490.

(10) *Kanu Ram* v. *Kashi Chandra*, 14 C.W.N. 226: 2 I.C. 660.

(11) *Rup Ram* v. *Rewti*, 32 A. 582; *Gowri* v. *Gopal*, 25 I.C. 503.

(12) *Vadlamudi* v. *Vadlamudi*, 52 I.C. (M.) 749; *Ram Krishna* v. *Kausalya*, (1935) C. 689.

or prevent her from stipulating for and reserving or obtaining some property for her own maintenance,[1] or transferring a portion of the estate to a reversioner in settlement of his claim for immediate possession, as for instance, in compliance with a clause in the will of the last owner.[2]

2509. The Bombay High Court at one time took the financial view that any consideration was sufficient to convert a surrender into an alienation,[3] but later cases of the same court dissented from this view,[4] till it was overruled by the Privy Council.[5] A surrender may still be a good surrender, even though the widow has made an adequate provision for her own maintenance, or provided for the payment of her legal debts and the discharge of other liabilities; provided it is not a device to divide the estate with the reversioner.[6] As Shankaran Nair, J., said: "I am unable to agree with the view that the validity of the surrender of her interest or title to the reversioner depends upon the motive of the widow or upon any question of any benefit that may accrue to her or to any other person. Such might have been the case if the widows were holding the property in trust for any purpose or for the benefit of the actual reversioner, at the time of her death."[7] In other words, the estate is her own, and there is nothing to prevent her from surrendering it upon terms. For intance, there is nothing wrong in her surrendering the estate, subject to a reasonable provision for her maintenance, which might be charged on the estate, so that it is enforceable even when the estate has passed to a transferee.[8] By surrender she may convert this estate into an annuity,[9] in which case, subject to the payment of an annuity, the transferee would acquire an absolute interest.[10] This raises another question upon which the courts seem divided. If the widow can surrender upon terms, can she not alienate her estate to a person other than the next presumptive reversioner with his consent, since by such act, she relinquishes no interest other than her own, for as Garth, C.J., puts it: "If it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make. And it seems equally impossible to deny that, for a long series of years, the court has treated and considered such alienation lawful."[11] But in Bombay, such an alienation would be judged as such, and upheld if it is for consideration to which the consent

(1) *Bhagwati Koer* v. *Dhanukdhari*, 47 C. 466 P.C.; *Sureshwar* v. *Mahesrani*, 48 C. 100 P.C.; *Chinnaswami* v. *Appaswami*, 35 M.L.J. 512; *Kareti* v. *Kareti*, 24 M. L.J. 533; *Challa* v. *Palury*, 31 M. 446; *Angamuthu* v. *Varatharajulu*, 42 M. 854 F.B.; *Ramachandra* v. *Nagamuthu*, 53 I.C. (M.) 785; *Ram Odhar* v. *Ram Manohar*, 45 A. 610.

(2) *Sureshwar* v. *Maheshrani*, 48 C. 100 P.C.

(3) *Adiappa* v. *Tontappa*, 44 B. 255 (260), following *Sriramulu* v. *Andalammal*, 30 M. 145 (148).

(4) *Rama* v. *Dhondi*, 47 B. 678 (683, 684); *Gangadhar* v. *Prabhudha*, 56 B. 410 (425, 426).

(5) *Sureshwar* v. *Maheshrani*, 48 C. 100 P.C.; *Rangasami* v. *Nachiappa*, 42 M. 523 P.C.

(6) *Sureshwar* v. *Maheshrani*, 48 C. 100 (108) P.C.; *Rangasami* v. *Nachiappa*, 42 M. 523 (536) P.C.; *Indra Narain* v. *Sarbasova*, 41 C.L.J. 341: 87 I.C. 930: (1925) C. 743.

(7) *Challa* v. *Palury*, 31 M. 446 (450); *Subbalakshmi* v. *Narayana*, 58 M. 150.

(8) *Chamaru* v. *Sonakoer*, 14 C. L. J. 303: 11 I.C. (C.) 301, and cases cited therein; *Chinnaswamy* v. *Appaswamy*, 42 M. 25; *Angamuthu* v. *Varatharajulu*, 42 M. 854 F.B.; *Gouri Bai* v. *Gaya Bai*, 22 N.L.R. 169: 97 I. C. 995: (1927) N. 44.

(9) *Bejoy* v. *Girindra*, 8 C. L. J. 458.

(10) *Hem Chunder* v. *Sarnamoyi*, 22 C. 354 (361).

(11) *Nobo Kishore* v. *Hari Nath*, 10 C. 1102 (1108) F. B.

of the next reversioner would merely furnish presumptive evidence of necessity.[1]

2510. Again, while the doctrine of surrender postulates the renunciation of all her rights, it does not follow that it should be done by a single act and not by a series of successive acts;[2] and in any case, it must, of course, be accompanied by delivery of possession. Till this is done, she is entitled to recall her act.[3] Again, where the estate vests jointly in two or more widows, there is nothing to prevent one co-widow from surrendering her interests, since it is the whole interest she possesses, though it is not the whole estate which passes to the reversioner.[4]

2511. Prior Dispositions Unaffected.—It goes without saying that surrender takes effect as from the moment it is made, and has no retrospective effect upon any prior alienation made by the heiress,[5] unless it affected the bulk of the estate, in which case the surrender would be illusory. If, therefore, she has gifted her whole estate or, what comes to the same thing, substantially her whole estate to one, there is nothing left to surrender. Such a case arose where the widow conveyed 18 acres and a house to her nephew, and three years later surrendered her remaining 2 acres to her next reversioner, the daughter, after which she adopted the plaintiff, who sued to eject the daughter, which the court decreed, holding that the prior disposition of the bulk of the estate had rendered the subsequent surrender inoperative, since it contravened the rule laid down by the Privy Council that it must relate to "the whole estate."[6] The case might be different if the previous gift related only to a portion of the estate.[7]

The questions of surrender and alienation have, in fact, to be regarded from two entirely different standpoints. The qutstion in the one case is: Was it the surrender of the entire interest in the entire estate to he nearest reversioner, in which case, the question of necessity is immaterial; while the question in the other case is: Was the alienation justified by necessity, it being immaterial who the alienee was, and whether the property alienated was the whole or only a part of the woman's estate.[8]

2512. Position of the Heiress After Surrender.—The doctrine of surrender owes its origin to the desire to relieve women of the management of property.[9] The surrendering heiress is sometimes spoken of

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(1) *Tukaram* v. *Yesu*, 55 B. 46 (57); In *Narayanaswami* v. *Ram Ayyar*, 53 M. 692 (700) P.C., this question was raised but left undecided as to the consent of the next reversioner was found not proved.

(2) *Venkata* v. *Venkata*, 41 M. L. J. 208.

(3) *Man Singh* v. *Nawalakbati*, 2 Pat. 607 (636, 637), O.A. 5 Pat. 290 P.C.

(4) *Medai Delavoy* v. *Medai Delavoy*, 92 I.C. (M.) 355; *contra* in *Anna* v. *Jaggu*, (1925) M. 153 (because a co-widow cannot surrender the whole estate).

(5) *Lachmi Chand* v. *Lachho*, 49 A. 334; *Karuppa* v. *Irulayee*, 52 M. L. J. 195: 100 I.C. 580: (1927) M. 459; *Prafulla* v. *Bhabani*, 52 C. 1018 (Question not finally considered, as court held that there was no valid surrender).

(6) *Sakharam* v. *Thama*, 51 B. 1019 (1022).

(7) *Prafulla* v. *Bhabani*, 52 C. 1018.

(8) *Rangaswami* v. *Nachiappa*, 42 M. 523 P.C.

(9) *Nachiappa* v. *Rangasami*, 28 M. L. J. 1 (8): 26 I.C. 757.

as having committed suicide, or as being civilly dead."[1] These are mere figures of speech and do not involve the assumption that the heiress has thenceforward no civil rights, or that she was ever in the position of one who suffers civil death, as by her remarriage, or abandonment of worldly pursuits. "A woman who surrenders is clearly not civilly dead for any other purpose than for the purpose of bringing in the next reversioner as heir, at once, to her husband's estate. She continues to own her own stridhan, and the obligation of all persons, who take her husband's estate, to maintain her, which is an absolute obligation thrown by the Hindu Law, cannot be destroyed by her surrender thereof. She does not become a sanyasi, because she surrenders her husband's estate. She is entitled to acquire properties, to retain her stridhan and to bring suits, and she remains competent to enter into contractual and other legal obligations."[2]

2513. In this case, the surrender by the widow and a reconveyance of the moiety were made on the same day, and it was not pleaded, though sought to be argued for the first time in appeal, that they were parts of the same transactions, which the court did not permit. But it is clear that the two contemporaneous deeds could not be treated as independent transactions. When it is so, there is nothing to prevent the reversioner from conveying an absolute estate to the heiress out of property surrendered to him.[3] And even where he conveys it as a part of the same transaction, both he and his legal representative claiming through him would be equally estopped.[4] The principle of this case has been carried even further in another case, in which it has been held that where a widow conveys the whole of her limited estate to the next reversioner, in consideration of an undertaking by such reversioner that he would reconvey a portion of such property to a person named by the widow, the conveyance is valid and is not vitiated by such agreement; and other reversioners cannot impeach the title of such reversioner and that of the person to whom the property is thus conveyed.[5] This view is supported on the ground that the title having vested in the reversioner, it was open to him to convey any portion of his estate to any person he liked, and the fact that he had previously agreed to convey it to the widow's nominee, as a consideration for his own surrender, did not vitiate his conveyance.

The rule that the surrender must comprise the entire estate, does not mean surrender of all interest in some of the estate, though in favour of the whole body of the reversioners.[6]

It has been held in Patna that, on surrender, the widow so far effaces herself that she is not even competent to sue for the recovery of rent due before her surrender.[7]

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(1) *Bhagwat Koer* v. *Dhanukdhari*, 37 M.L.J. 513 P.C.

(2) *Chinnaswami* v. *Appaswami*, 42 M. 25.

(3) *Hem Chunder* v. *Sarnamoyi*, 22 C. 354; *Rangappa* v. *Kamti*, 31 M. 366 F. B.

(4) *Rangappa* v. *Kamti*, 31 M. 866 F. B.; *Yeshwanta* v. *Antu*, 58 B. 521 (532).

(5) *Challa* v. *Palury*, 31 M. 446.

(6) *Debi Prasad* v. *Golap*, 40 C. 721 F.B.; *Suressur* v. *Mohesh*, 20 C.W.N. 142; *Marudamuthu* v. *Srinivasa*, 21 M. 128 (152); *Rangappa* v. *Kamti*, 31 M. 366 (370); *Rangasami* v. *Nachiappa*, 42 M. 523 (536) P.C.; *contra* in *Kanuram* v. *Kashi*, 14 C.W.N. 226, must be considered as overruled by the Privy Council in the last cited case.

(7) *Phulbati* v. *Farman*, 2 Pat. L. J. 606: 63 I.C. 448.

Nevertheless, any contract between the heir and the reversioner for the reservation or transfer of any property or benefit is not illegal, and where the transferee assigns any land to the heir, the right in which and the terms whereupon she would take the lands, must depend upon the terms of the transfer. If they convey to her an absolute estate, she will take it in that right.[1] And it is conceivable that a surrender may fail as a surrender, but the transaction may still be valid as a family arrangement.[2]

Limits of the Rule.

2514. But there are obvious limits to this rule. The surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner.[3] The question whether it is the one or the other must depend upon the quantum of consideration, its purpose and other circumstances of each case. In one case, the estate of two co-widows was assumed by the Court of Wards, who took possession of the estate and allowed the widows a monthly maintenance allowance of Rs. 625 each. They then purported to surrender their estate to the next reversioner. The Patna court held the surrender void as contravening S. 60 of the Court of Wards Act,[4] which rendered them incompetent to create "any charge upon, or interest in the property, or any part thereof."[5] In dismissing the appeal, their Lordships of the Privy Council held the transaction equally void under Hindu Law as unsupported by "necessity."[6] It is submitted that reference to necessity was irrelevant in judging of the validity of a transaction which the High Court had rightly held to be only one of relinquishment as distinct from alienation. Apart from the statutory bar, the transaction was, however, void, as lacking in *bona fides*, the surrender being made to remove the control of the Court of Wards, and in consideration of Rs. 2,000, promised by way of a monthly maintenance allowance to the two widows or their survivor. As such, the case was analogous to that in which the Calcutta High Court held the surrender a mere device to divide the inheritance. In that case, the widow had surrendered her zemindari, yielding an annual income of Rs. 3,000, and, on the next day, the reversioner executed a deed to the widow agreeing to pay her Rs. 3,000 in cash, and Rs. 1,800 annually for the rest of her life. The court held the surrender void, which it clearly was, since it was an alienation for consideration, the validity of which must depend upon the presence of necessity.[7] The same view was taken in another case in which the widow had taken the major portion of the consideration of Rs. 900 in cash out of which she had paid only Rs. 400 for her husband's debt.[8] On the other hand, the surrender is, nonetheless, valid, even though the widow had given half the estate to the daughter, because it appeared that the daughter had claimed tht whole under the will, of which she had obtained a probate.[9]

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(1) *Suressur* v. *Mohesh*, 20 C.W.N. 142.

(2) *Sambasiva* v. *Ramaswami*, 48 M. L. J. 353: 86 I.C. 772: (1925) M. 803.

(3) *Rangasami* v. *Nachiappa*, 42 M. 423 P.C.; *Gangadhar* v. *Prabudha*, 56 B. 410.

(4) Beng. Act. IX of 1870.

(5) *Ib.*, S. 60; *Man Singh* v. *Nowlakhbati*, 2 Pat. 607.

(6) *Man Singh* v. *Nowlakhbati*, 5 Pat. 290 (304, 305) P.C.

(7) *Prafulla* v. *Birendra*, 30 C. W. N. 1011: 97 I.C. 236: (1926) C. 1211; cf. *Siva Subramania* v. *Pirama*, 49 M.L. J. 128: 90 I.C. 1024: (1925) M. 1111.

(8) *Shanti Kumar* v. *Mukundalal*, 62 C. 204.

(9) *Chowdhury Sureshwar* v. *Maheshrani*, 41 C.L.J. 433 P.C.

2515. It must be in Favour of the Next Reversioner.—Secondly, such surrender can only be made in favour of the next reversioner and not in favour of any of the reversioners near or remote,[1] except that there is no objection to her surrendering her estate in favour of the second reversioner with the consent of the first reversioner.[2] The position is the same as if the heiress had surrendered in favour of the first reversioner, and he, in his turn, had assigned his interest in favour of the second reversioner. So, a gift to the daughter's son with the consent of the daughter has been upheld.[3] But the contrary has been laid down by the same court in several cases.[4] in some of which the language used is fatal to her very right.[5] The question was considered by the Calcutta High Court, who held the rule to be well established that "the widow may convey to the next reversioner, or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest."[6] Following this view, the court upheld a surrender in favour of the next reversioner and a stranger holding it to be a surrender to the reversioner, with an alienation by the reversioner to the stranger.[7] So, it has been held in Madras that the surrender need not be definitely to the next heir if that next heir agrees to be passed over.[8]

At any rate since the surrender in favour of the next reversioner is unobjectionable, there is nothing to prevent the surrender being made in favour of a female reversioner, such as the daughter.[9]

2516. Form Immaterial.—Since the sole essence of surrender is self-effacement, and law prescribes no form in which it might be effected, the process by which it is effected may be in form a surrender, or relinquishment, or *abandonment* of her rights, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property.[10] Again, a surrender may be effected either by a single act or a series of acts, provided that the several acts were done in pursuance of the same intention. Such was the case of the mother who had in 1870 settled two-thirds of her estate upon her two daughters, and twenty years later in 1890, after the death of her daughters, transferred the third, which she had reserved for herself, to her daughter's sons. On the mother's death, the son of one of her daughter's sons sued to recover the property which had been sold in execution of a decree against his father on the ground that the latter's title, as the mother's alienee, could not enure beyond the mother's life-

(1) *Rangasami* v. *Nachiappa*, 42 M. 523 P.C.; *Sureshwar* v. *Maheshrani*, 48 C. 100 P.C.; *Hem Chunder* v. *Sarnamoyi*, 22 C. 354; *Manjaya* v. *Sheshgiri*, 49 B. 187 (192).

(2) *Pratapchunder* v. *Joy Monee*, 1 W.R. 98; *Basangavda* v. *Basangavda*, 39 B. 87 (99).

(3) *Raja Dei* v. *Umed Singh*, 34 A. 207; *Chinnaswamy* v. *Appaswami*, 42 M. 25; *Narayanaswami* v. *Ram*, 53 M. 692 (700) P.C.

(4) *Ramphal* v. *Tulakuari*, 6 A. 116 F.B.; *Mada Abdulla* v. *Ram Lal*, 34 A. 129 (surrender in favour of sister's son, with the consent of the next reversioner, void), but the same bench held *contra* in *Raja Dei* v. *Umed Singh*, ib., p. 207.

(5) *Ramphal* v. *Tulakuari*, 6 A. 116 (120) F.B.; *Madan Mohan* v. *Puran Mal*, ib., p. 288.

(6) *Hem Chunder* v. *Sarnamoyi*, 22 C. 354 (361); *Ananda* v. *Indra Bhusan*, 12 C.W.N. 49.

(7) *Abhoya* v. *Ram Kinnar*, 89 I. C. (C.) 770.

(8) *Mulugu* v. *Mudigonda*, 31 M. L. J. 406: 36 I.C. 407; *Satyalakshmi* v. *Jagannadham*, 34 M. L. J. 229: 43 I.C. 939; *Chinnaswami* v. *Appaswami*, 42 M. 25.

(9) *Udhar Singh* v. *Ranee Kuar*, 1 Agra 234; *Bhupal* v. *Lachman*, 11 A. 253; *Rup Ram* v. *Rewati*, 32 A. 582.

(10) *Bhagwati* v. *Dhanukdhari*, 12 M. L.W. 105: 59 I.C. 445 P.C.

time, but his suit was thrown out by the court on the ground that the transfer of 1890 was not an alienation, but a surrender made in pursuance of an intention which led to the transaction of 1870, and that, therefore, the mother's death gave the plaintiff no right to question its propriety.[1]

2517. Since there is nothing in the Transfer of Property Act requiring that a surrender should be made in writing, it follows that a surrender need not be in writing, though, if it is once reduced to writing, it would require to be registered in accordance with the general provisions of S. 17 (*b*) of the Registration Act.

Alienation voidable.

344. An alienation of property, whether purporting to be for value or otherwise, is voidable at the instance of a reversioner and not void.[2]

2518. Analogous Law.—An improper alienation by the heiress can only be questioned by the reversioner affected thereby, and by no other person, has long been held,[3] following the view that the heiress is the owner and not a mere trustee of the estate, and that the curb upon her power of alienation is in the interest of the reversioner, who alone can complain of any prejudice to his rights. The reversioner may protect himself from an improper alienation by giving notice of his objection to the alienee, in which case, however, it will not affect a subsequent transferee without notice, who will be bound by a decree declaratory of the reversioner's right as unaffected by the alienation. The reversioner, again, may take his chance by suing to eject the alienee, on the widow's death, as provided in Art. 141 of the Limitation Act, in which case, his suit will, in itself, be evidence of his election.[4]

Alienation of whole estate with consent of all reversioners.

345. (1) An alienation, whether for value or otherwise, of the whole of the estate, made with the consent, express or implied, of the general body of the presumptive male reversioners, and, in special cases, of as many of them as is reasonably possible, is conclusive as against the next reversioner.[5]

Alienation with the presumptive reversioner's consent.

(2) An alienation, purporting to be for legal necessity, or for the benefit of the estate, made to another with the consent of the presumptive male reversioner, shall be presumed to have been so made against the next reversioner, unless the latter proves the contrary:[6]

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(1) *Sureya Rao* v. *Suryanarayana*, 41 M. L. J. 208; *Maru* v. *Hanso*, 48 A. 485.

(2) *Modhu Sudan* v. *Rooke*, 25 C. 1 P.C. *Bijoy Gopal* v. *Krishna*, 34 C. 329 (333) P.C.; *Ramgowda* v. *Bhau Saheb*, 52 B. 1 (7) P.C.; *Rangasami* v. *Nachiappa*, 42 M. 523 (538) P.C.

(3) *Modhu Sudan* v. *Rooke*, 25 C. 1 P.C.; *Bijoy Gopal* v. *Krishna*, 34 C. 329 (333) P.C.; *Ramgowda* v. *Bhau Saheb*, 52 B. 1 (7) P.C.; *Kesheo Prasad (Maharaja)* v. *Chandrika*, 2 Pat. 217; *Jabedali* v. *Prasanna Kumar*, 27 C. W.N. 433: (1923) C. 423: *Bahadur Singh* v. *Sultan Husain*, (1922) O. 171.

(4) *Bijoy Gopal* v. *Krishna*, 34 C. 329 P.C.

(5) *Manjaya* v. *Seshagiri*, 49 B. 187; *Debi Prasad* v. *Golap Bhagat*, 40 C. 721 (753) F.B., dissenting from *Pulin Chandra* v. *Bholai Mandal*, 35 C. 939 (in which presumption was held to be irrebuttable) approving *Hemichunder* v *Sarnamoyi*, 22 C. 354.

(6) *Debi Prasad* v. *Golap Bhagat*, 40 C. 721 (753) F.B., approved in *Rangasami* v. *Nachiappa*, 42 M. 523 (534, 536) P.C.

Consent Binds Representatives.

Provided that the son, or other personal representative, and all members of the family, of which the person consenting was then the manager, shall be bound by his consent.[1]

Illustrations.

(*a*) *A*, a widow, gifts the whole of her husband's estate inherited by her to a stranger *B*, with the consent of the bulk of the then presumptive reversioners. On *A's* death, her next reversioner, *C*, seeks to eject *B* on the ground that *A's* alienation was unsupported by legal necessity, and that *B's* consent did not affect him. *B's* consent binds *C*.

(*b*) *A*, widow of *B*, with the assent of his brother, sells her estate to her brother *C* who redeems a mortgage created by *B*. *D*, a distant cousin of *B's* takes no action during his lifetime. On *A's* death, the estate vests in *D*. It is for the court to decide whether *D's* laches did not amount to acquiescence in the propriety of the sale.

(*c*) *A*, widow of *B* sells her whole estate to a stranger, *C*, to defray the expenses of the marriage of *B's* daughter, *D*. *B's* sister, the then presumptive reversioner, consents to the sale. On *A's* death, the estate vests in *B's* distant cousin, *E*, who sues to eject *C*. *C* pleads his sale good as supported by the next reversioner *D*. *D's* consent is of no avail, since *D*, being a female, could not, by her consent, raise any presumption of the necessity of the sale to *C*.

(*d*) *A*, widow of *B*, makes a gift of her whole estate to her brother *C*, with the consent of *B's* brother, *D*. A distant cousin of *B's* protests against the gift. On *A's* death, the estate vests in *D*. *D* is entitled to avoid the gift.

(*e*) *A* gifts a part of her inherited estate to *B* with the consent of *B's* brother *C*. On *A's* death, the estate vests in *C's* son *D*, who seeks to avoid the gift. *D* cannot do so, since *C's* consent binds him.

2519. Analogous Law.—As will be presently seen, vague though this branch of the law is, and still in a fluid state of formation, owing to its uncertainty and insufficiency, which calls for the intervention of the Legislature, since judicial expansion has reached its limits, and has failed to define precisely the extent of the heiress's power of alienation, and the reversioner's control over it, still the rules emerging from the case law have become sufficiently concrete to be capable of succinct enunciation.

The extent of the right of alienation of a woman, inheriting to a male, depends upon the nature of her estate. At one time it was suggested that, in the case of the widow, she held it as a mere trustee for her husband's heirs, and that, as such, she had no right of her own therein. But this extreme view was soon abandoned in favour of that now held that the widow takes the estate as an heir and as an owner, though her ownership is qualified by reason of her sexual disability to inherit such estate as her *stridhan*, entailing the result that, being a life-owner, she is necessarily precluded from alienating it for purposes other than those which Hindu Law regards as necessary or proper, which may be proved or presumed from the fact, that her reversioners, interested in the expectancy, assent to, or permit, the alienation. Now, it is clear that if the whole estate had vested in the widow and the body of reversioners for the time being, then their mere consent would suffice to convey an absolute estate in the alienee irrespective of whether the alienation was

(1) *Ramgowda* v. *Bhau Saheb*, 52 B. 1 P.C., affirming O.A. *Bhau Saheb* v. *Ramgauda*, 25 Bom.L.R. 818: 76 I.C. 937; *Rengan* v. *Palaniyandi*, 56 M.L.J. 66: (1928) M. 1101; *Bhagwan Singh* v. *Ujagar Singh*, (1928) P.C. 20: *Babu Singh* v. *Rameshwar*, 7 Luck. 360: (1932) O. 90 (95).

for value or necessity, but since so long as the widow is alive her reversioners have only a *spes successionis*, it follows that she and they together are equally incompetent to prescribe for a higher title than they themselves possess in the estate.[1] At the same time, their concurrence must count for something, and it is obviously equitable that they must be held bound by their consent. But consent to what? Any alienation, even if it be a gift, unsupported by consideration, or necessity? After wavering between the two views the courts have, it seems, now become reconciled to that stated in the section. There remained the question of its effect upon the next reversioner as to which the cases have latterly adopted the rule, also stated in the section.

2520. **Alienation with Reversioner's Consent.**—The rules formulated in this section have, only recently, emerged out of a chaos of cases which, in the absence of any textual authority, and faced with the statutory doctrine of estoppel, gave scope for the enunciation of dicta from which a somewhat hurried retreat became necessary when the true conditions governing restraint upon alienations rendered strict adhesion to the narrow doctrine almost impossible. Stripped of questions more to less ancillary the confusion seems to have centred round two points: (*a*) the limits of alienation with consent, and (*b*) the extent of the consenting authority. As to the first, inspite of certain *dicta* to the contrary, the prevailing view till recently was that apart from surrender to the next presumptive reversioner the alienor could not prescribe for a larger title than what she herself possessed in the estate except where her alienation was made for legal necessity or benefit to the estate and that the consent to such alienation whether of the next presumptive reversioner, or of the community of all reversioners could not, apart from necessity, convey an absolute title in favour of the alienee, thus excluding the possibility of an alienation without necessity, temporal or spiritual. In this view, consent merely created a presumption of necessity which was not conclusive. Even within these limits, the question of consent remained: who could give a valid consent to raise such presumption—the next presumptive reversioner, or the general body of heirs, and in either case, could the consent be deemed free if the consenting party had himself received a benefit therefrom? The narrowest doctrine provided for such sublime altruism was to make any alienation itself impossible. It gave the alienee no protection from the fact of consent and he had to rest his title upon the sheet anchor of necessity. It is true that if he could rope in all the reversioners he had some measure of security but it was by no means long lived, since other reversioners were sure to spring out of the loins of their consenting forbears, and as they claimed the reversion in their own right, the alienee had but a poor security, since his armour stood to be penetrated by an afterborn son of a father, who, it may be, had indicted his assent to an alienation by the widow or other limited female owner. An alienee would pay but little for so insecure a title and, in the end, his title rested upon uncertainties against which he had no redress.

The logical evolution of the present rule was foreseen as far back as 1856, when the late Supreme Court of Bengal who held that, as the widow was at any time entitled to relinquish her estate in favour of the next presumptive reversioner, there was no reason why she should not

(1) *Rangasami* v. *Nachiappa*, 42 M. v. *Golap Bhagat*, 40 C. 721 F.B. 523 (534) P.C.; approving *Debi Prasad*

alien it in favour of his nominee. If the rule had rested here it would not have aroused the controversy it did, on account of the interplay of other doctrines, in which the quality of her estate itself became a subject of re-examination; which led, in its train, to the re-examination of the whole question of her relation with the reversioner. The earliest view that the widow inheriting to her husband held her heritage as a trust for her husband's heirs was the first to be combated by the Privy Council who held the estate as her own, held in her own right, unlimited as to its enjoyment by it and only limited as regards her power of alienation. This led to the deduction that the estate which she conveyed to the reversioner was a surrender and not relinquishment which she was entitled to make only by parting with it as a whole or almost so. Surrender then became distinct from alienation and the two became subject to principles wide apart which in their train became a prolific source of conflicting deductions upon which the several courts, and the courts among themselves, became sharply divided.

Historical Retrospect.

2521. The root cause of this uncertainty and conflict was the decisions of the Privy Council who were reluctant to state the law more precisely than what they were compelled to by the immediate exigency of the cases they had to decide. But, even in so doing, they did not, at times, remember the distinction between a gift and an alienation for value, nor did they advert to the precise meaning of the term "heirs" the effect of whose consent they were considering. For example, while in some cases they upheld a gift by the widow because it was made with the consent of her "heirs"[1] in other cases they called for the consent of the general body of heirs[2] and treated it as no more than evidence of property.[3] The whole question was examined in great detail in a case decided in 1918 in which Lord Dunedin referred to "different currents of judicial opinion, and, as in this case, and some others, the actual differences in judicial determination,"[4] and set out what he conceived to be the result of the decided cases in the following words:—

(1) An alienation by a widow of her deceased husband's estate, held by her, may be validated, if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, and not a device to divide the estate with reversioner.

(2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde*, and the alienee does not prove inquiry on his part, and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be

(1) *Rany Sremuty* v. *Rani Koond*, 4 M.I.A. 292 (319, 320); *Bajrangi* v. *Manokarnika*, 30 A. 1 (17-21) P.C.

(2) *Raj Lukhee* v. *Gokool Chunder*, 13 M.I.A. 209 (228); *Rangasami* v. *Nachiappa*, 42 M. 523 (534-536) P.C.; *Varjiram* v. *Ghelji*, 5 B. 563; followed in *Vinayak* v. *Govind*, 25 B. 129; *Radha Shyam* v. *Jog Ram*, 17 C. 896; *Ram Phal* v. *Tula Kuari*, 6 A. 116.

(3) *Collector of Masulipatam* v. *Venkata*, 8 M. I. A. 529; *Raj Lakhee* v. *Kokool Chunder*, 13 M.I.A. 209; *Bijoy Gopal* v. *Girindranath*, 41 C. 793 P.C.; *Hari Kishen* v. *Kashi Pershad*, 42 C. 876 (886, 887) P.C.; *Rangasami* v. *Nachiappa*, 42 M. 523 (534-536) P. C.

(4) *Rangasami* v. *Nachiappa*, 42 M. 523 (531) P.C.

held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one.[1]

2522. Consent binds the heirs.—The principle of the rule that a consent by a presumptive reversioner not only binds his son and descendants, but all those who were joint with him at the time[2] was settled as far back as 1856, in a case decided by the late Supreme Court of Bengal in which Sir James Colville, C.J., said: "that a consent to the widow's disposition given by a reversionary heir, who afterwards dies in her lifetime, is binding on his immediate descendants. Such a rule seems to be reasonable and convenient, since otherwise, every disposition by a widow would be in certain circumstances voidable, and he could hardly ever make a good title to the property. But it cannot, I think, be put generally on the doctrines of estoppel, since the sons or other descendants of the deceased reversioner claim not through him, or as the representatives of his interest, but as the nearest collateral heirs of the person from whom the widow inherited then living."[3] This view has since been affirmed by the Privy Council[4] whose decision leaves no doubt that the consent of the presumptive reversioner binds his sons and personal representatives as well as the members of the family of which he was then the manager, and it creates a presumption of propriety against the next reversioner though there is no privity between them.[5]

Cl. 2, Proviso.

In some cases the disability to contest such alienation is spoken of as arising out of the doctrine of estoppel[6] but the rule appears to be one of wider equity and convenience and would operate even though the condition essential to constitute a statutory estoppel was wanting[7] These cases leave no doubt that, in order to bind the next reversioner, the consenting party must be the presumptive—not a remote—reversioner, and that as he is disqualified from unravelling the transaction, so is the next reversioner. The reversioner may consent or he might equally ratify an alienation after it is made.[8] In one case, however, the Privy Council held that in order to be operative the reversioner must have become *in titulo* to reduce the estate to possession[9] but their later view appears to be that, though a reversioner, having a mere *spes successionis*, is precluded from transferring his own contingent interest, but that does not preclude him from consenting to a transfer by the female owner.[10]

346. (1) It is sufficient if the consent, as is referred to in sections 344 and 345 is express or implied, and it may be given contemporaneously with or subsequently to the alienation.

Meaning of consent.

(1) *Rangasami* v. *Nachiappa*, 42 M. 523 (536) P. C.

(2) *Bhagwan Singh* v. *Ujagar Singh*, (1928) P.C. 20.

(3) *Jadomoney* v. *S. Mookarjee and Co.*, (1856) 1 Boulnois, 120 (135): 3 I. D. (O.S.) 72 (81).

(4) *Rangowda* v. *Bhau Saheb*, 52 B. 1 (7, 8) P.C.; affirming O.A. *Bhau Saheb* v. *Ramgawad*, 25 Bom.L.R. 818: 76 I. C. 937.

(5) *Debi Prosad* v. *Golap Bhagat*, 40 C. 721 (782) F.B.; *Trilochun* v. *Umesh Chunder*, 7 C.L.R. 571; *Raja Bullubh* v. *Oomesh Chunder*, 5 C. 44.

(6) *Basappa* v. *Fakirappa*, 46 B. 292 (301).

(7) *Ramakottayya* v. *Viraraghavayya*, 52 M. 556 (562) F. B.; *Akkawa* v. *Sayad Khan*, 51 B. 475 (486) F. B., following *Basappa* v. *Faikrappa*, 46 B. 292.

(8) *Bajrangi* v. *Manokarnika*, 30 A. 1 (21) P.C.

(9) *Rangasami* v. *Nachiappa*, 42 M. 523 (538, 539) P.C.

(10) *Ramgowda* v. *Bhau Saheb*, 52 B. 1 P.C.

(2) A consent so given is not rendered invalid by reason of the fact that the person consenting had himself received a benefit from the transaction:

Provided that no consent shall be deemed to be valid:

(*a*) if it is given without full knowledge of the nature and effect of the transaction;

(*b*) if it is given or obtained collusively or fraudulently with intent to defeat the claims of a future reversioner; or

(*c*) if it is not given in good faith with intent to confirm the transaction.

***Explanation.*—A reversioner may be debarred though he may not be estopped by the operation of the doctrine of estoppel.**

Illustrations.

(*a*) *A*, a widow, gifts her inherited estate to *B*, in which *C* afterwards acquiesces. On the succession opening, *C* seeks to set aside the alienation on the ground that his consent given later could not validate an alienation already made, and that, in any case, since *B*, being a volunteer, was in no way damnified by his consent, it did not suffice to estop him from ejecting *B*. *C* cannot eject *B* since his ratification of the alienation in favour of *B* had the same legal effect as if he had previously given his consent, and as to estoppel *C's* disability arose from his conduct independent of the rule of estoppel.

(*b*) *A*, a widow divides her estate into three portions, one of which she gifts to her brother *B* to which *C*, the then presumptive reversioner, in consideration of the portion being given to him, consents, the remaining third *A* retains for her life. On *A's* death *D* the next reversioner seeks to eject both *B* and *C*, on the ground that *C's* consent was collusive. *D* is entitled to set aside the arrangement under which *B* and *C* had divided the inheritance.

2523. Consent and Ratification.—The consent requisite to create the presumption or to validate the transfer, may be express or implied, and given at the time of the transfer, or the same may be ratified by any subsequent act or acquiescence: *omnis ratihabitio retrotrahitur et mandato priori acquiparatur.*[1] The question of consent is one of fact and one which depends upon the circumstances of each case. Such consent may be given by the reversioner joining in the conveyance as a consenting party,[2] or he may execute an independent consent deed,[3] or by attesting the deed, noting thereon that he approved of the transfer[4] or by other evidence showing that the reversioner, being aware of the transfer, had either consented to, or acquiesced in it. Where the next reversioner is a minor, consent for him may be given by his guardian.[5]

The mere fact that the reversioner has attested the deed is held by the Privy Council to be no proof of consent, since it is no proof that the attestor knew of the contents of the deed.[6] And even if he did, and had, in fact, joined in the alienation, it would not, it is said, estop him

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(1) "A subsequent ratification (or confirmation) has a retrospective effect and is equivalent to a prior command"—cited and followed in *Bajrangi* v. *Manokarnika*, 30 A. 1 (21) P.C.; *Narayana* v. *Rama*, 38 M. 396 (402).

(2) *Kissen Geer* v. *Busgeet Roy*, 14 W. R. 379.

(3) *Mohan Lal* v. *Siromonee*, 2 B.S.R. 401; *Bajrangi* v. *Manokarnika*, 30 A. 1 P.C.

(4) *Madhu Sudan* v. *Mohendra*, 2 Boul. 40; *Anantoo* v. *Ram Rup*, 87 I.C. 315: (1925) A. 692.

(5) *Suleman* v. *Perichevla*, 86 I.C. (M.) 195: (1925) M. 670 is not *contra*, being decided upon its own facts.

(6) *Hari Kishen* v. *Kashi Pershad*, 42 C. 876 P.C.; *Banga Chandra* v. *Jagat Kishore*, 44 C. 186 (199) P.C.

afterwards from disputing its validity.[1] But as their Lordships pointed out, while, as a rule, the reversioner's election to hold the deed good could be effective only after he became *in titulo* to reduce the estate to possession and knew of the alienation, still "something might be done even before that time which amounted to an actual election to hold the deed good."[2] In that case, not only the person consenting would be bound by his own consent, but even those after-born, who claimed through him, would be bound.[3] In this view, the presumptive reversioner is bound by his consent, even though given before the succession had opened.[4] And even if the presumptive reversioner be a female, she would be bound by her consent and precluded from challenging the validity of the transaction, on the ground of election.[5] The fact is that the law of estoppel is a rule of general law, and if its conditions are fulfilled, the reversioner or no reversioner both are equally bound by it.

2524. Intelligent Consent.—Since the reversioner's consent dispenses with the proof of legal necessity, it follows that, in order to have that effect, his consent must be given after full knowledge of the facts and an intelligent appreciation of its nature and effect upon his own right. A person who is too young[6] or too old[7] to appreciate the nature and effect of his consent, is naturally out of the question. So, the Privy Council said: "In order to raise such a presumption, the consent of the deceased's kindred to his widow's or daughter's alienation, must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect."[8]

Clause (3).

This case, then, shows that the presumption arising under the rules is only one which the court may make, due regard being had to all the circumstances of the case, and that where it appears that the executant was a pardanashin, and the consenting reversioner a man just come of age and not free to form an independent judgment, it will refuse to act on the presumption and call upon the alienee to establish his case by proof of legal necessity. As their Lordships observed in another case: "When a stringent equity, arising out of an alleged consent by the reversioner, is sought to be enforced against them, such consent must be established by positive evidence that, upon an intelligent understanding of the nature of the dealings, they concurred in binding their interest, and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony."[9]

2525. In this case, the estate of one Shyamlal Singh was inherited by his widow Nawab Kumari, who mortgaged them, by two deeds, to one

(1) *Swaminatha* v. *Swaminath*, 99 I.C. 772: (1927) M. 458; *contra* in *Puran Das* v. *Duli Chand*, 96 I.C. 668: (1926) A. 684. *Thakur Prasad* v. *Mt. Dipa*, 10 Pat. 352.

(2) *Rangaswami* v. *Nachiappa*, 42 M. 523 (538, 539) P.C.

(3) *Ib.*, p. 538.

(4) *Gur Narain* v. *Sheolal*, 46 C. 566 P.C.; *Basappa* v. *Fakirappa*, 46 B. 292; *Akkava* v. *Sayadkhan*, 51 B. 475 F.B.; *Mahadeo* v. *Mata Prasad*, 44 A. 44; *Feteh Singh* v. *Thakur Rukmini*, 45 A. 339; dissented from in *Rajagopalachariar* v. *Sami Reddi*, 50 M.L.J. 221: 93 I.C. 49 (51, 52): (1926) M. 517.

(5) *Akkava* v. *Sayadkhan*, 51 B. 475 F.B.

(6) *Sham Sundar* v. *Achan Kuar*, 17 A. 125, O.A.: 21 A. 71 P.C.

(7) *Deputy Commissioner* v. *Anseri*, 9 O.C. 104 (An alienation by a widow aged 40, with the consent of the next reversioner aged 85, held to be worth nothing).

(8) *Achan Kuar* v. *Thakurdas*, 17 A. 125, affirmed O.A. *Sham Sunder* v. *Achan Kunwar*, 21 A. 71 (80, 81) P.C.; *Hari Kishen* v. *Kashi Pershad*, 42 C. 876 (886) P.C.

(9) *Hari Kishen* v. *Kashi Pershad*, 42 C. 876 (886) P.C.

Bhagat, who obtained a decree, in execution of which he purchased them. The plaintiffs, who were Shyamlal's brother's son and, as such, Nawab Kumari's reversioners, sued the mortgagee-purchaser for possession of the properties, on the ground that the mortgagor had no right to alien them beyond her own lifetime. The defence was legal necessity and consent by the reversioners. As to the latter, the only fact relied on was that some of Shyamlal's nephews had purchased the stamp and wrote out the mortgagor Nawab Kumari's name and that two of them were attesting witnesses to the deed. But the nearest reversioner at the time was Shyamlal's brother Raghubir, and the acts of the nephews were held to be insufficient to create the presumption of legal necessity, as there was no act done by the nephews, from which their intelligent concurrence could be inferred.[1] But the case would probably have been differently decided, if the nephews had been the next reversioners.

2526. Value of Recitals.—Recitals in deeds are by themselves not sufficient evidence of legal necessity, though they are evidence as between the parties to the conveyance and those who claim under them. If they remain unchallenged, for a long time, by persons whose interest is adversely affected by them, they would furnish evidence, upon which the court may find the fact as more consistent with probability.[2] Such was the case of one Brij Narain, who died childless in 1845, leaving him surviving his two widows *G* and *J*. *G* died in June, 1890 and *J* in 1902. During their lives they disposed of all the properties inherited by them from their husbands, by deeds executed at intervals, which all contained recitals of facts, which, if true, justified the sales. On the death of *J*, the plaintiff, a remote reversioner, sued for possession of the estate, challenging the sales, two of which he had himself attested, as supported by legal necessity, of which the recitals were the only material evidence. Referring to them, the Lord Chancellor said: "But in such a case as the present, their Lordships do not think that these recitals can be disregarded, nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time, or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts. But as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant facts have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction, perfectly honest

(1) *Hari Kishen* v. *Kashi Pershad*, 42 C. 876 (885) P.C.

(2) *Banga Chandra* v. *Jagat Kishore*, 44 C. 186 (196) P.C.

and legitimate when it took place, would ultimately be incapable of justification, merely owing to the passage of time."[1]

2527. Bona Fide Consent.—Again, the consent to be given must be *bona fide* consent, that is to say, consent given with the object of validating a transfer as supported by legal necessity. The fact that the reversioner receives a consideration for so doing, does not invalidate his consent, though it may affect his *bona fides* and weaken the presumption, otherwise arising, as to the legality of the transfer.[2] And so far as the consenting reversioner is concerned, he will be estopped.[3] But a consent given or obtained by collusion or fraud, in order to validate a transaction otherwise invalid or unsupported by legal necessity, is of no effect, and would not support the transaction, even though consented to by the next reversioner.[4] Since it is not the law that consent takes the place of legal necessity, but is only evidence of its existence, and if it appears or is shown that it did not exist, the presumption arising as to its existence, can no longer alter the fact.

Next reversioner when transferee.

2528. From the fact that consent of the next reversioner raises a presumption of legal necessity, it follows that such consent must be to an alienation made to some one other than the consenting reversioner himself. If the transfer is made in his favour, he cannot, of course, consent to the propriety of a transfer in his own favour; he must, therefore, either prove legal necessity or surrender, and in the latter case, the alienation will be subject to the special rule governing it.[5] (§ **343.**)

Power cannot be delegated.

2529. The power of the next reversioner to consent to a transfer is personal to him, and cannot be delegated by him to his executor.[6]

2530. Gift Excluded.—Since consent is merely presumptive evidence of legal necessity, it follows that consent cannot validate a transfer which is not supported plainly by legal necessity,[7] or which is in favour of the next reversioner and does not amount to the acceleration of inheritance.[8] Consequently, a gift by the widow, though consented to by the next reversioner, cannot convey an absolute estate,[9] unless the gift itself is supported by legal necessity. Such, for example, is the gift on the occasion of the daughter's marriage, which, as already stated, is supported by law as conducive to the spiritual benefit of the father, and would then be good, if consented to by the joint body of reversioners.[10]

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(1) *Banga Chandra* v. *Jagat Kishore*, 44 C. 186 (196) P.C.

(2) *Bajrangi* v. *Mankoarnika*, 30 A. 1. P.C.; *Gangappa* v. *Subbu*, 6 M.L.T. 260.

(3) *Muthuveera* v. *Vythilinga*, 32 M. 206.

(4) *Kolondaya* v. *Vedamutu*, 19 M. 337.

(5) *Kudappa* v. *Rongala*, 86 I.C. 4: (1925) M. 384.

(6) *Hayes* v. *Harendra*, 31 C. 698 (702).

(7) *Tukaram* v. *Yesu*, 55 B. 46.

(8) *Rangasami* v. *Nachiappa*, 42 M. 523 P.C.: 50 I.C. 498; *Bhawani* v. *Chait Ram*, 39 A. 1 P.C.; *Ramphal* v. *Tula Kuari*, 6 A. 116; *Bakhtavar* v. *Bhagvana*, 32 A. 176; *Abdulla* v. *Ram Lal*, 34 A. 129; *Raja Dei* v. *Umed Singh*, 34 A. 207; *Parvati* v. *Dayabahai*, 44 M. 488; *Hunsraj* v. *Moghibai*, 7 Bom.L.R. 622; *Ananda* v. *Indra*, 12 C.W.N. 49; *Drigpal* v. *Harihar*, 24 O.C. 245: 64 I.C. 80.

(9) *Rangasami* v. *Nachiappa*, 42 M. 523 P.C.: 50 I.C. 498; *Ismail* v. *Jagannath*, 19 I.C. (A.) 258; *Abdulla* v. *Ram Lal*, 34 A. 129: 8 A.L.J. 1318; *Beni Madho* v. *Jagat Singh*, 10 A.L.J. 33; *Pilu* v. *Babaji*, 34 B. 165.

(10) *Abhesang* v. *Raisang*, 14 Bom.L.R. 602.

Consent cannot legalize the creation of an estate unknown to the law. So where the widow and the mother of the owner provided for descent of their estate, on their death, to the natural brothers of the adopted son, and the deed was contented to by the next reversioner, it was held that his consent could not legalize the devolution of the estate in a line different from that prescribed by the law.[1] But in such a case, the consenting reversioner would be personally estopped from questioning the propriety of the gift. So, where a widow made a gift of a portion of her husband's property to her husband's brother's grandson, with the consent of the next reversioner, another brother of her husband, the gift was held valid and such as could not be impeached by the consenting brother.[2]

2531. Consent of Female Reversioner Immaterial.—In order to let in the operation of this rule, the consent must be of the next male reversioner, since females ordinarily take only a limited estate, and they cannot, by their consent, confer an absolute title which, by reason of their sex, they are themselves precluded from taking.[3] This exception applies equally to Bombay, irrespective of the rule that certain females take there an absolute estate.[4] But though the next female neversioner may not consent to a surrender to a remote reversioner, there is nothing to prevent her from joining the heiress in conveying the estate to her own son.[5]

2532. When Next Reversioner a Minor.—It would seem that when the next reversioner is a minor, his consent may be obtained through his guardian,[6] though, in this case, the minor, on attaining majority, may repudiate his guardian's consent.

2533. Alienation Otherwise Valid.—The rule here stated is only a rule of evidence, dispensing with the proof of legal necessity, where it may be presumed from the consent of the next reversioner. But where such consent fails, the transaction may, nevertheless, be good and be upheld by proof of legal necessity *aliunde*. And where it is good, apart from legal necessity, it will be upheld, even though the parties misunderstood their rights. So, where the widow and the mother of the last owner effected a partition, providing for the devolution of their estate, by inheritance on the natural brothers of the son whom the widow had adopted, and this deed was signed by the next reversioner, it was held that the deed was divisible into two parts—that which effected the division of the estate *inter partes* required no consent of the next reversioner and was, therefore, valid without their consent, but that which provided for the descent of the estate, in a line different from that prescribed by law, was a thing which the widow could not do either with or without the reversioner's consent, which, therefore, did not estop him, who could, therefore, recover on his title, as if he had never consented.[7]

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(1) *Rup Narain* v. *Gopal*, 36 C. 780 (797) P.C.

(2) *Basappa* v. *Fakirappa*, 23 Bom.L. R. 1040; *Babu Singh* v. *Rameshwar*, 7 Luck. 360.

(3) *Goolab Singh* v. *Puran Singh*, 14 M.I.A. 176 (199); *Madan Mohan* v. *Puran Mal*, 6 A. 288; *Nobo Kishore* v. *Hari Nath*, 10 C. 1102; *Abinash* v. *Hari Nath*, 32 C. 62; *Bepin Behari* v. *Durga Charan*, 35 C. 1085 (1090); *Waliul Hasan* v. *Gopal*, 6 C.W.N. 905 (908).

(4) *Varjiban* v. *Ghelji*, 5 B. 563. *Vinayak* v. *Govinda*, 25 B. 129.

(5) *Chinnaswami* v. *Appaswami*, 42 M. 25.

(6) *Waliul Hasan* v. *Gopal*, 6 C.W. N. 905; *Chandi* v. *Jangi*, 8 O.C. 21; *Bhogaraju* v. *Adapalli*, 10 M.L.T. 179.

(7) *Rup Narain* v. *Gopal*, 36 C. 780 (797) P.C.

An alienation by a female heir, though not supportable as a surrender, may yet be held binding as a compromise of a claim[1] or as a family settlement. (**S. 173.**).

2534. Estoppel by Consent.—From the fact that consent is evidence of necessity, and even creates a presumption, it is clear that it is strong evidence against the consenting reversioners,[2] and it may amount to an estoppel against them and their legal representatives.[3] The widow entered into an arrangement with her three daughters and their sons, dividing her entire estate among them, and the three daughters acted up to this arrangement for 38 years, after which one of them sued the purchaser of the property from another, on the widow's death, by her right of survivorship. Her claim was decreed by the Subordinate Judge, but it was dismissed on appeal, both the High Court and the Privy Council holding the plaintiff bound by the family arrangement, to which she was a party and which she had not repudiated for so long.[4] A reversioner is not estopped by taking the mortgage of the property from the heiress's donee, since such mortgage is not inconsistent with his reversionary right. As the Privy Council said: "Now, at the time of the mortgage, the plaintiff did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift. Why should he not take all that the mortgagors could give or propose to give? To hold that, by so doing, he barred himself from asserting his own title to part of what was mortgaged, seems to their Lordships a quite unwarranted proposition."[5] In another case, a transfer had been consented to by the then contingent, who afterwards became and claimed as the next reversioner. The transferee pleaded estoppel against him; but the Privy Council held that there was no estoppel, because the transferee must have known that the reversioner had then a mere expectancy and that his joining in the sale could not, therefore, have materially influenced either the vendor's or the vendee's conduct in the matter.[6] The case would, of course, have been different, if the party consenting were then the presumptive reversioner, in which case, not only he but his successors in title would have been bound.[7] So, again, the case is quite different where, on demise of the widow, the reversioner receives rent of a leasehold created by her, in which case, since the acceptance of rent is only compatible with affirmance of the lease, the reversioner cannot afterwards treat it as a nullity.[8]

2535. Equities on Avoidance.—Apart from estoppel, it is obviously equitable that where an alienation was made with the consent of the next reversioner, who received a substantial benefit from the transaction, it is not open to the reversioner or to his descendants to impugn the alienation while retaining the benefit.[9] So, again where a mortgagee, with possession from a widow, spent money in improving the property, and the reversioner

(1) *Suressur* v. *Mohesh*, 20 C.W.N. 142.

(2) *Krishna* v. *Sambasiva*, 11 I.C. 24; *Mata Prasad* v. *Devi Sukhlain*, 58 I.C. (A.) 576; *Bhup Singh* v. *Jhumman Singh*, 44 A. 95.

(3) *Annagouda* v. *Bhausaheb*, 52 B. 1 P.C.; *Babu Singh* v. *Rameshwar*, 7 Luck. 360: (1932) O. 90 (95).

(4) *Haroli* v. *Bhagwan Singh*, 50 I.C. (A.) 812 P.C.

(5) *Rangaswami* v. *Nachiappa*, 42 M. 523 P.C.

(6) *Gur Narain* v. *Sheo Lal*, 46 C. 566 (579) P.C.; *Parvati* v. *Dayabhai*, 44 B. 488.

(7) *Mahadeo* v. *Mata Prasad*, 44 A. 44; *Ramdhin* v. *Mathura Singh*, 10 A. 407; *Shib Chandra* v. *Dub Ken*, 28 C.L.J. 123; *Venkata Row* v. *Tuljaram*, (1917) M.W.N. 80; *Shanmugha* v. *Kayappa*, (1920) M.W.N. 679.

(8) *Jitan* v. *Bhagwan*, 3 Pat.L.J. 780.

(9) *Bhausaheb* v. *Ramgauda*, 25 Bom. L.R. 813: (1923) B. 471.

sued for its recovery, on the death of the widow, the mortgagee was held entitled to remove what he had placed on the property, at his own expense.[1]

347. When an alienation made by an heiress is found to be partially supported by legal necessity or benefit and binding on the reversioner, it may be set aside or upheld in accordance with the rules laid down in section 135, or otherwise as hereinbefore provided.

Alienation for partial necessity.

2536. **Analogous Law.**—The High Courts had for some time disclosed a singular lack of unanimity on the effect of an alienation supported only by partial necessity, till the Privy Council, in 1926, reminded them of their own previous decision of 1874 and re-affirmed it overruling the arithmetical rule into which the courts in India had drifted by treating the validity of such alienation as one of ratio overlooking the other circumstances bearing upon it.[2] In that case, the widow had sold certain property for Rs. 3,500, out of which Rs. 3,000 was supported by legal necessity. On a review of the law on the subject, the Privy Council upheld the sale, holding that the sale, being substantially supported by legal necessity, could not be challenged merely because a small portion of the consideration was not proved to be supported by legal necessity. Their Lordships reiterated this view in another case in which the manager had sold the property for Rs. 43,500, even though the necessity extended to more than Rs. 38,000.[3] The question to be considered in such cases is not one of arithmetical calculation, the real question to be considered is whether the sale itself was justified by necessity, if the purchaser has acted honestly and made due enquiry as to the existence of necessity and whether, having regard to the character of the property, excessive sale could have been avoided. It would manifestly be impossible, and possibly prejudicial to the interest of the estate, if the widow were to be held bound, in every instance, to sell property for exactly the sum required for necessity.[4] So, where the widow permanently leased a tank for a premium of Rs. 174, reserving the annual rent of 8 annas only, to pay off the debt of Rs. 100, the court upheld the lease, holding it was supported by necessity.[5] Even where the necessity did not exceed Rs. 7,775, the court upheld the sale of a house for Rs. 19,500, on the ground that it was not saleable piecemeal.[6] Again, proof that the bulk of the alienation was supported by legal necessity may be evidence that the remainder was also presumably so supported. A mere failure to prove any part of the consideration as supported by necessity, is not necessarily tantamount to proof that it was unsupported by it.[7]

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(1) *Siddappa* v. *Pandurang*, 47 B. 696.

(2) (1926) reported in 1927. *Sri Krishen Das* v. *Nathu Ram*, 49 A. 149 P.C., following *Masitullah* v. *Damodar Prasad*, 48 A. 518 P.C.; *Medal Delavoi* v. *Nainar Tevan*, 27 C.W.N. 365 P.C., overruling *contra* in *Govind Singh* v. *Baldeo Singh*, 25 A. 330; *Ram Dei Kunwar* v. *Alen Jafar*, 27 A. 494, followed in *Niamat Rai* v. *Din Dayal*, (1927) P.C. 121.

(3) *Niamat Rai* v. *Din Dayal*, (1927) P.C. 121.

(4) *Vithu* v. *Mendri*, 5 N.L.R. 172 (176).

(5) *Felaram* v. *Bagalanand*, 14 C.W.N. 895: 6 I.C. 207.

(6) *Balkrishna* v. *Hiralal*, 41 A. 338; *Gokaran* v. *Sham Lal*, 3 L. 426, following *Chatranarayan* v. *Uba Kunwari*, 1 B.L.R. 201; *Felaram* v. *Bagalanand*, 6 I.C. (L.) 207; *Naman Kal* v. *Har Bhagwan*, 2 L. 357; *Kannu* v. *Amirthammal*, 26 I.C. (M.) 418.

(7) *Jai Singh* v. *Darbara Singh*, 6 L. 137 (Three-fourths supported by legal necessity and transfer challenged after 20 years).

Case for Terms.

2537. A case for terms may arise under section 51 of the Transfer of Property Act, to which reference must be made for further information.[1] It may also arise where the alienee, whether purchaser or not, has advanced money which, though supported by necessity, has been alienated for a grossly inadequate consideration or the transaction cannot be upheld or set aside without awarding compensation. The cases on the point present infinite variety, and though they cannot all be reduced to a principle, they are, nevertheless, all intended to thwart transparent injustice.

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(1) *See* 1 Gour's Law of Transfer, (5th Ed.), §§ 892-914.

CHAPTER XXVI.

REVERSIONERS AND THEIR RIGHTS.

2538. Topical Introduction.—Under the English Law of Real Property, "a reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of the estate."[1] It is so called because the land returns to the grantor on the determination of the particular estate. So, if an estate in fee simple be granted to *A* for life, and the remainder to *B*, the estate of *A* is the estate in possession and is called the "particular estate,"[2] and *B's* estate is called a "remainder."[3] But if the grant be to *A* for life, with no subsequent estate to another, the latter continues in the grantor and is called a reversion.[4] The ultimate estate is always an estate in fee simple, and is called a remainder or reversion, as it is granted out or continues in the grantor.[5]

2539. The term "reversioner" is born of Anglo-Indian law. It is not to be found in the Sanskrit texts. The term owes its origin to the close similarity between the rights of a Hindu reversioner and those of the English reversioner or remainderman. Even the Hindu widow was, at one time, spoken of as a life-tenant; but it was soon perceived that she was not a tenant but the owner, and her estate, not a tenancy, because there was no one else in whom the ownership could vest on her estate coming into being. The only person in whom the estate could possibly vest is the reversioner, but his estate was not a vested interest at all, but a mere contingency, and that, therefore, full ownership must remain in the widow whose estate was one of complete ownership qualified by use. These qualifications were partly necessitated by reason of her sex and her presumed incapacity to exercise all the rights of ownership, and partly by a feeling that the natural course of devolution of property was in the male line, and that females, though allowed to come in, did so by sufferance, on whose death the succession should revert to the natural line from which it had become diverted into the female line. This is the doctrine of reverter referred to by the Privy Council,[6] and it explains both the term reversioners as also their rights.

2540. The female heiress being the owner of her inheritance and the reversioner having nothing but a *spes successionis*, this chapter deals with the extent of that interest and of the protective equity to which it is held entitled. The right of the reversioner to protect his reversion is now beyond dispute, but it is a right necessarily limited and should not be extended beyond the necessities of the case. The cases have defined with some particularity, its nature, and scope.

2541. The woman's estate acquired by inheritance or partition being thus limited, those interested in the reversion become naturally interested

(1) Co. Litt., 22 (*b*).
(2) *Ib.*, 143 (*a*).
(3) *Ib.*, 49 (*a*).
(4) *Ib.*, 22 (*b*).
(5) Fearne's Contingent Remainders (9th Ed.), p. 3, note (4); 24 Hals. § 403.
(6) *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 (489) P.C.

in the estate, and it is clear that they are entitled to some protective equity during the continuance of the life-estate, as they are entitled to the definition of their right upon its determination.

348. Reversioner is a person (whether a male or a female) who is entitled to inherit an estate on determination of the intervening life-estate vested in a female heir to the full owner last deceased.

Reversioner defined.

2542. **Who is a Reversioner.**—The term "reversioner" is directly borrowed from the English Law of Real Property, under which the fee simple tenant granting a life-estate retains its reversion or return to himself.[1] Under Hindu law, a woman is merely an impediment in the natural law of succession. Except in the case of stridhan and certain female heirs in the Bombay Presidency,[2] a woman inheriting to a male takes only a life-estate, and on her death succession reverts to the natural heirs of the owner as if the owner had just then died. Till then, the inheritance is regarded as in suspense, and real inheritance takes effect only on the determination of such estate. It will be seen, that so long as such estates intervene the reversioner has no estate at all, but a mere *spes successionis*, a mere possibility or hope of succession which ripens into a vested estate on the determination of the intervening estate by the death, surrender or re-marriage of the female heir, if her re-marriage entails forfeiture of her estate.

All such heirs, near or remote, of the deceased full owner, are, during the period of their suspense, called reversioners, the one nearest to him in the line of heirs being his presumptive nearest or next reversioner, others who would inherit on failure of the next reversioner being merely presumable or remote reversioner.

2543. **Reversioner's Title.**—The reversioner, suing for possession has, in the first instance, to prove his title. This does not mean that he must categorically disprove the existence of all possible heirs, for such a thing would, in many cases, be impossible. All that he can be expected to prove, and must prove, is that, to the best of his knowledge, there are no nearer heirs. It is then for those who claim on the ground of nearer kinship, to come forward and establish their relationship.[3]

349. (1) So long as the estate is vested in the heiress, the interest of her reversioners to succeed to it is a mere *spes successionis* and is incapable of being the subject of any contract, surrender or disposal.[4]

Reversioner's interest.

(2) One reversioner does not derive his title from another but all derive their title equally from the last full owner.[5]

2544. **Analogous Law.**—In proving his status as next reversioner, he has to prove two propositions, one positive, and another negative. The first that he is a reversioner and the second that there is no one nearer to him. This he can only prove reasonably, because it is impossible to prove an absolute negative.[6]

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(1) Lat. *revertor re* back *verto* to turn —turning back coming back, return.
(2) S. 326 *ante*.
(3) *Javitri* v. *Gendan Singh*, 25 A.L.J. 500: 102 I.C. 167.
(4) *Amrit Narayan* v. *Gaya Singh*, 45 C. 590 (603) P.C.
(5) *See* § 2550.
(6) *Raghunath* v. *Kamsalya*, (1937) M. 607 (608).

2545. From the fact that the heiress takes a full estate, though her interest is qualified, it follows that the estate vests in her for the time being,[1] and that the heirs expectant on her demise have no vested interest but merely a hope of succession.[2] This interest is a mere chance dependent upon their being alive at her death. As such, it is not property and possesses none of its attributes. It cannot be transferred[3] or be the subject of any contract or devise.

As the Privy Council observed: "A Hindu reversioner has no right or interest *in praesenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere *spes successionis*. His guardian, if he happened to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto,"[4] from which it necessarily follows, that he cannot, by the surrender of his expectancy is favour of the life-tenant, block out the interests of any who might, at the date of the widow's death, be the next reversioner,[5] though he would be himself personally estopped by his conduct, and be bound by his previous act, if he turns out to be the next reversioner when the succession opens.[6] But a person, consenting to a surrender as reversioner to *A*, may challenge it as reversioner to *B*. Such was the case of one Motilal who had consented to the surrender of his uncle Sashi Mohan's estate by the latter's mother, which he afterwards challenged as reversioner to Sashi Mohan's two brothers, since deceased.[7] It is thus clear that where the reversioner is a minor, his guardian cannot enter into any binding agreement with respect to his reversion on his behalf. But if the reversioner is adult and contracts with reference to his future rights, his contract would be indistinguishable from any other contract relating to future property, and though there cannot be a disposal of a non-existent property, there is nothing to prevent its being made the subject of a valid contract, though, being a contract relating to a contingency, it has to be closely watched.

2546. So, where the widow entered into an arrangement with the nearest reversioner for the time being, by which she conveyed part of her widow's estate to the reversioner, and he, in turn, purported to give her an absolute estate in the remainder, it was held to be an arrangement

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(1) *Janaki* v. *Narayanasami*, 39 M. 634 (637) P.C.; *Sham Sundar* v. *Achhankuar*, 21 A. 71 P.C.

(2) *Nund Kishore* v. *Ram Tewary*, 29 C. 355 P.C.; *Janaki* v. *Narayanasami*, 39 M. 634 (637) P.C.; *Manickam* v. *Ramalinga*, 29 M. 120; *Chiruvolu* v. *Chiruvolu*, 29 M. 390 (399); *Muthuveeru* v. *Vythilinga*, 32 M. 206; *Bhogaraju* v. *Adepalli*, 35 M. 560; *Jagannath* v. *Dibho*, 31 A. 53; *Hargawan* v. *Baijnath*, 32 A. 88; *Gumanan* v. *Jehangira*, 40 A. 518; *Parvati* v. *Govind*, 13 N.L.R. 188: 42 I. C. 837.

(3) S. 6 (*a*), Transfer of Property Act; *Nund Kishore* v. *Kanee Ram*, 29 C. 355; *Amrit Narain* v. *Gayasingh*, 45 C. 590 P.C.; *Manickam* v. *Ramalinga*, 29 M. 120; *Pindiprolu* v. *Pindiprolu*, 30 M. 486 (489); *Ramaswami* v. *Ramaswami*, 30 M. 255 (262, 263); *Midnapore Zemindari Co.* v. *Appayasami*, 41 M. 749 (776, 777); *contra* in *Rychurn* v. *Peary Monee*, Marsh 622, is no longer sound.

(4) *Amrit Narayan* v. *Gaya Singh*, 45 C. 590 (603) P.C.; *Ananda* v. *Gour Mohan*, 48 C. 536; *Bhagwati* v. *Jardan*, 2 Pat.L.J. 471; 62 I.C. 933.

(5) *Ganga Bai* v. *Hari*, 45 B. 1167 (1169).

(6) *Shunmugha* v. *Koveppa*, (1920) M.W.N. 679: 60 I.C. 635.

(7) *Motilal* v. *Eastern Mortgage, etc., Co.*, 61 I.C. 486 (487) P.C.: 25 C.W.N. 265.

which did not bind the actual reversioner.[1] The reversioner has nothing to renounce[2] and nothing that could be seized in execution of a decree against him.[3] In case of insolvency, it is not his property which could be made available to his creditors,[4] and an agreement amongst presumptive reversioners to divide it when it fell in, would at least be an agreement to divide future property, which will convey no title, *in praesenti*,[5] though, being an agreement, it might be specifically enforced upon the estate becoming vested in the reversioner. So, where the owner died, leaving his estate to his widow *B*, who devised it to her daughter *C*, who, in her turn, devised it to her husband *D*. On *B's* death, her reversioner *E* claimed the estate, but subsequently compromised his claim with *D*, by which *D* gave certain lands to *E* in consideration of *E's* withdrawing his claim to the rest of the property. On a suit by *B's* mortgagee against *D*, the question arose whether *D* was a legatee or assignee of the reversion. In the former case, he would take subject to the mortgage. In the latter, he would not take any rights. It was held that *D's* compromise with *E* may amount to *E's* waiver of his reversionary right, but it could not amount to an assignment clothing *D* with the status of a reversioner, and that, therefore, *D* could not dispute the validity of *B's* mortgage on the ground of legal necessity.[6]

2547. So, in another case, on the death of a widow, disputes having arisen between the husband's agnate and the daughter as to the latter's right to succeed to her mother, the question was referred to arbitrators, before whom the daughter's husband, purporting to act as well for her as for her infant son *A*, came to an agreement with the agnates, by which some movable property and two small fractional shares of certain lands, which stood in her and her mother's name, were given to her, and all right to the immovable property of her father was abandoned in favour of the agnates. Her infant son was absolutely ignored in the compromise. The arbitrators passed an award on the basis of this compromise, and later on, a decree was passed upon the basis of the award in spite of the daughter's opposition. In a suit by *A*, *inter alia* for a declaration that the compromise did not bind him, it was held that the bargaining of the reversionary interest of *A*, in the guise of an arbitration, was ineffective and null and void; that even if *A* had an existing right in the property, his father had no power to enter into an arrangement which wiped out all the interest of the minor without consideration; and that as the conditions which make a decree against a Hindu widow binding on the estate, were wanting in this case, the decree against A's mother did not bind him.[7]

2548. But here the reversioner was a minor, and reference to arbitration on his behalf a subterfuge to divide the estate. But if the rever-

(1) *Meenatchi* v. *Rajam*, 11 M.L.J. 335.

(2) *Dhoorjeti* v. *Dhoorjeti*, 30 M. 201; *Amrit Narayan* v. *Gaya Singh*, 45 C. 590 (603) P.C.

(3) S. 90 (*m*), C. P. C. In *Chidambaramma* v. *Hussainamma*, 39 M. 565, it was held that sale for her husband's debts, made against the widow, binds the reversionary interest; but it does not justify its seizure and sale as such.

(4) S. 2 (*e*), Provincial Insolvency Act (III of 1907); S. 52, Presidency Towns Insolvency Act (III of 1909); *Babu* v. *Krishnarav*, 21 B. 319.

(5) *Amrit Narayan* v. *Gaya Singh*, 45 C. 590 P.C.

(6) *Ramaswami* v. *Ramaswami*, 30 M. 255 (262, 263); *Pindiprolu* v. *Pindiprolu*, 30 M. 486 (492); *Midnapore Zemindari Co.* v. *Appayaswami*, 41 M. 743 (776, 777).

(7) *Ram Shankar* v. *Ganesh*, 29 A. 451 (455, 456), following *Mewa Kunwar* v. *Hulas Kunwar*, L.R. 1 A. 157 (166); *Gobind* v. *Abdul Qayyan*, 25 A. 546 (575); *Bache* v. *Dharam Das*, 28 A. 352.

sioner is an adult and contracts with reference to his future rights, his contract would be indistinguishable from any other contract relating to future property, and though there cannot be a disposal of non-existent property, there is nothing to prevent its being made the subject of a valid contract, though, being a contract relating to a contingency, it has to be closely watched.

2549. But in another case, the compromise related to an impartible estate. The owner had bequeathed it absolutely to his widow, whom his reversioner sued for possession, on the ground that the will was invalid, but compromised his suit with the widow acknowledging her as the "gaddinashin" for her life, and on her death, the estate should fall on the reversioner or any of his representatives then alive. The reversioner predeceased the widow, and his own widow sued for possession of the estate on the strength of the compromise, which the court decreed, though no attempt was made to distinguish its earlier cases.[1] But the decision was apparently based on the rule that a compromise of a disputed claim bound the parties and their representatives. In other words, while a reversionary right cannot be transferred, surrendered or renounced, it is an interest which may support a compromise. This was the *ratio decidendi* of another case, in which the court upheld a similar compromise, on the ground that it amounted to an arrangement which is not the transfer of an expectancy prohibited by S. 6 (*a*) of the Transfer of Property Act, but the settlement by parties litigating on doubtful rights, in which the parties define their respective interests, and which the courts upheld for the sake of preserving the peace of families.[2] But the case is different, where the effect of the reversioner's compromise of his suit with the widow was to settle the succession for the future, which the court could not uphold. Such was the case of the plaintiff, a remote reversioner who, having sued the widow and her daughter for possession of the estate, on the ground of waste, compromised his suit with them, it being agreed that the widow was to retain the estate for life, and on her death, the plaintiff and the daughter were to divide it equally. Subsequently to this compromise, the widow and the daughter made a gift of the entire estate to the daughter's son, whereupon the plaintiff sued them to avoid the gift made in contravention of the compromise, which, he maintained, amounted to a family settlement binding upon all reversioners, but the court threw out his suit, holding that the plaintiff could not, in the guise of a compromise, settle the succession, and that as the two females were entitled to surrender their limited estates to the next reversioner, their gift to him had the effect of accelerating his succession, which could not be avoided by the plaintiff.[3]

Clause (2).

2550. Reversioner's Title.—It is settled law that one reversioner does not derive title from another but from the last full owner,[4] so that, strictly speaking, he is

(1) *Harpal Singh* v. *Lekhraj*, 30 A. 406.

(2) *Olati* v. *Varadarajulu*, 31 M. 474; *Hardei* v. *Bhagwan Singh*, 50 I.C. (A.) 812 P.C.

(3) *Sita Bai* v. *Ram Deo*, 57 I.C. (A.) 712.

(4) *Chhidu* v. *Durga*, 9 M.I.A. 543; *Jumoona* v. *Bamasoonderi*, 1 C. 289 P.C.; *Ishri Datt* v. *Hansbutti*, 10 C. 324 P.C.; *Bhagwanta* v. *Sukhi*, 22 A. 33 P.B.; *Chhidu* v. *Durga*, *ib.* 382; *Shib Shankar* v. *Soni Ram*, 32 A. 33 (41), affirmed O.A. *Soni Ram* v. *Kanhaya Lal*, 35 A. 227 P.C.; *Chhidu Singh* v. *Durga Dei*, 32 A. 382; *Risal Singh* v. *Balwant Singh*, 40 A. 593 P.C.; *Sakyabani* v. *Bhavani*, 27 M. 588; *Govinda* v. *Thayammal*, 28 M. 57; *Chiruvolu* v. *Chiruvolu*, 29 M. 390 (408) F.B.; *Chinnaveerayya* v. *Lakshmi*, 22 M.L.J. 375; *Abinash* v. *Hari Nath*, 32 C. 62 (71); *Manokarni* v.

not bound by any representation made by, or any adjudication had between, the last limited owner, and one reversioner and another,[1] though, on the last point, the courts have extended the principle of *res judicata* as equally extending to the reversioner, but as pointed out before, it is so on the ground of public convenience. But the same rule cannot apply to admissions, as to which the Privy Council observed: "According to Indian law, the claimants of 1847 were but expectant heirs, with a *spes successionis*. The appellants claim is their own right as heirs of Mohar when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by contracts made by every person through whom he traces his descent."[2] Reversioners do not even derive their title through their parents, and any statement made by the latter is not, therefore, admissible against them.[3] "There is no privity of estate between one reversioner and another, as such, and, therefore, an act or omission by one reversioner cannot bind another reversioner who does not claim through him."[4] Consequently, the fact that one has consented to an alienation by the heiress, does not estop another from contesting it.

But, in Madras, it has been held that the daughter's sons inherit jointly, under the ordinary law of inheritance, with the right of survivorship so that there is the right of representation *inter se*.[5]

A reversioner (though not presumptive) has been held entitled to redeem property sold in execution of a decree against the female heir as provided in Or. XXI, R. 89 of the Code of Civil Procedure.[6] But the same laxity is not permissible in one claiming estate, since it is incumbent on a plaintiff, seeking to succeed to property as a reversioner, affirmatively to establish the particular relationship which he puts forward, and he is also bound to satisfy the court that, to the best of his knowledge, there are no nearer heirs, but he cannot be expected to do anything more, and it is for those who claim that their kinship is nearer, to prove their relationship.[7]

2551. Limits of His Rights.—The act which entitles the reversioner to sue, must be an act which endangers the reversion directly and immediately, and not indirectly and remotely.

As already stated, an act in the nature of a preparation does not give the reversioner the right to sue. So, it has been held that a reversioner cannot sue for a declaration that an authority to adopt given by the husband is forged,[8] or that a will made by the heiress bequeathing her estate to certain persons, purporting to be in pursuance of an oral direction given

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Haripada, 18 C.W.N. 718 P.C.; *Govinda* v. *Thayammal*, 28 M. 57; *Veerayya* v. *Gangamma*, 36 M. 570 *contra Chhagan Ram* v. *Motigavri*, 14 B. 572, overruled by the contrary held by the Privy Council.

(1) S. 43, Specific Relief Act; *Venkatanarayana* v. *Subbammal*, 38 M. 406 (411, 412) P.C.

(2) *Bahadur Singh* v. *Mohar Singh*, 22 A. 95 (107, 108).

(3) *Manokarni* v. *Haripada*, 18 C.W.N. 718 P.C., 24 I.C. 311; *Govinda* v. *Thayammal*, 28 M. 57; *Veerayya* v. *Gangamma*, 36 M. 570.

(4) *Govinda* v. *Thayammal*, 28 M. 57 (60, 61).

(5) *Krishnier* v. *Lakshmiammal*, 18 M. L.J. 275, following *Venkayyamma* v. *Venkata*, 25 M. 678 P.C., explained in *Veerayya* v. *Gangamma*, 36 M. 570 (573, 574).

(6) *Pankhabati* v. *Nonihal Singh*, 18 C.W.N. 778: 21 I.C. 207; *Brij Kishore* v. *Pratap Narain*, 4 Pat.L.J. 369: 51 I. C. 359.

(7) S. 3, Evidence Act; *Javitri* v. *Genden Singh*, 48 A. 779; *Badri* v. *Saraswati*, 103 I.C. 329: (1927) A. 687; *Rama Row* v. *Kuttiya*, 40 M. 654, followed in *Pandu* v. *Abdul Kadar*, 56 I. C. (N.) 693 (695).

(8) *Sreepada* v. *Sreepada*, 35 M. 592, *contra* in *Bobha* v. *Bobha*, 35 M.L.J. 144, followed in *Surayya* v. *Annapurnamma*, 42 M. 699.

by her husband, is invalid,[1] since such a will might be cancelled by her at any time. But, though this was conceded,[2] the Privy Council did not reverse the decisions of the two courts below, concurrently made in the deliberate exercise of a discretion entrusted to them by law. But such cases illustrate the practice of the Privy Council. They do not affect the rule.

2552. Estoppel of Reversioner.—But though the reversioner cannot contract or compromise his right, and no right accrues by reason of such contract or compromise, it may create an estoppel, which may preclude the reversioner from making a claim by reason of his contract or compromise, and if he was a party to a *bona fide* family arrangement, it may not only bind him, but also his heirs.[3] Here the right arises not by reason of the contract, but by reason of the family arrangement or estoppel, the principle of which is one of universal application (**S. 176**). So, where a person (*A*) governed by the Mitakshara, died leaving a widow and a daughter surviving her. The widow's right to succeed was disputed by the widows of his predeceased brothers and by the plaintiff Kanhailal, his sister's son, who claimed to have been adopted by one of those widows to her deceased husband. In 1892, a compromise, to which all the four ladies and the plaintiff were parties, was made under which all the ladies took each a fourth of the estate. The plaintiff took nothing immediately, but his adoption and his right to succeed to his mother were recognised, whose share he later os acquired by relinquishment. Then *A's* daughter died, leaving a daughter of her own, and later still, *A's* widow died. The plaintiff and his brother Ramsarup claimed, as next reversioners, the whole of *A's* property allotted to the three ladies, other than his own mother, by the compromise. His suit was dismissed by the courts in India, but he pressed his claim on the ground that his reversionary right could not be the subject of a valid compromise. But their Lordships threw out his appeal, holding the plaintiff estopped by his own act in 1892 in inducing the ladies to a compromise, in which his mother, and by her relinquishment, he himself, obtained a fourth of the estate, and secured from them the recognition of his adoption.[4] In another case, the widow had executed three deeds on the same day, by one of which she gifted certain properties to her brother; by another she sold half of certain lands to one Annagowda (*A*) who was then her next reversioner, the other half of these lands being sold to her own son-in-law. On her death, he became her next reversioner and survived her by six years, but did not question her alienations to her own relations. On his death, however, his son and grandson sued to dispossess the alienees, but both the High Court and the Privy Council threw out their suit, holding that the three transactions must be treated as parts of the same arrangement and the two transfers must, therefore, be presumed to have been made with *A's* consent by which his heirs were bound.[5] It has been held in other cases that there was nothing in law to prevent a Hindu widow in possession making a valid gift of the estate with the consent of a reversioner who

(1) *Umrao* v. *Badri*, 37 A. 422; *Ram Bhajan* v. *Gurucharan*, 1 A.L.J. 468.

(2) *Jaipal* v. *Indar Bahadur*, 26 A. 238 (243) P.C.

(3) *See* Ch. on "Family Arrangements."

(4) *Kanhai Lal* v. *Brij Lal*, 40 A. 487 P.C., distinguishing *Somsuddin* v. *Abdul Hussein*, 31 B. 165. To the same effect, *Shunmugha* v. *Koyappa*, (1920) M.W.N. 679: 60 I.C. 635; *Mahadeo* v. *Mata Prasad*, 44 A. 44; *Fateh Singh* v. *Thakur Rukmini*, 45 A. 339 F.B.; *Mati Shah* v. *Gandharp Singh*, 48 A. 637, distinguishing *Ananda Mohan* v. *Gour Mohan*, 48 C. 536.

(5) *Ramagowda* v. *Bhausaheb*, 52 B. 1 P.C.

would be personally bound by his act,[1] though other reversioners remained free to question it.[2] In one case, it was held that in the case of a compromise, in which the reversioner takes part and from which he receives some bentfit is exceptional, the doctrine of estoppel could not be extended to compel the reversioner to make good his transfer on his subsequently coming into possession of the property, because "the principle plainly has no application where the contract of assignment refers to property which has been expressly rendered inalienable by the Legislature."[3] But this view appears to be erroneous, because the Legislature has not made the property inalienable, but declared it inalienable by one who has no interest therein beyond a mere contingency. If, therefore, the principle underlying S. 43 of the Transfer of Property Act is inapplicable, it is not because the property is inalienable but because the reversioner's erroneous representation of his authority to transfer such property is futile, since the transferee must know that he has no interest therein beyond a mere possibility of succession and that such possibility cannot be transferred. It, therefore, follows that a contract of transfer it *in futuro* is equally void and unenforceable, though it may give the party wronged a right to compensation.

2553. Spes Successionis.—A mere *spes successionis* cannot be transferred. Such is the chance of an expectant reversionary heir to an estate in possession of a female heiress. Even under the English Law, a mere chance of succeeding to an estate was a bare possibility incapable of assignment[4] though equity would enforce a contract to convey the estate when it fell in.[5] But the Privy Council have held "that the principle of English Law which allows a subsequently acquired interest to feed, as it is said, the estoppel, does not apply to Hindu conveyances."[6] It is equally clear that the same rule would hold good in cases governed by S. 6 (*a*) of the Transfer of Property Act, since that clause prohibits the sale of a chance directly, it equally prohibits its sale circuitously and moreover such a contract, if permitted, would defeat the law, namely, S. 6 (*a*), and would, therefore, be illegal within the meaning of S. 23 of the Contract Act. The result then is that such expectancies can neither be sold[7] nor their sale contracted for.[8]

Clause (2).

No declaration by reversioner of his rights.

350. A reversioner cannot maintain a suit merely to obtain a declaration of his reversionary rights.[9]

(1) *Diveah* v. *Koond Luta*, 4 M.I.A. 292; *Hoolab Singh* v. *Kurum Singh*, 14 M.I.A. 176; *Bullubh Sen* v. *Omesh Chunder*, 5 C. 44; *Sia Dasi* v. *Gur Sahai*, 3 A. 362, cited and followed in *Ramadhin* v. *Mathura*, 10 A. 407 (410); *Rangaswami* v. *Nachiappa*, 42 M. 523 (538) P. C.; *Binda Kuar* v. *Lalita Prasad*, (1936) P.C. 304.

(2) *Ramphal* v. *Tulakuari*, 6 A. 116; *Bakhtawar* v. *Bhagwana*, 32 A. 176.

(3) *Anandi Mohan* v. *Gour Mohan*, 48 C. 536; *Jotilal* v. *Benimadho*, (1937) Pat. 280.

(4) *Jones* v. *Roe*, 3 T.R. 88 (93): 100 E.R. 470; In re *Parsons. Stockley* v. *Parsons*, 45 Ch. D. 51.

(5) *Wiseman* v. *Roper*, 1 Ch. R. 158; *Wethered* v. *Wethered*, 2 Sm. 183: 57 E. R. 757; *Lyde* v. *Mynn*, 1 Myl. & K. 683: 39 E.R. 839; *contra, per* Lord Eldon, in *Carleton* v. *Leighton*, 3 Mer. 667: 36 E. R. 255; *Harwood* v. *Tooks*, 2 Sim. 192: 57 E.R. 761.

(6) *Doolichund* v. *Brojo Bhookun*, 6 C.L.R. 528 (532, 533) P.C. s. c., 10 C.L.R. 61 P.C., cited and followed in *Ram Nirunjun* v. *Prayag*, 8 C. 138 (144).

(7) *Dhoorjeti* v. *Dhoorjeti*, 30 M. 201.

(8) *Sham Sundar* v. *Acchan Kunwar*, 21 A. 71 (79, 80) (P.C.); *Sumsuddin* v. *Abdul*, 31 B. 165; *Dhoorjeti* v. *Dhoorjeti*, 30 M. 201; *Kokaralapudi* v. *Kannukuri*, 28 M.L.J. 660: 39 I.C. 241 *contra Gitabai* v. *Balaji*, 17 B. 232 (decided before the Transfer of Property Act was extended to Bombay); *Nasirul Haq* v. *Fyazul Rahman*, 33 A. 457; *Ram Nirunjun* v. *Prayag*, 8 C. 138.

(9) *Janaki* v. *Narayanasami*, 39 M. 634 P.C.; *Sheoparsan* v. *Ramnadhan*, 43 C. 694 P.C.

2554. **Analogous Law.**—Since a reversionary right is a mere contingency, it follows that a reversioner cannot sue for a declaration of his contingency, that is to say, sue that he would be entitled to succeed the heiress in case he should survive her,—a contingency which may never happen and about which the courts will, therefore, entertain no suit. In one case, the presumptive reversioner sued to restrain waste, failing which he applied for the declaration of his right as such reversioner, but the Privy Council threw out his suit, holding "that it was impossible to predicate at this moment who is the next reversionary heir of the deceased proprietor. If a court of a law proceeded to make any declaration of right upon that subject, such a declaration would be subject to being rendered valueless by the development of events. It would not, after events had developed, be even of authority in regulating or declaring the rights of the present respondents as against any other claimant to the character of reversionary heir. Accordingly, a declaration of right, granted at the present state, would appear to be stamped with something in the nature of futility."[1] But, though a reversioner is not entitled to establish his own *status* as a reversion, there is nothing to prevent his establishing his relationship to the last owner if it is challenged. And as will be presently seen, he is entitled to restrain waste.

Prevention of waste improper act and alienation.

351 (1) Subject to the provisions of the next section, the presumptive reversioner is entitled to restrain the heiress, or her alienee from committing waste or any other act endangering the reversion,[2] and such right may be exercised by a contingent reversioner if the act complained of is alleged to have been done in collusion with the presumptive reversioner.[3]

(2) And he may restrain her by an injunction from making an improper alienation and obtain a declaration that any alienation made by her would be voidable by him on her death;[4]

(3) He may obtain a declaration that an alleged adoption prejudicing his reversion is invalid or never in fact took place;[5]

(4) He may oppose the grant of probate to the limited owner if prejudicial to the reversion.[6]

2555. **Analogous Law.**—The principle of this section has received statutory recognition in illustrations to cls. (*e*) and (*f*) of the Specific Relief Act.[7] The right of the reversioner to restrain waste is not a personal right nor is his suit a personal suit, which he is entitled to maintain as the presupmtive reversioner. As observed by the Privy Council: "A reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognized by the court of Law as having a right to demand that the estate

(1) *Janaki* v. *Narayanasami*, 39 M. 634 (637, 638) P.C. To the same effect, *Sheo Parsan* v. *Ramnadhan*, 43 C. 694 (705) P.C.; *Kathama Nachiar* v. *Dorasinga*, 6 M.H.C.R. 310, affirmed O.A. 23 W.R. 314 (322) P.C., followed; *Parvati* v. *Govind*, 13 N.L.R. 187: 42 I. C. 337; *Mankuar* v. *Lachman*, (1886) A. W.N. 244; *contra* in *Manmatha* v. *Rohilli*, 27 A. 408; *Udu* v. *Durgadin*, 5 O.C. 360, must be treated as overruled by the Privy Council.

(2) *Janaki* v. *Narayanasami*, 39 M. 634.

(3) *Anand Kunwar* v. *Court of Wards*, 6 C. 764 P.C.

(4) S. 42, *Ill.* (*d*), (*e*), Sp. Relief Act; *Suraj Mal* v. *Nathwa*, 45 A. 255.

(5) S. 42, *Ill* (*f*), Sp. Relief Act; *Venkatanarayana* v. *Subbammal*, 38 M. 406 P.C.

(6) *Khettramoni* v. *Shyama Churene*, 21 C. 539.

(7) *Obala* v. *Kandasami*, 47 M. 181 (189) P.C.

be kept free from waste and free from danger during its enjoyment by the widow or other owner for life. But the reversionary heir thus appealing to the court, truly for the conservation and just administration of the property, does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion . . . . This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation, attempted during the enjoyment of the life-estates, would necessarily be premature, and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the persons to whom, as reversioners, it shall ultimately, and at the proper time, be determined that the estate shall go."[1]

It is thus settled that the reversioner's suit is a representative suit, and even as such, it is permitted, because the waste committed might otherwise be past remedy, and as regards an improper alienation, all evidence might disappear if a suit were only permitted when the succession opened. As the Privy Council observed in another case: "Suits of that kind form a very special class, and have been entertained by the courts *ex necessitatie rei*. It seems, however, to their Lordships that if such a suit as that is brought, it must be brought by the reversioner with that object, and for that purpose alone, and that the question to be discussed is solely between him and the widow, that he cannot, by bringing such a suit, get, as between him and a third party, an adjudication of title which he could not get without it."[2]

Clause (1).

2556. Waste.—It is not every waste that the reversioner may sue to restrain. As previously remarked, the heiress does not hold the estate in trust for him. She holds it in her own right, subject only to the rights of the reversioner. What those rights are, have by now become well settled, and the general principle was thus stated by the Privy Council: "It is not sufficient to say that there is one person entitled in possession, and another entitled in remainder, in order to induce the court to interfere to take the property out of the hands of the individual who is in possession of it; but it is necessary to show that there is danger to the property, from the mode in which the party in possession is dealing with it, in which case, and in such case only, the court will interfere."[3] In an old case, Peel, C. J., said: "The Hindu female is rather in the position of an heir taking by descent, until a contingency happens. . . . Therefore, a bill filed by the presumptive heir in succession, against the immediate owner who has succeeded by inheritance, must show some case approaching to spoliation, which must enable the court to see that there is probable ground for apprehending that unless an injunction be granted to restrain some threatened or a pending act, ultimate loss to the heirs, who may come into possession by a succession, will ensue. It is not enough to make out that some gift has been made, or some disposition taken place, or that such is about to be made or to take place, which the law would not support. The estate of the female owner, her own personal estate might be large and adequate to repay ten times over the alleged spoliation, and there might not be the remotest prospect of loss, and the thing alienated might have no specific peculiar value."[4]

(1) *Janaki* v. *Narayanaswami*, 39 M. 634 (637, 638) P.C.

(2) *Kathama Nachiar* v. *Dorasingha*, L.R. 2 I.A. 169 (191), cited in *Sheo Parsan* v. *Ramnadhan*, 43 C. 694 (705) P.C.

(3) *Hurryydoss* v. *Upoornath*, 6 M.I.A. 433.

(4) *Hurrydoss* v. *Dossee*, 2 Tay. & B. 279 (287): 2 I.D. (O.S.) 744 (749).

So, in an old case, the Privy Council formulated the following rules as applicable to limited owners: "That when the husband dies intestate and without issue, the widow is entitled to the absolute possession of the property descended from him, to enjoy it during her lifetime, and to dispose of it under certain restriction, that the extent and limit of her power of disposing of the property are not definable in the abstract, but must be left to depend upon the circumstances of the disposition when made, and must be consistent with the law regulating such disposition. That there is no distinction in this respect between the movable and immovable property descended."[1]

2557. The term "waste," as used in this connexion, must, then, be understood to mean spoliation, or such damage as endangers the inheritance. The reversioner has no right to rush into court upon a mere possibility. So, where the widow had received Rs. 55,466 in the Company's 5 per cent. rupee paper, which they redeemed at par, paying to the widow the amount in cash, which she retained for about three months awaiting an advantageous investment, whereupon the reversioner rushed into court with an allegation that the widow intended to misappropriate the amount, upon which the widow denied that the reversioner had any cause of action. The latter, however, argued that it was an ordinary *quia timet* suit, and the Privy Council held that the mere retention of money did not make the heiress guilty of *devastavit* or showed the slightest intention of committing waste, and that, therefore, the reversioner's suit was rightly thrown out.[2] But the case was held to be different where, upon acquisition of land, the widow withdrew the compensation awarded in respect thereof, under the pretence of absolute ownership, which she would not have been allowed, if she had disclosed her limited title. The court, thereupon, ordered her to invest the money as required by S. 32 of the Land Acquisition Act.[3] The two classes of cases are distinguishable. She had the right to the money in the one case, which she had not in the other. Where she has the right, "the general apprehension of danger that, if personal property be entrusted to a Hindu widow, there is every probability of its being parted with, and if so, it may not be recovered, is an element which cannot be allowed to exist or considered consistently with the views of the Privy Council case last cited.[4] The danger must be established, not as a matter of probable speculation, but as one of reasonable certainty to the satisfaction of the court.[5] It must be remembered that the reversioner is merely entitled to his reversion, in whatever state he finds it. The heiress is not the guarantor of its state or condition. As owner, she is entitled to make full beneficial use of it, by opening mines and working them,[6] and tapping other new sources of income. She is not to be deterred from any compassionate regard to the rights of her successor, from making full use of her property. Nor can the successor complain of its deterioration as waste, or its exhaustion as a danger to his reversion, since both these contingencies are fully consistent with the prudent exercise of the rights of ownership.

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(1) *Per* Lord Gifford in *Cossinauth* v. *Hurrosoondery*, Morton 85: 1 I.D. (O.S.) 945.

(2) *Hurry Doss* v. *Upoornath*, 6 M.I.A. 433 (447).

(3) *Mrinalini* v. *Abinash*, 11 C.L.J. 533: 6 I.C. 508; *Gambirmal* v. *Hamirmal*, 21 B. 747; *contra* in *Bindoo* v. *Bolie*, 1 W.R. 125.

(4) *Cassinath* v. *Hurrosoondery*, Morton 85: 1 I.D. (O.S.) 945.

(5) *Biswanath* v. *Khantomini*, 6 B.L.R. 747 (751); *Lalla Futtah Bahadur* v. *Mt. Pranputter*, 13 B.S.D.A. 382 (383): 15 I.D. (O.S.) 760.

(6) *Subba* v. *Changalamma*, 22 M. 126.

2558. Improper Alienation.—The reversioner is entitled to restrain the heiress from alienating her property for unauthorized purposes. The reversioner may either restrain her, as well as her intended alienee, from proceeding with the alienation, or if the alienation is made, he may obtain a declaration that it was made without legal necessity and was, therefore, void beyond the heiress's lifetime.[1] But no improper alienation made by the widow would justify her dispossession, as appears to have been, perhaps too readily, assumed in a case of a Mahomedan life-tenant of Bhag property;[2] though, on the other hand, if the widow is found to have grossly mismanaged the estate, reducing its value to the next reversioner, the latter would be entitled to press on her dispossession by the estate being placed in the hands of a Receiver for management.[3] In one such case, in which the senior widow's management showed "reckless dealing with property and the lavish expenditure of large sums for purposes which afford no satisfactory explanation," the Privy Council justified the appointment of a Receiver to manage the estate, as made in the exercise of a very sound discretion.[4]

Clause (2).

2559. Disputing Adoption.—The reversioner is entitled to dispute the factum and validity of an adoption made by the heiress, because it has the effect of defeating his rights,[5] but a reversioner cannot sue for a declaration that an authority to adopt given by the husband is fabricated, for it is only a preparation and does not of itself affect the reversionary right.[6]

Clause (3).

2560. Limitation.—The reversioner's suit "to obtain a declaration that an alleged adoption is invalid, or never in fact took place," must be instituted within six years of "when the alleged adoption becomes known to the plaintiff."[7] Now, what is the meaning of the term "plaintiff" in this connexion? Does it mean the actual suitor, or does it include all those who would be bound by the result of the suit? It has been so held in Madras where six years after an alleged adoption, a remote reversioner sued for the declaration of its invalidity, and supported his suit on the ground that the next reversioner, though he knew of the invalidity, had collusively and fraudulently failed to challenge it. But the court held that since such a suit is a representative suit, limitation against the next reversioner ran against the whole body of reversioners, and on the next reversioner being barred, the other reversioners became also barred, and that fraud did not stop time running or gave a new cause of action to

(1) S. 42, Ills. (*d*) & (*e*) Specific Relief Act; *Raj Lukhee* v. *Gokool Chunder*, 13 M.I.A. 209; *Goolab Singh* v. *Kurun Singh*, 14 M.I.A. 176; *Mahomed Shamsool Hooda* v. *Shewuk Ram*, 22 W.R. 609 P.C.; *Jumoona* v. *Bamasoonderi*, 1 C. 289 P.C.; *Radha* v. *Kour*, (1864) W.R. 148; *Gobindamani* v. *Shamlal*, (1864) W.R. 153 F.B.; *Oodey Chand* v. *Dhummonee*, 3 W.R. 183; *Chuttar* v. *Wooma*, 8 W.R. 273; *Grose* v. *Amritamayi*, 12 W.R. 13; *Bistobehari* v. *Baijnath*, 16 W.R. 49; *Chottoo* v. *Jemab*, 6 C. 198; *Hemchunder* v. *Surnamoyi*, 22 C. 354; *Balbhadra* v. *Bhawani*, 34 C. 853; *Suraj Mal* v. *Nathwa*, 45 A. 255.

(2) *Ahmed* v. *Bai Bibi*, 44 B. 727 (732).

(3) *Garuva* v. *Ragammal*, 8 M.L.J. 189: 7 I.C. 534.

(4) *Jiji Amba* (Ex parte), 13 M. 390 (394) P.C.

(5) *Anand Kunwar* v. *Court of Wards*, 6 C. 764 P.C., approving *Bhikji* v. *Jagannath*, 10 B.H.C.R. 351; *Kattama* v. *Dorasingha*, 23 W.R. 314 P.C.; *Venkatanarayana* v. *Subhammal*, 38 M. 406 P.C.; *Ramabai* v. *Rangrav*, (1894) B.P.J. 287: 19 B. 614; *Anyaba* v. *Daji*, 20 B. 202; *Gyanendro* v. *Lobongomunjori*, 11 C.L.R. 198; *contra* in *Juggendronath* v. *Rajendronath*, 7 W.R. 357, overruled by the Privy Council in *Anand Kunwar* v. *Court of Wards*, 6 C. 764 P.C.

(6) *Sreepada* v. *Sreepada*, 35 M. 592.

(7) Art. 118, Limitation Act (IX of 1908).

the other reversioners.[1] But this view, though not solitary, has not remained uncontested,[2] and it has been held (it is submitted, rightly) that when the article speaks of the "plaintiff," it uses it in its ordinary sense, and the nature of his suit does not restrict the prescribed period, the starting point for which is his own knowledge and not that of some one else, though the latter might be equally or even more interested in contesting the adoption; but since one reversioner does not derive his right to sue from or through another, he is in no way prejudiced by the latter's failure to contest an adoption. In any case, the failure of a suit under this article, does not entail its failure under Art. 125, though a Bombay Full Bench have so held.[3]

Clause (4).

2561. "May oppose probate."—On a similar principle, a reversioner has been held entitled to oppose the grant of a probate, and he may intervene when he finds the heiress guilty of collusion between herself, and her adopted son. So, where one *S*, alleging himself to be the adopted son of *M*, applied for the probate of the will of his father, and the latter's widow had first opposed the application, but subsequently withdrew her opposition to probate being granted to *S*, whereupon her daughter *K* applied for leave to oppose the grant of probate, on the ground that her mother had colluded with the applicant, which the court granted, holding that the daughter was the reversioner and her rights would be prejudiced by the grant of a probate without hearing her, as the widow, who had at first contested the application, had withdrawn her opposition, and there was reason to suspect that she was in collusion with the son.[4]

2562. Administration Suit.—A reversioner is entitled to sue for administration if a dedication of property, to which a reversioner is entitled, is not valid, and the executors proposed to carry out the dedication. Such an act would entitle the reversioner to seek the assistance of the court and have the property properly administered.[5] When a person, entitled to an estate in reversion, brings a suit against the executors of the estate for administration, and subsequent thereto, an administration suit is brought by one executor against his co-executors and a consent decree obtained without the reversioner being made a party, such a reversioner will be entitled to bring his suit to a hearing, and upon a second decree being made, the accounts and enquiries, already had under the first decree, will be adopted in the second decree, so far as can be applied, and the reversioner who brought the first suit will be entitled to the conduct of the proceeding.[6]

Reversioner's suit.

352. (1) A suit to obtain any of the foregoing reliefs must be brought in the first instance by the presumptive reversioner[7] but if owing to his

(1) *Polepeddi* v. *Polepeddi*, 44 M. 218. To the same effect, *Ayyadorai* v. *Solai*, 24 M. 405.

(2) S. 2 (8), Limitation Act (IX of 1908); *Govinda* v. *Thyammal*, 14 M.L.J. 209; *Abinash* v. *Harinath*, 32 C. 62; *Bhagwanta* v. *Sukhi*, 22 A. 33 F.B.

(3) *Shrinivas* v. *Hanmant*, 24 B. 260 F.B.

(4) *Khettramoni* v. *Shyama Churn*, 21 C. 539.

(5) *Hem Chunder* v. *Sarnamoyi*, 22 C. 354; *Rojomoyee* v. *Troyluckho*, 29 C. 260 (272).

(6) *Rojomoyee* v. *Troylukho*, 29 C. 260 (272, 273), following *Zambaco* v. *Cossavetti*, L.R. 11 Eq. 439; *Mellore* v. *Surre*, 21 Ch. D. 647.

(7) *Raj Lukhee* v. *Gokool Chunder*, 13 M.I.A. 209; *Kooer Goolab Singh* v. *Rao Kurum Singh*, 14 M.I.A. 176 (186); *Jumoona* v. *Gokool*, 1 C. 289 P.C.; *Mata Prasad* v. *Nageshar*, 47 A. 883 (894, 895) P.C.

minority, poverty,[1] collusion, consent, ratification, waiver of his right as reversioner, estoppel or limitation, he is unable or unwilling, without sufficient cause to sue, then[2] it may be brought by the reversioner next to him in succession but in that case the court may join the presumptive reversioner as a party to the suit.[3]

(2) A suit instituted by the presumptive reversioner may, on his death, or otherwise on proof of latches or collusion with the heiress whose acts are impugned, be continued by the next presumable reversioner.[4]

(3) Where the immediate reversioner is a female, the nearest male reversioner may maintain such suit without having to show any of the causes mentioned in clause (1).[5]

(4) Any adjudication made in such suit is *res judicata* as against the heir when the reversion opens.[6]

Clauses (1), (2).

2563. **Analogous Law.**—A suit to enforce what may be called the reversioner's equity set out in the last section, belongs, in the first instance, to the presumptive reversioner. He and he alone is entitled to sue. As the Privy Council observed: "Although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed, if the widow were to die at that moment. They are also of opinion that such suit may be brought by a more distant reversioner, if those nearer in succession are in collusion with the widow or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Appaji* v. *Jagannath Vital*[7] is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow, can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself, by his own act or conduct, from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue.[8] In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would

(1) *Mata Prasad* v. *Nageshar*, 47 A. 883 (895) P.C.

(2) *Anand Kunwar* v. *Court of Wards*, 6 C. 764 P.C.; *Abinash* v. *Harinath*, 32 C. 62 (65).

(3) *Venkatanarayana* v. *Subbammal*, 38 M. 406 (414) P.C.; *Lakshmi* v. *Anantharama*, (1937) M. 699 (703) F.B.

(4) *Anand Kunwar* v. *Court of Wards*, 6 C. 764 P.C.; *Abinash* v. *Harinath*, 32 C. 62 (65).

(5) *Abinash* v. *Harinath*, 32 C. 62 (66); *Ram Yad* v. *Rambihara*, (1919) 54 I.C. (Pat.) 357; *Kandasami* v. *Akkammal*, 13 M. 195; *Balgobind* v. *Ramkumar*, 6 A. 431; *Hanuman* v. *Jofa Kunwar*, (1906) A.W.N. 207; *Lakupati* v. *Rambodh*, 37 A. 350 (352); *Deoki* v. *Jwala Prasad*, 50 A. 678 (683, 684) (left to judicial discretion. *Contra Madari* v. *Malki*, 6 A. 428; *Ishwar Narain* v. *Janki*, 15 A. 182 Female reversioner cannot be ignored; *Viranwali* v. *Kundan Lal*, 9 L. 106 (109, 110) coparcener's suit can be converted into one by a reversioner.

(6) *Katama Nachiar* v. *Raja of Shivagunga*, 9 M.I.A. 539; *Venkatanarayana* v. *Subbammal*, 38 M. 406 P.C.; *Janaki* v. *Narayanasami*, 39 M. 634 P.C.; *Kesho Prasad* v. *Sheo Pergash*, 44 A. 19 (29) F.B.

(7) 10 B.H.C.R. (A.C.) 351.

(8) *Goolab Singh* v. *Kurum Singh*, 14 M.I.A. 176.

probably require the nearest reversioner to be made a party to the suit.[1] "Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just as the relief sought is for their common benefit. On the death, therefore, of the presumptive reversioner, the next presumable reversioner would clearly be entitled to continue the action instituted by the deceased plaintiff, unless there is anything in the processual law of India to preclude him from so doing."[2] Again, "there is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff, or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioner to sue. Apart, therefore, from the question whether the next presumable heir is the legal representative of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights."[3] As such, they are all bound by the result of the suit, whether favourable or unfavourable to them.[4] But if the plaintiff in the previous suit was not a reversioner at all, any decision given therein would not operate as *res judicata* on the real reversioners[5] (§ 2550).

2564. The right of suit belongs to all reversioners, in their order of succession, without regard to sex.[6] So, the daughter may sue during the lifetime of her mother, if her reversionary rights are seriously threatened.[7] So, where the widow abandoned possession of her husband's estate, alleging that her husband was not separate but a member of the joint family, the daughter was entitled to sue, and was put in physical possession of the estate as manager during the widow's lifetime.[8] So, where the daughter was found to have colluded with the widow, the next presumable reversioner was held entitled to sue both.[9] So, where the widow and the plaintiff's father jointly made an alienation, the son was held entitled to maintain the suit for its cancellation, even though his father and not he was the immediate reversioner.[10]

Clause (3).

2565. The existence of an immediate female reversioner, such as the daughter, is no obstacle to the next presumptive male reversioner avoiding an improper alienation, since the one takes only a life-estate, while the other takes an absolute

(1) *Anand Kunwar* v. *Court of Wards*, 6 C. 764 (772, 773) P.C.; *Sita Saran* v. *Jagat*, 49 A. 815: 25 A.L.J. 636: 102 I.C. 296.

(2) *Venkatanarayana* v. *Subbammal*, 38 M. 406 (411) P.C.; *Janaki* v. *Narayanasami*, 39 M. 634 P.C.; *Keshoprasad Singh* v. *Sheo Prasad*, 44 A. 19; affirmed O.A., 46 A. 831 (836) P.C.; *Maha-prasad* v. *Nageswar*, 52 I.A. 398: (1925) P.C. 272; *Challagundla* v. *Mudalli*, 35 M.L.J. 57 (71) F.B.; *Susheela* v. *Bishunpada*, 60 C. 636; *contra* in *Sakhahari* v. *Bhavani*, 27 M. 588; *Chinna* v. *Lakshminarasamma*, 37 M. 406; *Arunachallam* v. *Vellaya*, 23 M.L.J. 719.

(3) *Venkatanarayana* v. *Subbammal*, 38 M. 406 (412, 413).

(4) *Venkatanarayana* v. *Subbammal*, 38 M. 406 P.C.; *Janaki* v. *Narayanasami*, 39 M. 634 (638) P.C.; *Kesho Prasad Singh* v. *Sheo Prasad*, 44 A. 19, affirming O.A. 46 A. 831 (836) P.C.; *Maha Prasad* v. *Nageshar*, 52 I.A. 398: (1925) P.C. 272.

(5) *Kalicharan* v. *Bageshra*, 23 A.L.J. 653: 89 I.C. 374: (1925) A. 585.

(6) Ss. 39, 54, Ill. (*m*), Specific Relief Act (I of 1877); *Gokulananda* v. *Iswar*, 15 Pat. 379.

(7) *Golab* v. *Shib Sahi*, 2 Agra 54.

(8) *Gunesh* v. *Lal Mutee*, 17 W.R. 11.

(9) *Jwala Nath* v. *Kulloo*, 3 Agra 55 F.B.; *Gauri Dat* v. *Guru Sahai*, 2 A. 41.

(10) *Retoo* v. *Lalljee*, 24 W.R. 399.

interest. Moreover, as observed in a case, "that in the case in which, upon the death of a full owner, the estate successively passes through the hands of a series of female heirs, who take only a qualified estate, before the property vests in another full owner, they may rightly be regarded, in the aggregate, as the holders of a limited interest which intervenes between the full ownership of the original owner and the ultimate taker."[1]

2566. It may be also suggested that since such suit is a representative suit, the female owner cannot represent the interest of the male reversioners, who have, therefore, a cause of action of their own, which is unaffected by her intervention.

The contrary was laid down in some earlier cases of the Allahabad Court, where it was held that apart from collusion or connivance, the existence of an intermediate female reversioner was an obstacle to the maintainability of the suit by the next presumptive male reversioner.

But since the suit is a representative suit, a reversioner, entitled, after the death of a tenant for life, to a share in the inheritance, cannot lay claim to any definite share, nor can he sue to set aside a transaction affecting the inheritance, so far only as it would affect his probable share. For instance, suppose he is one of six reversioners complaining of an adoption. He cannot sue only of his one-sixth share and pay court-fee thereon, alleging that he sues only to the extent of his interest.[2] The reversioner cannot oust the heiress because she denies his title,[3] but if she disclaims all interest in the estate, the court may place the reversioner in possession as manager for her lifetime.[4]

The nearest or any other reversioner must, of course, prove his relationship to the last full owner if it is denied, and unless he proves his own title as reversioner entitled to sue, the defendant cannot be called upon to justify her alienation.[5]

Minority.

2567. The minority of the nearest reversioner justifies a reversioner more remote to maintain such suit.[6]

Collusion, Consent and Ratification.

2568. The question of consent has already been examined before. Connected with it is the question of collusion. Collusion implies that the presumptive reversioner had improperly joined with the heiress in destroying the reversion, which enables the remote reversioners to vindicate their rights.[7] So, where the immediate reversioner consented to a

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(1) *Abinash* v. *Harinath*, 32 C. 62 (66); *Narayan* v. *Chengalasuma*, 10 M. 1; *Kandasami* v. *Akkammal*, 13 M. 195; *Raghupati* v. *Tirumalai*, 15 M. 422; *Chunder Koomar* v. *Dwarkanath*, (1859) B.S.D.A. 1623; *Balgobind* v. *Hirumanee*, 2 W.R. 255; *Balgobind* v. *Ram Kumar*, 6 A. 431; *Raja Dei* v. *Umed Singh*, 34 A. 207; *Lakshpati* v. *Rambodh Singh*, 37 A. 350; *Jaint Singh* v. *Gosain*, 16 A.L.J. 493: 46 I.C. 85; *Ramyad* v. *Rambihari*, (1919) 4 Pat.L.J. 734: 54 I.C. 357; *contra* in *Radha Kishen* v. *Bakhtowar*, 1 Agra 1; *Madari* v. *Malki*, 6 A. 428; *Ishwar* v. *Janki*, 15 A. 132; *Booma Sundree* v. *Bama Soondwee*, 10 W.R. 301.

(2) *Keshava* v. *Lakshminarayana*, 6 M. 192.

(3) *Naulakhi* v. *Jai Mangal Singh*, (1885) A.W.N. 279.

(4) *Ganesh* v. *Lalmuthu*, 17 W.R. 11.

(5) *Bhabuti* v. *Khetal Singh*, 21 I.C. 274; *Dalgan* v. *Parsidh*, 11 I.C. 202; *Bhola* v. *Chandi*, 5 I.C. 666; *Rameshwar* v. *Ganpati*, (1936) L. 652.

(6) *Lachmi Narain* v. *Maihro*, (1909) P.W.R. 109: 4 I.C. 957.

(7) *Naikram* v. *Soorujbuns*, (1859) B.S.D.A.B. 891; *Sita Saran* v. *Jagat*, 49 A. 815.

gift by a widow, it did not prevent a remote reversioner from impeaching it.[1] Ratification is a consent given to an act *ex post facto*.

2569. The circumstances in which a remoter reversioner may maintain a suit, have been stated in the section. But a question arises, how is he to satisfy the court that the presumptive reversioner was unable or unwilling to sue?

Where such reversioner has joined in the alienation, it is not difficult to prove his complicity. But in other cases, it is apprehended that this fact need not be proved with the accuracy of a plea. It will suffice if there is a verified declaration against the presumptive reversioner who is impleaded as a party defendant. It will, then, be obvious whether he is interested in upholding the suit or opposing it. If a remote reversioner sues without joining the nearest reversioner,[2] or proving why the nearest reversioner is precluded from maintaining the suit,[3] his suit is liable to be dismissed. So would be the suit instituted by the plaintiff as next reversioner when he was merely a remote reversioner, and there was no allegation of any collusion and the like against them.[4] In such cases, the court may allow an amendment of the plaint, if it is not too late, and would not alter the nature of the suit.[5]

2570. Not only the actual reversioner who consents to a transfer, but his legal representative also, is precluded from maintaining a suit for its cancellation,[6] and where several persons join in a conveyance and convey "the whole and entire property absolutely," it must be taken that they have exercised every power which they possess, and that they have parted with their whole interest, whether in possession or in expectation. Where, therefore, the widow and the immediate next reversioner made such alienation in favour of a third person, the reversioner would be prevented from afterwards avoiding the transfer.[7]

So, a reversioner may ratify a transfer. So, where a tenure granted by the widow was recognized, after her death, by the reversioner, who received rent from the holder of the tenure, such receipt was held to amount to ratification of the tenure, precluding a suit for setting it aside on the ground of the widow's incompetency.[8]

2571. Relief.—The relief admissible in such suit must necessarily depend upon the nature of the claim. If it relates to an adoption, it may challenge its factum or validity, or both. If to an alienation, it may deny its validity on the ground that it was wholly unsupported by necessity. Where it is so, it is open to the court to cancel the alienation altogether[9] or to declare only its partial invalidity.[10] If it is partially supported by necessity, it is open to the court to declare it valid to that extent and

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(1) *Bakhtawar* v. *Bhagwana*, 32 A. 176.

(2) *Rughoobar* v. *Bhekaree*, 22 W.R. 472; *Sita Saran* v. *Jagat*, 49 A. 815: 25 A.L.J. 636: 102 I.C. 296.

(3) *Jhandu* v. *Tarif*, 37 A. 45 P.C.

(4) *Meghu Rai* v. *Ram Khelawan*, 35 A. 326.

(5) *Avula* v. *Avula*, (1913) M.W.N. 383: 18 I.C. 213.

(6) *Rangappa* v. *Kanti*, 31 M. 366 F. B.

(7) *Trilochun* v. *Umesh*, 7 C.L.R. 571.

(8) *Mahesh* v. *Ugrakant*, 24 W.R. 127. As to what is ratification, see *Bejoy* v. *Girendra*, 13 C.W.N. 201: 4 I.C. 513.

(9) S. 39, Specific Relief Act.

(10) *Pramotha* v. *Bhuban*, 25 C.W.N. 585.

charge the sum upon the property of which it may order payment.[1] The uncertainty regarding the person who would be entitled to succeed the widow is no ground for refusing a declaration regarding the character of the alienation, and the declaration may be that the alienation is invalid as a whole, but that on equitable ground, the alienee should have a charge declared in his favour for the binding portion of the consideration.[2] In some cases, it has been held that the plaintiff cannot obtain a declaration of the invalidity of an alienation partially supported by legal necessity, unless there is an offer in the plaint to reimburse the alienee to the extent the alienation was for necessity.[3] But it is submitted that the right of reimbursement is merely an equity which the court awards as a portion of its relief, and that it is always open to the court to grant such relief as the plaintiff may be found entitled.[4]

When Owner Ousted.

2572. In a reversioner's suit in the lifetime of the limited owner, the latter cannot be ejected, since whatever may be the effect of her improper alienation, it does not entail forfeiture of her own estate.[5] And all that the reversioner is entitled to, and can claim, is to have his possible interest protected. As such, he is not entitled to a remedy more extensive than is requisite to protect his rights. His reversionary interest is not accelerated by an alienation which the heiress may make in fraud of his presumptive right. All that the reversioner is ordinarily entitled to, is a declaration that the female owner's act is null and void, as far as it may affect the interest of the person entitled as reversioner, and if there were a danger, lest from the nature of the property, the *corpus* should be wasted, the utmost he can claim is a decree for its protection by the appointment of a Receiver or by such other means as the court might deem suitable.[6] But though this is the rule, cases may arise where her own conduct may lead to her own dispossession. So, where the daughter who was entitled to her father's estate, acquiesced in the possession of her father's relatives, holding them out as the rightful heirs, the court awarded her possession, but added a clause that if she declined to accept possession, the reversioner was to be put into possession as manager of the property on her behalf, and that he would then act under the orders and directions of the Trial Court, filing accounts in, and paying the income to her through, such court.[7] In another case, the order of the court appointing a Receiver was upheld by the Privy Council. In that case, the property in question, a large and valuable zemindari, was seized by Government, but afterwards restored to the widows of the last holder. Within four years of this restoration, the two junior widows sued the senior widow, complaining of various acts done to the detriment of their rights, and more especially,

(1) *Paparayudu* v. *Rattamma*, 37 M. 275; *Gobind* v. *Baldeo*, 25 A. 330; *Partapa* v. *Altar Singh*, (1913) P.R. 34: 20 I.C. 289.

(2) *Paparayudu* v. *Rattamma*, 37 M. 275.

(3) *Poolchund* v. *Raghoobuns*, 9 W. R. 108; *Sugeeram* v. *Juddoobun*, 9 W.R. 284; *Muteeram* v. *Gopal*, 20 W.R. 187; *Gobind* v. *Baldeo*, 25 A. 330; *Subramania* v. *Ponnusami*, 8 M. 92; *Singam* v. *Draupadi*, 31 M. 153; *Gouri* v. *Tirumaya*, 18 M.L.J. 17; *Dina Nath* v. *Hrisikesh*, 20 C.L.J. 285 (290).

(4) *Garikipati* v. *Garikipati*, 37 M. 275; *Vithu* v. *Mendli*, 5 N.L.R. 172.

(5) *Lall Soonder* v. *Hurry Krishen*, Marsh. 113; *Jwala Nath* v. *Kulloo*, 3 Agra 55; *Kishnee* v. *Khealee Ram*, 2 N. W.P.H.C.R. 424; *Haradhun* v. *Issur Chunder*, 6 W.R. 222; *Shib Koeree* v. *Joogun*, 8 W.R. 155.

(6) *Jwala Nath* v. *Kulloo*, 3 Agra 55 (59) F.B.

(7) *Adi Deo* v. *Dukharan*, 5 A. 532 (542); *Radha Mohun* v. *Rama Dass*, 24 W.R. 86 *note*. (The view of the case on the subject of limitation has been overruled by the Legislature.)

that she had, without their consent adopted a son, to whom she had transferred the entire estate. The senior widow upheld the adoption and alleged that the other widows had no right beyond a claim for maintenance. The court found the senior widow's management reckless, and her expenditure lavish, and that the adopted son could not supersede the widows. But, though it held the widows entitled to the estate, it refused to remove the manager, as they were old and incompetent. The widows appealed, but the Privy Council held that it was a matter of discretion with the court as to the removal of the Receiver, and looking to the case, the court had exercised a very sound discretion in not removing him.[1] The courts have, in other cases, upheld the appointment of a manager in a case of proved waste endangering the reversion.[2] It will not interfere in an attempt at a false adoption and the mutation of names in favour of the so-called adopted son.[3] As the court remarked: "Certain specified acts of misconduct by her operate, according to Hindu Law, to destroy her estate and to vest the property in the reversionary heirs, and according to several decisions, the courts also have jurisdiction to interfere to prevent the waste or destruction or the fraudulent alienation of property by her, if a sufficient case is made to justify this interference. In such cases, the widow has been deprived not of her interest but of all control over the property, which has been placed, for its preservation, in the hands of others (sometimes, in the hands of the reversioners themselves) as managers on her behalf."[4]

2573. Decision Res Judicata.—Since the reversioner's suit is a representative suit, in which he represents fully the whole reversion, it follows that a decision given in his suit operates as *res judicata* against the other reversioners.[5] This is the logical outcome of the identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their right."[6] In this view, "it is impossible to resist the conclusion that if the right litigated is a common right, and if that litigation has been honestly conducted, the other reversioners are affected by the law of *res judicata*. This is a logical result of the decision of the Judicial Committee."[7] But a reversioner suing or sued in one character, say as lessor or lessee, is not debarred by the rule of constructive *res judicata* from defending his right as reversioner in a suit instituted against him and the widow on a previous sale by her to the plaintiff.[8] Though the reversioner sues as a representative of his class and for their mutual benefits, any costs awarded against him must be met

Clause (4).

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(1) *Jijiamba (In re)*, 13 M. 390 (394) P.C.

(2) *Moharance* v. *Naddu Lall*, 10 W. R. 73.

(3) *Komul Mones* v. *Alhadmonee*, 1 W. R. 256.

(4) *Ib.*, p. 257.

(5) *Brojo Kishore* v. *Sreenath*, 9 W.R. 463 (465); *Chiruvolu* v. *Chiruvolu*, 29 M. 390 (401) F.B.; *Challagundla* v. *Madala*, 41 M. 659 F.B., overruling *contra* in *Sakhyahani* v. *Bhavani*, 27 M. 588; *Govinda* v. *Thayammal*, 28 M. 57; *Venkatanarayana* v. *Subbammal*, 28 M. 406 (412); *Veerayya* v. *Gangamma*, 36 M. 570; *Narayana* v. *Rama*, 38 M. 396; *Garikipati* v. *Rattamma*, (1912) M.W. N. 1176 (1179); *Kesho Prasad* v. *Sheopargash*, 44 A. 19 (26, 27) F.B., overruling *contra* in *Chhiddu Singh* v. *Durga Dei*, 22 A. 382 F.B.; *Darbari* v. *Govind Ram*, 43 A. 558; *Thakur Prasad* v. *Mt. Dipa*, 10 Pat. 352.

(6) *Venkatanarayana* v. *Subhammal*, 38 M. 406 (413) P.C.

(7) *Challagundla* v. *Madala*, 41 M. 659 F.B., explaining and following *Venkatanarayana* v. *Subhammal*, 38 M. 406 (413) P.C.; *Janaki* v. *Narayanasami*, 39 M. 634 P.C.

(8) *Debendranath* v. *Nagendranath*, 60 C. 1158 (1165).

by him and his personal representatives even though they have received no personal assets of the female owner.[1]

2574. Procedure.—The reversioner, though entitled, is not bound to file one suit challenging all alienations.[2] As he is not entitled to eject her transferees during her lifetime, the only suit he can institute is one for a declaration that the alienations, being unsupported by necessity or for any other cause, do not bind the reversioner.[3] But since a will is, at any time, revocable, the reversioner cannot sue to declare the invalidity of her will.[4] A suit instituted by the presumptive reversioner, may, on his death, be continued by his son[5] or the next reversioner.[6]

Burden of proof.

353. (1) In a suit between the reversioner and the heiress's alienee for possession of property comprised in her estate, it lies on the latter to prove that the former is bound by the transfer to him as supported by legal necessity.[7]

(2) In a suit between a pardanashin heiress and her transferee, it lies on the transferee to prove not only that the deed was executed by, but was explained to, and really understood by the former, who had executed it by the free and independent exercise of her will.[8]

2575. Analogous Law.—It is general rule that a transferee from a limited owner must establish that his transfer was competent. As such, in a suit between the reversioner and a female heiress's transferee, the former is entitled to succeed by reason of his natural title, unless it is displaced by proof of a better one in the transferee.[9] As between the grantor and the grantee, the rule is, however, different, since the grantor cannot derogate from his own grant.

But the case of a pardanashin woman is exceptional, because a pardanashin naturally labours under a special disability, and is, therefore, entitled to the same special protection which law confers on the weak, the ignorant and the infirm.[10] As the Privy Council observed: "The lady was a pardanashin lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall, in such a case, rest not with those who attack but those who found upon the deed, and the proof must go so far as to show, affirmatively and conclusively, that the deed was not only executed, but was explained to, and was really understood, by the grantor. In such cases, it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law, as just stated, is too well settled to be doubted or upset."[11]

Clause (1).

2576. Reversioner and Limited Owner's Transferee.—The first clause deals with the burden of proof in a suit between the reversioner and the alienees of the

(1) *Kameshwar* v. *Beni Madho*, 11 Pat. 430.
(2) *Bansolochan* v. *Jagannath*, (1924) A. 838; *Gutha* v. *Rama Katayya*, 96 I.C. 132: (1926) M. 508.
(3) *Tehl Kuar* v. *Amarnath*, 79 I.C. 670: (1925) L. 2.
(4) *Ib.*
(5) *Hur Lal* v. *Hari Singh*, (1931) A. 630.
(6) *Jadubansi* v. *Mahpal Singh*, 38 A. 111 (115); *Premmoyi* v. *Preonath*, 33 C. 636.
(7) *Obala* v. *Kandasami*, 47 M. 181 (188, 189) P.C.
(8) *Kali Baksh* v. *Ram Gopal*, 36 A. 81 P.C.; *Savitri* v. *F. A. Savi*, 12 Pat. 359 (independent advice not necessary).
(9) *Obala Kondama* v. *Kandasamy*, 47 M. 181 P.C.
(10) *Kamini* v. *Krishna*, 39 C. 933 (946).
(11) *Kali Baksh* v. *Ram Gopal*, 36 A. 81 (89) P.C.; *Sajjad Hussain* v. *Wazir Ali*, 34 A. 455 P.C.

last limited owner. As the reversioner does not claim through or under the limited owner, he is not bound by her recitals and acknowledgment of transfer, which have to be proved by the transferee. This he may do in any of the following ways:—

(1) By proof of consent of the then presumptive reversioner, raising a presumption of necessity.

(*a*) Such consent may be proved by the attestation of the deed by him, if it is shown that it was made after it had been read to him;

(*b*) It may be proved by subsequent conduct such as ratification or acquiescence;

(2) By independent evidence of payment of consideration and proof of necessity;

(3) By proof that, after reasonable enquiries, he was satisfied of the necessity.

2577. Pardanashin Transferor.—Where, moveover, the transferor is a pardanashin, her transferee has to prove in a suit, whether by the grantor or her reversioner, that the transfer was made by her on an intelligent appreciation of its nature and effect, and that no advantage was taken of her disability.[1]

Clause (2).

It is sometimes insisted on that a pardanashin lady must have independent advice, but as pointed out by the Privy Council,[2] this is not an absolute rule of law. Advice is merely a means to secure that which is essential, namely, an intelligent appreciation of the transaction. It is not the formal execution which so much matters, since, if they are proved to have understood the deed, the fact that they assented to it from behind a screen, would not vitiate it for want of due execution, as required by S. 59 of the Transfer of Property Act.[3]

Improper alienation.

354. An alienation by the heiress in excess of her powers is not void, but voidable at the election of the reversioner.[4]

2578. Analogous Law.—It is now settled[5] that an alienation by the heiress, without legal necessity, is not void but merely voidable at the instance of the reversioner, who may ratify it or treat it as a nullity. But except as against the reversioner, it is valid and cannot be avoided by a third party.[6] (§ 2580.)

(1) *Keshublal* v. *Radharaman*, 17 C.W.N. 991 (995).

(2) *Mahomed Buksh* v. *Hosseini*, 15 C. 684 P.C.; *Kali Buksh* v. *Ram Gopal*, 36 A. 81 (91) P.C.; *Sabitri* v. *F. A. Savi*, 12 Pat. 359.

(3) *Padarath* v. *Ram Narain*, 37 A. 474 (481) P.C.

(4) *Ramgowda* v. *Bhausaheb*, 52 B. 1 (7) P.C.; *Bijay Gopal* v. *Krishna*, 34 C. 329 (333) P.C.; *Madhu Sudan* v. *E. H. Rooke*, 25 C. 1 (8) P.C.

(5) *Ramgowda* v. *Bhausaheb*, 52 B. 1 P.C.; *Madhu Sudan* v. *Rooke*, 25 C. 1 P.C.; *Bejoy Gopal* v. *Krishna*, 34 C. 329 (338) P.C., reversing O.A. *Bejoy Gopal* v. *Nil Ratan*, 30 C. 990; *Kishori Lal* v. *Bhusai*, 14 C.W.N. 106; *Indra Narain* v. *Sarbasova*, 41 C.L.J. 341: 87 I.C. 930: (1925) C. 743; *Upendra Nath* v. *Shibadasi*, 88 I.C. 898: (1925) C. 1053; *Deonandan* v. *Udit Narain*, 18 C.W.N. 940; *Sitaram* v. *Khamdu*, 22 Bom.L.R. 1155: 59 I.C. 480; *Chavhan* v. *Ram Sarup*, 20 O.C. 232: 42 I.C. 27; *Ajodhia Prasad* v. *Mt. Sanjhari*, 6 Luck. 710.

(6) *Deonandan* v. *Udit Narain*, 18 C.W.N. 940; *Jagat Chandra* v. *Biswa Mahar*, 55 I.C. (C.) 743; *Sitaram* v. *Khandu*, 22 Bom.L.R. 1155; *Kesho Prasad* v. *Chandrika*, 2 Pat. 217; *Saiyid Mahomed* v. *Parbati*, 9 O.L.J. 312; *Bahadur Singh* v. *Sultan Husain*, 66 I.C. 456: (1922) O. 171; *contra* in *Sheikh Muhammad* v. *Ramachandra*, 90 I.C. (N.) 74.

2579. Mode of Avoidance.—Even as regards the reversioner, such transfer can only be avoided, if it is unsupported by legal necessity and if he has not consented to or ratified it. A reversioner is not bound to sue for its cancellation immediately after it is made. He may wait till the reversion falls in. He is then put upon his election whether to ratify or avoid it. If he elects to treat it as a nullity, he may sue the alienee for possession, and it is then on the latter to make good his alienation by proving both its factum and validity.[1] Even where the reversioner challenges it in a suit of his own, the burden of proof is still on the alienee. He has still to prove that his alienor was justified in making the alienation or that he had, after reasonable inquiries, ascertained the existence of legal necessity and *bona fide* believed in its existence. If he proves this, his title cannot be shaken, even though, in fact, there was no necessity.[2]

2580. Who may Avoid It.—None but the reversioner is entitled to impeach an alienation made by the heiress, though, on her death, if there is no reversioner, and the Crown takes the inheritance as the *ultima hæres*, it has the same right of impeaching an unauthorized alienation.[3] The estate of a widow under the Punjab customary law is subject to the same restrictions, and the heir who succeeds to her by custom, is entitled to challenge her alienations, in the same way as any other reversioner.[4] The same right belongs to an execution-purchaser who has acquired the entire estate, and not merely the limited estate of the female owner.[5] As against all but the reversioner, her transfer stands good. So, where the heiress mortgaged her property which was sold in execution to another, who sold it to the plaintiff who sued her transferees for possession, whereupon the latter challenged the mortgage as unsupported by necessity, the court held that as the defendant was not the reversioner but a mere assignee of the mortgagor's right, he could not be permitted to challenge the plaintiff's title.[6] The question whether the reversioner's election is not personal to him, and can be availed of by his transferee, can only admit of one answer. The transfer being not void, but merely voidable at the instance of the reversioner, the latter is the only person competent to challenge it.[7] In any case, his transferee cannot challenge it where he himself had waived his right by laches or acquiescence inferred from his silence and failure to avoid it for a considerable period. And there may be equities to adjust, even if the transfer is set aside (§ **2535**).

Succession of reversioners.

355. (1) On the death of the heiress her limited estate devolves on her next reversioner then alive.

(2) Reversioners take *per capita*.[8]

(3) Where the next reversioner disclaims the estate, it devolves on the reversioner next to him in succession.

(1) *Bijoy Gopal* v. *Krishna*, 34 C. 329 (333, 334) P.C.

(2) S. 38, Transfer of Property Act; *Hanooman Persad* v. *Mt. Babooee*, 6 M.I.A. 393 (424); *Bijoy Gopal* v. *Krishna*, 34 C. 329 (333) P.C.; *Ramgawda* v. *Bhausaheb*, 52 B. 1 (7) P.C.; *Tirupatiraju* v. *Venkayya*, 45 M. 504 (510) F.B.

(3) *Collector* v. *Cavaly*, 8 M.I.A. 529; *Deonandan* v. *Udit Narayan*, 18 C.W.N. 940 (941); *Bijoy Gopal* v. *Krishna*, 25 C. 1; *Madhu Sudan* v. *Rooke*, 11 C.W.N. 424.

(4) *Gobinda* v. *Nandu*, 5 L. 450 (453).

(5) *Raj Kishen* v. *Jaheeroor-ul-Huq*, (1864) W.R. 351; *Brojo Kishore* v. *Sreenath*, 9 W.R. 463.

(6) *Deonandan* v. *Udit Narayan*, 18 C. W.N. 940.

(7) *Kesho Prasad* v. *Chondrika*, 2 P. 217; *Saiyid Mhd. Hadi* v. *Parbati*, 9 O.L.J. 312; *Mirza Sadiq Husain* v. *Mhd. Karim*, 9 O.L.J. 456; (1922) O. 289; *contra* in *Sheikh Muhammad* v. *Ramachandra*, 90 I.C. (N.) 74.

(8) *Katama Nachiar* v. *Raja of Sivagunga*, 9 M.I.A. 539 (609).

Explanation.—**The term "death" in clause (1) includes civil death as by remarriage or abandonment of worldly affairs which determines the estate.**

2581. **Analogous Law.**—On death or remarriage of the female heir, the estate reverts to the natural line of heirs. Hence the term "reversioners," who are heirs of the last full owner, if he had lived up to, and died simultaneously with the female owner.[1] If the next reversioner disclaims the inheritance, it falls on one who stands next to him in the line of succession.[2] Reversioners take *per capita* and not *per stirpes*.

It has already been seen that the succession may be accelerated by the remarriage of the female owner, or her renunciation of wordly affairs[3] or of the estate.[4]

Reversioner's rights on succession.

356. On the estate vesting in the reversioner he acquires the following rights:—

(1) He is entitled to possession of the estate together with all its accumulations, accretions and incidents as on the death of the heiress;[5]

(2) He is entitled to dispute all unauthorized acts of the female heir;[6]

(3) He is entitled to represent the estate, and as such, may continue the suit instituted by or against the heiress;

(4) He may execute all decrees obtained by her as representing the estate, as he is liable to satisfy all such decrees obtained against her.[7]

Illustration.

A Hindu widow in possession of her husband's estate made several alienations before her death. The reversioner can sue for possession of the estate joining the several alienees leaving them to plead and prove the validity of their alienations.[8]

2582. **Analogous Law.**—On the death of the limited owner, her reversioner, whether a male or a female, becomes entitled to all the estate of the full owner, including all its accumulations, accretions and incidents. As such succession is by descent and not by survivorship, the heir is bound to take out a succession certificate, if any of the property inherited by him require a succession certificate.[9]

Clause (1).

2583. When the succession opens, it is the right of the next reversioner to obtain possession. If he is dormant, and fails to take possession, it does not pass the title to a remoter reversioner, entitling him to sue for possession.[10] The next reversioner is entitled to the estate, with all its increments and incidents. So, where a widow had mortgaged a shop, which she had inherited

(1) *Abinash* v. *Probodh*, 15 C.W.N. 1018; *Gooshaeen* v. *Pursotum*, *ib.*, p. 238.

(2) *Ladooiah* v. *Sanvaley*, 3 Agra 191; 10 I.C. 356.

(3) *Hafzoonissa* v. *Padhabinode*, (1856) 12 S.D.A.B. 559: 15 I.D. (O. S.) 78 (84).

(4) S. 343 (Surrender of woman's estate).

(5) *Bejoy Gopal* v. *Krishna*, 34 C. 329 (333, 334) P.C.; *Sulin Mohon* v. *Raj Krishna*, 60 I.C. (C.) 826. As to accretion *see* S. 338.

(6) See *Supra*; *Premmoyi* v. *Preonath*, 23 C. 636; *Mahadeo* v. *Sheokaran*, 35 A. 481.

(7) *Mahadeo* v. *Sheokaran*, 35 A. 481.

(8) *Bejoy Gopal* v. *Krishna*, 34 C. 329 (333, 334) P.C.

(9) Ss. 370-390, Succession Act; *Abinash* v. *Probodh*, 15 C.W.N. 1018: 10 I.C. 357.

(10) *Bind Bahadur* v. *Returaji*, 20 A. L.J. 702: 68 I.C. 776.

from her husband without any necessity, and the property being destroyed by floods, the mortgagee re-built it with his own money, which he continued to treat as the property mortgaged to him. On the widow's death, her reversioner sued for possession, while the mortgagee claimed his cost of re-building, by way of compensation, but the court decreed possession without compensation, holding that the re-building of the shop by the mortgagee did not confer on him any higher equity than if it had been re-built by the widow. "Had she re-built by borrowing the amount it would have been binding on the reversionary estate, only if there had been legal necessity for the purpose and the widow had mortgaged the estate therefor."[1] Such a case is indistinguishable from one in which one builds a house upon the land of another. He cannot make him pay for it. For, as the Privy Council observed: "It is not in every case, in which a man has benefited by the money of another, that an obligation to repay the money arises. To raise an equity of that kind, there must be an obligation, express or implied, to repay."[2] Such an obligation would be implied if the mortgage had been wholly or even partially for legal necessity. So, if the heiress had borrowed money for the purpose of increasing her estate, the reversioner cannot take the acquisition and repudiate the debt.[3] The equity against the reversioner would, of course, be stronger if he had encouraged the building,[4] or if the builder had *bona fide* believed that he was absolutely entitled to the property and improved it by adding to its market value.[5] The building of a costly temple is not such improvement as the reversioner has to pay for.[6]

But in such case the builder will be permitted to remove his embellishments,[7] unless he had treated the heiress as their owner, in which case he has no equity even to remove them.[8]

As to accretions, *see* Section 338.

Clause (2).

2584. "He may dispute unauthorized acts."—The reversioner may challenge all unauthorized acts of the widow. For instance, he may treat her improper alienation as null and void, and enter upon the property, ignoring her conveyance. He is not bound to have it set aside.[9] As stated before, it will be then on the alienee to make good his title or claim compensation or any other equity to which he may feel himself entitled.

Clause (3).

2585. Her Legal Representative.—He is entitled to continue as a legal representative in all proceedings pending at her death and relating to his estate.[10]

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(1) *Vrijbhukandas* v. *Dayaram*, 32 B. 32.

(2) *Ram Tubal Singh* v. *Bisseswar*, 23 W.R. 305 P.C.; *Gadeppa* v. *Apaji*, 3 B. 237.

(3) *Oodey Singh* v. *Phool Chund*, 5 N. W.P.H.C.R. 197; *Shewak Ram* v. *Bhowani*, 5 C.L.R. 140.

(4) *Dettaji* v. *Kalbha*, 21 B. 749.

(5) S. 51, Transfer of Property Act; *Abhoy Churn* v. *Attarmoni*, 13 C.W.N. 931.

(6) *Kidar Nath* v. *Nathu Mal*, 40 C. 555 (564) P.C.

(7) *Narayan* v. *Bholagir*, 6 B.H.C.R. (A.C.) 10; *Vinayak Rao* v. *Vidyakar*, 9 Bom.L.R. 404; *Premji* v. *Cassum*, 20 B. 298; *Shiddappa* v. *Pandurang*, 47 B. 696.

(8) *Vrijbhukandas* v. *Dayaram*, 32 B. 32 (36).

(9) *Sulin Mohan* v. *Rajakrishna*, 25 C. W.N. 420: 60 I.C. 826.

(10) *Rikhai Rai* v. *Sheo Pujan Singh*, 33 A. 15; *Jadubansi* v. *Mahpal*, 38 A. 111; *Chintamony* v. *Mohesh Chundra*, 23 C. 454; *Premmoyi* v. *Preonath*, *ib.*, p. 636.

2586. As such, he may execute decrees obtained by her as representing the estate,[1] as others are entitled to execute against him, as such representative, their decrees obtained against her. He is not, of course, bound by any proceedings erroneously continued against the heiress's personal representative.[2]

Clause (4).

His liabilities.

357. On succession, the reversioner becomes subject to the following liabilities:—

(1) He is bound by all alienations made by the heiress supported by legal necessity or benefit of the estate;

(2) He is liable to pay for the reasonable expenses of her shradh in proportion to the estate which he has inherited;

(3) He is liable to pay all her debts and for her wrongs, to the extent provided in the next two following sections.

2587. **Analogous Law.**—An alienation by an heiress, for necessity, being authorized by law, necessarily binds the reversioner. The reasonable expenses of her shradh are chargeable on the inheritance in the hands of the reversioner, who is liable to contribute a reasonable amount in proportion to the estate inherited by him.[3]

2588. His liability to pay her debts depends upon their nature and necessity. The question was put to the shastris in a case and they replied: "Supposing the proprietor's widow, who succeeded him, to have contracted the debts for the payment of rent due to Government, or other necessary disbursements to save the estate, or for the purpose of promoting her husband's spiritual welfare, or for the support of the family, or for the due execution of any conditions made by her husband, and to have died prior to the liquidation of such debt, the proprietor's heirs, that is, his brother and brother's sons, are bound to discharge the debt. And if the amount was borrowed for the purpose of being appropriated to any other purposes than those specified, such debt must be satisfied by him who becomes possessed of her jewels and other movable property."[4] Other cases have been decided conformably to this opinion, it being held "that if wives, who, with the consent of their husband, assume the management of his family affairs, contract a debt, the liquidation of such debt rests with the husband; otherwise he is not answerable for it."[5]

Debts of the heiress.

358. Reversioners are not bound to pay the debts of the heiress other than her trade debts incurred in respect of a family business[6] or those not supported by legal necessity or benefit,[7] or by such inquiry as is referred to in section 38 of the Transfer of Property Act.[8]

2589. **Analogous Law.**—Section 357 defines the extent of the reversioner's liability to pay the debts of the previous female holder. This section defines the limit of his liability. It is settled law that the reversioner is bound by an alienation made by the heiress for legal necessity or benefit. But it is not as well settled whether he is equally bound to pay

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(1) *Mahadeo* v. *Sheokaran*, 35 A. 481.
(2) *Kailash* v. *Girija*, 39 C. 929.
(3) *Ramdhari* v. *Permanund*, 19 C.W. N. 1183 (1187).
(4) Mac. H. L. Case 7, pp. 248, 249.
(5) Mac. H. L. Case 4, pp. 246, 247.
(6) *Sakrabhai* v. *Maganlal*, 26 B. 206 F.B.; *Barada Prosad* v. *Krishna Chandra*, (1934) C. 414 (Case-law reviewed) *See* § 2504.
(7) S. 341.
(8) *Maharaja of Bobbili* v. *Zamindar of Cochin*, 35 M. 108.

her debts similarly supported, though this would appear to be the case.[1] In Bombay, it has been held that he is liable for the unsecured trade debts of the widow incurred for the purpose of a family business,[2] but in so holding Sir Lawrence Jenkins, C.J., who delivered the judgment of the Full Bench, addressed himself to the general question and was inclined to hold that the reversioner was liable to pay the legal debts of his predecessor.[3] And this is in accord with the view of the Madras Court,[4] but the Allahabad[5] and the Patna Court[6] and some cases of the Calcutta Court[7] have laid down the contrary.

The difference between the two points of view lies in the fact that, though the debt might be supported by legal necessity, still the reversioner is not liable under a decree passed against the heiress unless there was something in the creditor's suit to show that he had claimed to bind the estate she held as distinct from her personally. In the view of the Bombay and Madras courts, this will be presumed, but in the view of the other courts, it must be specifically pleaded and proved and cannot be the subject of a mere presumption.

2590. Personal Claim.—Some claims are, from their very nature, personal to the heiress, and any sale made to satisfy them cannot convey any interest beyond that of the limited owner. Such is a claim for rent accrued due after the death of the last full owner,[8] or one made in respect of a debt advanced on the personal security of the widow.[9] And though, ordinarily, a money decree against the heiress does not bind the reversioner,[10] still where it is a decree in respect of a debt due from the last owner, it is a decree passed against the heiress as representing the estate, and, as such, will bind the reversioners,[11] provided the suit was so framed as to bind them.[12] But where the suit is for maintenance, which is a personal obligation binding on the heiress as such, the decree will only affect her own interest.[13] So, the mere fact that the debts were incurred by the widow and the reversioner, does not necessarily make the decree realizable out of the entire estate, since they may have both contracted the debt without representing the estate.[14]

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(1) *Ramcomar* v. *Ichamoyi*, 6 C. 36 (39); *Hurry Mohun* v. *Gonesh*, 10 C. 823 F.B.

(2) *Sakhabhai* v. *Magan Lal*, 26 B. 206 (215) F.B.; *Popat* v. *Damodar*, (1934) B. 390.

(3) *Ib.*, (215, 216) F.B.; *Dhondu* v. *Mishrilal*, 60 B. 311 F.B.

(4) *Eegella* v. *Mimushakari*, 33 M. 492; *Veerabhadra* v. *Marudaga*, 34 M. 188; *Maharaja of Bobbili* v. *Zemindar of Chundi*, 35 M. 108.

(5) *Shiamanand* v. *Har Lal*, 18 A. 471; *Dhiraj Singh* v. *Mangal Ram*, 19 A. 300; *Kallu* v. *Faiyaz Ali*, 30 A. 394.

(6) *Sheikh Ghasib* v. *Canchanan Singh*, 15 Pat. 798 (808, 809); distinguishing the Bombay Full Bench case of *Dhondu* v. *Mishri Lal*, 60 B. 311 F.B.; on the ground that it failed to notice the P.C. Case, *Lalit Mohan* v. *Dayamoyi*, (1927) P.C. 41, affirming O.A. *Dayamoyi* v. *Lalit Mohan*, (1925) C. 401; *Ramsewak* v. *Jamuna Prasad*, (1937) Pat. 667.

(7) *Prosunno* v. *Umedur*, 13 C.W.N. 353; *Giribala* v. *Srinath*, 12 C.W.N. 769.

(8) *Kristo* v. *Hem Chunder*, 16 C. 511; *Brajalal* v. *Jiban*, 26 C. 285; *Sadat Ali* v. *Hara Sundari*, 16 C.W.N. 1070; *Bireswar* v. *Kamal Kumar*, 17 C.W.N. 337; *Rameswar* v. *Provabai*, 19 C.W.N. 313.

(9) *Kallu* v. *Faiyazali*, 30 A. 394; *Krsto Moyee* v. *Prosonno*, 6 W.R. 304.

(10) *Ram Shewak* v. *Sheo Gobind*, 8 W.R. 519; *Narana* v. *Vasteva*, 17 M. 208.

(11) *Mohenia* v. *Ram Kishore*, 23 W.R. 174; *Brajalal* v. *Jiban*, 26 C. 285 (300).

(12) *Lalit Mohan* v. *Dayamoyi*, (1927) P.C. 41; affirming O.A. *Dayamoyi* v. *Lalit Mohan*, (1925) C. 401; *Sheikh Ghasit* v. *Pancham Singh*, 15 Pat. 798 (809).

(13) *Baijun* v. *Brij Bhookun*, 1 C. 133 P.C.; *Baijun* v. *Brij Bhookun*, 24 W.R. 306.

(14) *Mohenia* v. *Gouri Nath*, 2 C.W.N. 162 (165).

2591. Sale for Arrears of Revenue.—The question what interest the purchaser takes on a sale held for arrears of revenue, must, for its answer, depend upon the terms of the revenue law under which the sale is held. So, on a sale held under Act XI of 1859, the question arose what interest the purchaser took by his sale. It was contended that the effect of S. 52 was to convey the estate subject to all encumbrances, but the court held that reading that section along with S. 13, the sale had the effect of conveying the entire estate.[1]

Wrongs of the heiress.

359. The reversioner is bound to pay for the tortious acts of the heiress committed for the benefit of the estate.[2]

2592. Analogous Law.—That the heir is personally liable for damages to which another becomes entitled on account of the tortious acts of his predecessor, is a branch of the general law, that he who takes the benefit, must equally bear the burden. But the extent of the heir's liability in such cases is neither unqualified nor unlimited. As Bowen, L. J., observed in a case: "The only cases in which apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act appear to us to be those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment, could be made such, in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrong-doer could have been recovered from him, can be traced after his death to his assets and recaptured by the rightful owner thereon. But it is not every wrongful act by which a wrong-doer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong-doer cannot be sued merely because it was worth the wrong-doer's while to commit the act which is complained of and an indirect benefit may have been reaped thereby."[3]

But in this respect the liability of the reversioner would seem to be greater, since he is equally liable for the heiress's torts committed for the benefit of the estate, though they may not have resulted in any benefit to it. In one case, the plaintiff, as reversioner, sued the widow for possession and mesne profits of certain property wrongly taken possession of by the widow's husband. He obtained a decree and, in execution, obtained possession of the property, but the decree for mesne profits remained unsatisfied, which he sought to enforce against her reversioners. It was held that the property of the husband in the hands of the reversioner was liable.[4] In another case, the widow had taken possession, in good faith, of certain property, from which she was ejected by a suit in

(1) *Debi Das* v. *Bipro Charan*, 22 C. 641 (643).

(2) *Lachmi Narain* v. *Sham Sunder*, 1 I.C. (A.) 116.

(3) *Phillips* v. *Homfray*, 24 Ch. D. 439.

(4) *Lachmin* v. *Sham Sundar*, 1 I.C. (A.) 116.

which mesne profits were also decreed. The decree-holder sued out execution against the reversioners, impleading them as her legal representatives, and they were held liable for mesne profits, because the widow had acted for the benefit of the estate.[1]

360 Decree against the heiress. **The reversioners are bound by a decree passed against the heiress as representing the estate, unless it is shown that it was a decree obtained by collusion or fraud or that there had not been a fair trial of the rights in the suit.**[2]

Explanation 1.—**The decree in this section includes all proceedings consequent upon such decree including a sale in execution thereof.**[3]

Explanation 2.—**A decree passed against the heiress on a matter personal to her is not a decree passed against her as representing the estate.**[4]

Explanation 3.—**A decree otherwise valid is not rendered invalid merely by reason of the fact that it had been obtained by consent or compromise.**[5]

Illustrations.

(*a*) *A*, widow, sues *B* for a declaration of the invalidity of his adoption. Her suit is dismissed on the ground that *B's* adoption was valid. On *A's* death, her daughter sues *B* for possession of the estate on the ground that *B's* adoption is invalid. The question is *res judicata*.[6]

(*b*) *A*, a widow, sues *B* for a declaration of the invalidity of *B's* adoption. Afterwards *A* compromises her claim with *B* and suffers a decree to be passed declaring *B's* adoption valid. On *A's* death, her daughter *C* sues *B* for possession of the estate, alleging the invalidity of *B's* adoption. The question whether the matter as to *B's* adoption is *res judicata* depends upon whether the decree in the previous suit had been obtained after a fair contest.[7]

(*c*) *A*, the mother of the last owner, obtains a decree for maintenance against his widow *B*. In execution she attaches and brings to sale the right, title and interest of *B*. The seller takes only the widow's estate as the decree was a personal decree against *B*.[8]

(*d*) *A*, the creditor of the last owner, sues and obtains a decree against the latter's widow *B*, in execution of which he sells the right, title and interest of *B*. The sale passes the entire estate and not merely *B's life-estate*.[9]

2593. Analogous Law.—A decree obtained against the heiress may be executed against the reversioner as her legal representative, who is bound by all proceedings taken against her, since he is the person "on whom the estate devolves" on her death.[10] It is true that the heiress takes a limited estate, and on her death, her reversioners do not succeed by any right derived through her, since they are the heirs of the last full owner. Now, the rule of *res judicata*, enacted in S. 11 of the Code of Civil Procedure, makes an adjudicated final only as between the same parties to the

(1) *Lalji* v. *Kurki*, 14 C.L.J. 90, following *Ramkishore* v. *Kalli Kanto*, 6 C. 479; *Premmoyi* v. *Preonath*, 23 C. 636.

(2) *Jugul Kishore* v. *Jotendro*, 16 C. 985 P.C.; *Nagendrabala* v. *Panchanan*, 20 C. 136 (case-law reviewed).

(3) *Jugul Kishore* v. *Jotendro*, 10 C. 985 P.C.; *Jeban Krishna* v. *Brojo Lal*, 30 C. 550 (555) P.C.

(4) *Ib.*

(5) *Khunni Lal* v. *Gobind Krishna*, A. 593 P.C.

(6) *Risal Singh* v. *Balwant Singh*, 40 A. 593 P.C.

(7) *Ibid.*

(8) *Baijan* v. *Brij Bhukhan*, 1 C. 133 (139,140) P.C. explained in *Jugul Kishore* v. *Jotendra*, 10 C. 985 (992).

(9) *Jugul Kishore* v. *Jotendra*, 10 C. 985 (990) P.C.

(10) S. 2 (11), Civil Procedure Code.

suit "or between parties under whom they or any of them claim."[1] But they are nevertheless her legal representatives because between her and them there is the privity of estate. But since the reversioners do not claim under the heiress, the rule of *res judicata* is, strictly speaking, inapplicable to them.[2] But both convenience and policy have sanctioned a qualified rule deduced from the underlying principle of *res judicata*, under which they are held bound, if (*i*) the heiress in the previous suit represented the estate, (*ii*) there was a *bona fide* litigation, and (*iii*) the decree was obtained on a fair trial of the matter in suit. These three conditions being fulfilled, there is no reason why the reversioners should be suffered to re-agitate the same matter which has already been decided against their predecessor in estate.[3]

2594. Moreover, it is the general rule, now enacted as a part of the statute law, that any person against whom a judgment is used as barring the re-trial of the same question, may show that it had been obtained by fraud or collusion,[4] added to which the reversioner is not bound by a decree obtained against the widow unless it appears or is shown that the character in which she was sued was such that she represented the entire interest and that, as such, she was charged with the double duty of protecting the dual interest—her own and that of her reversioners.[5] (§ **2605.**)

The working of these rules in practice may now be examined.

2595. Representative Suit.— In the first place, then, the suit must be one in which the heiress was arrayed as representing the entire estate. It is not necessary that she should be so described. But what is necessary is that from the subject-matter and character of the suit, it must appear that she had been so sued. Such is necessarily the suit in which she sues for recovery of the inheritance,[6] or attacks the factum of validity of an adoption which, if good, would divest her estate.[7] But, on the other hand, where the decree for rent of a temporary tenure was obtained against the widow of a tenure-holder as administratrix of her husband's estate, it was held that the description of the widow as administratrix in the decree was not conclusive evidence against the reversionary heir, that the estate in his hands was not bound by the decree and that the decree, being in respect of a temporary tenure, was personal to the widow and could not, therefore, be executed against the reversioners.[8] So, a decree for rent of the estate in the hands of the daughter for the year of her possession is a personal decree. So is the decree for maintenance of a relation not charged on any estate.[9]

2596. Bona Fide Litigation.—Secondly, the decree must have been obtained on a *bona fide* litigation between herself and her adversary. There

(1) S. 11, C.P.C.

(2) *Risal Singh* v. *Balwant Singh*, 40 A. 93 P.C.

(3) *Katamma* v. *Raja of Shivagunga*, 9 M.I.A. 539; *Jugal Kishore* v. *Jotendra*, 10 C. 985 (991) P.C.; *Munni* v. *Tirloki Nath*, (1931) P.C. 114; *Modi Malappa* v. *Subbayya*, (1937) B. 458 (460).

(4) S. 44, Ev. A.

(5) Per *Lord Romilly in Nugender* v. *Maminee*, 11 M.I.A. 361; *Kaiama Nachiar* v. *Raja of Shivganga*, 9 M.I.A. 539 (604).

(6) *Brojo Nath* v. *Jugeswar*, 9 C.L.J. 346: 1 I.C. 62.

(7) *Risal Singh* v. *Bulwant Singh*, 37 A. 496, O.A. 40 A. 593 P.C.

(8) *Baijan* v. *Brij Bhookun*, 1 C. 133 P.C.; *Kristo* v. *Hem Chunder*, 16 C. 511; *Brajlal* v. *Jiban*, 26 C. 285, affirmed O. A. *Jiban* v. *Brajlal*, 30 C. 550 P.C.; *Bireswar* v. *Kamal Kumar*, 17 C.W.N. 337: 16 I.C. 437.

(9) *Baijan* v. *Brij Bhookun*, 1 C. 133.

is no *bona fide* litigation where one person sues to eject the widow and the latter absents herself or admits his claim. In neither case is there anything on record to show that the litigation was *bona fide* or that any question raised therein was fairly tried.[1] But this should not be treated as a general rule. For, it is conceivable that the case may be too righteous to admit of any contest, and consequently, the mere fact that the heiress did not contest the suit, does not suffice to take the suit out of *res judicata*. It depends upon its own facts. The court has to examine the record, if necessary, to see whether the litigation was *bona fide* notwithstanding that the heiress did not appear or did not consider worth her while to contest the suit.[2]

2597. Fair Trial.—Thirdly, the decree must have been obtained on a fair trial of the matters in suit. What is then a "fair trial"? It is apprehended that all that it means is that the heiress should have prosecuted her case with a reasonable diligence, furnishing all available evidence, withholding and suppressing none, and that the record should evince no collusion or secret compact or compromise presenting to the court an appearance which masks the reality of the case. A fair trial is perfectly consistent with any natural disadvantage from which the heiress may suffer. It is even consistent with a special disadvantage which may impair the force of her pleading. So, where the adoptive mother sued her adopted son for a declaration of the invalidity of his adoption, on the ground of want of authority from her husband, and the court upheld the adoption,[3] and where, in a subsequent suit by her reversioner for ejectment of the son, the latter pleaded *res judicata*, by reason of the previous decision, which the reversioner resisted on the ground that the previous suit was decided on a personal estoppel against the widow and the latter, in suing the defendant, did not represent the estate but only herself; the Privy Council overruled both the contentions holding that the previous suit had been expressly decided without recourse to the doctrine of estoppel, and that as to the second contention their Lordships held that, "notwithstanding the personal estoppel under which she laboured, the widow did represent the estate on the question of fact as to whether defendant had or had not been validly adopted."[4]

In other words, without representing the estate, the question of the validity of the defendant's adoption to her husband would be meaningless. It was, however, conceded that as a litigant she had laboured under a personal disadvantage in the previous suit by reason of her own adoption, but this did not suffice to remove the bar of *res judicata*, as it could not be said, in the language of the leading case, that there had not been a "fair trial of the right in that suit."[5] "In the absence of all authority, their Lordships cannot decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified, merely owing to personal disability or disadvantage as a litigant, although the

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(1) *Sant Kumar* v. *Deo Saran*, 8 A. 365; *Sachit* v. *Budhua*, 8 A. 429; *Gobind* v. *Khumni Lal*, 29 A. 487 (494); *Mahadei* v. *Baldeo*, 30 A. 75; *Ghelabhai* v. *Javer*, 37 B. 172; *Jevan* v. *Vetha*, 9 Bom.L.R. 885.

(2) *Gur Nanak* v. *Jai Narain*, 34 A. 385; *Subbammal* v. *Avudaiyammal*, 30 M. 3.

(3) *Dharam Kuar* v. *Balwant Singh*, 30 A. 549, O.A. 31 A. 398 P.C.

(4) *Risal Singh* v. *Balwant Singh*, 40 A. 593 P.C.

(5) *Katama Nachiar* v. *Raja of Sivaganga*, 9 M.I.A. 539.

merits are tried and the trial is fair and honest. The principle is that reversioners must risk that, so that there may be an end to litigation."[1]

Another question in this connection arises whether the reversioners are bound by a consent decrees passed against the widow. It is said that a Hindu widow, who is a limited or qualified owner, cannot confess judgment and be party to a consent decree so as to bind the reversioners,[2] but the decisions of the Privy Council[3] have rendered this view no longer tenable; and the sole test by which the decrees and compromises of limited owners are to be judged, is whether they were fair and suffered or made with due regard to the interests of the reversioners. So, the mere fact that the heiress did not contest the suit, or having contested it, filed an appeal which she afterwards withdrew,[4] does not render the decree ineffectual against the reversioners.

2598. Heiress Represents the Estate.—Since the estate vests in the female heir in her own right, it follows that she is entitled to represent it in all transactions concerning it.[5] Where, for instance, a suit is pending or a decree is passed with reference to the estate, she is, on the death of the last owner, entitled to continue or to defend the proceeding as his legal representative.[6] If a decree is executed against the estate of the deceasded, without joining her as his legal representative, subsequent proceedings do not affect the estate which she has inherited, and nothing passes by any sale of the estate made in the proceeding to which she was no party.[7] Co-widows are, as a rule, regarded as a single juridical person and must act together. But where a widow sued for the recovery of her husband's estate, both for herself and her co-widow, impleading the latter as a defendant, the court was held entitled to pass a decree for the entire property, if the co-widow was agreeable to such a course during the trial.[8] Since a Hindu widow represents the estate, any adjudication made in such suit might be availed of by her co-widow, though she had opposed it in the suit. As such, an adjudication in favour of a widow, claiming to represent the estate of her husband against an alleged adopted son, would enure for the benefit of her co-widow, even if the latter had disclaimed all interest in the estate and supported the adoption in that litigation, in her capacity of guardian of the adopted son.[9] There cannot be an acceleration of the right of a male reversioner by means of transactions between two or more joint female heirs without the knowledge or consent of the reversioner. A reversioner's cause of action does not arise under Art. 141 of the Limitation Act, until the death of all the limited owners, if there are more than one.[10]

Decree Against Her.

2599. Since the heiress represents the estate, any decree, fairly and properly obtained against her in regard to the estate is, in the absence of collusion or

(1) *Risal Singh* v. *Balwant Singh*, 40 A. 593 (604) P.C.

(2) *Raja Lakshmi* v. *Katyayan*, 38 C. 639 (643), following *Roy Radha* v. *Nau Ratan*, 6 C.L.J. 490 (525); *Sheo Narain* v. *Khurgo*, 10 C.L.R. 337; *Sant Kumar* v. *Deo Saran*, 8 A. 365; *Gobind* v. *Khunnilal*, 29 A. 487; *Mahadei* v. *Baldeo*, 30 A. 75, *Jeram* v. *Veerbai*. 5 Bom.L.R. 885; *Rama* v. *Daji*, 20 Bom.L.R. 947: 48 I.C. 125.

(3) *Khunnilal* v. *Gobind*, 33 A. 356 P. C.; *Hiran* v. *Sohan*, 18 C.W.N. 928 P.C.

(4) *Ghelhabai* v. *Javer*, 37 B. 172.

(5) *Bhau* v. *Govind*, (1878) B.P.J. 60.

(6) *Natha* v. *Jamni*, 8 B.H.C.R. (A. C.) 37; *Hari* v. *Minakshi*, 5 M. 5.

(7) *Ramasami* v. *Sabu Kai*, 8 M. H. C. R. 186; *Siva* v. *Palani*, 4 M. 401 (403); *Subbhanna* v. *Venkata Krishnan*, 11 M. 408; *Jatha* v. *Venkatappa*, 5 B. 14; *Akoba* v. *Sakharam*, 9 B. 429; *Alukmonee* v. *Banee Madhub*, 4 C. 677.

(8) *Ramachari* v. *Saraswati*, (1920) M.W.N. 721: 60 I.C. 246.

(9) *Sukhdeo* v. *Bhulai*, 16 N.L.R. 911.

(10) *Muthiala* v. *Budhagunta*, 39 M.L. J. 567: 60 I.C. 135.

fraud, binding on the reversionary heir, and where the merits are tried and the trial is fair and honest, a Hindu lady, otherwise qualified to represent the estate in litigation, does not cease to be so qualified, merely owing to a personal disability or disadvantage as a litigant.[1]

Unfair Trial.

2600. A converse case was decided by the same Board in a case in which the reversioners having disputed the daughter's right to succeed, the matter was referred to the arbitrators between the daughter and her son Amrit, then a minor, represented by his father on the one side and the reversioners on the other, but before they could decide, the parties effected a compromise, by which the reversioners were to receive the estate, the arbitrators were requested to give, and they in fact gave, their award in accordance with the compromise, which was filed in court and embodied into a decree. On the death of the daughter, her son sued the reversioners for possession, but the reversioners pleaded the award in bar of his claim which, Amrit pleaded, was a nullity, as secured by fraud during his minority and when he was not properly represented. The High Court overruled his contention, but, on appeal, the Privy Council reversed the decision of the High Court, holding that Amrit had merely a *spes successionis*, during the lifetime of his mother, and it could not be the subject of any contract or compromise. The action of Amrit's father, therefore, in referring to the arbitration any matter connected with his son's reversionary interest, was null and void. Moreover, the compromise was not beneficial, to the minor, and, therefore, not binding on him. The decree following the award did not determine or affect his reversionary rights. The minor was not even a party to the proceedings which culminated in the compromise being reduced to a decree. There had not then been a fair trial of the minor's rights in the previous suit, and it did not operate as *res judicata* to his claim.[2]

This was, then, a case in which there could have been no *bona fide* litigation and no settlement or compromise. Such was also the case of the widow who sued to recover her husband's estate. After partially examining some of her witnesses, she declined to proceed further with their examination and summoned the defendant, and on his failure to attend, her suit was dismissed. The widow did not appeal against that order. On her death, her daughter's sons sued the same defendant to recover the same property, and he pleaded the previous suit as *res judicata*. The High Court held that, in view of the circumstances disclosed by the facts of the previous disposal, it was obvious that the facts of the previous case should be closely examined, to see whether there had been a fair trial. Apparently, there was not, because the widow did not fairly prosecute her case and did not appeal against its closure. She was bound to protect not only her own interest but also the interests of the person who was to take after her death.[3]

(1) *Katama Nachiar* v. *Raja of Shivganga*, 9 M.I.A. 539; *Jogul Kishore* v. *Jotendro*, 10 C. 985 P.C.; *Pratap Narain* v. *Triloknath*, 11 C. 186 P.C.; *Hurrinath*, v. *Mothoor Mohun*, 21 C. 8 P.C.; *Risal Singh* v. *Balwant Singh*, 40 A. 593 P.C.; *Mata Prasad* v. *Nageshar*, 47 A. 883 P.C.; *Munni Bibi* v. *Triloki Nath*, (1931) P.C. 114; *Vaithilinga* v. *Sriranga-thanni*, 48 M. 883 P.C.; *Jharula* v. *Jalandar*, 39 C. 887; *Mohendra* v. *Shamsunnessa*, 19 C.W.N. 1280; *Nand Kumar* v. *Rhada*, 1 A. 282; *Sachit* v. *Budhna*, 8 A. 429; *Hanuman* v. *Bhaganti*, 19 A. 357 (371); *Madan Mohan* v. *Akharyar*, 20 A. 241; *Ghelabai* v. *Javer*, 37 B. 172; *Bhogaraju* v. *Addepalli*, 35 M. 560; *Ganpat* v. *Bindeshari*, 100 I.C. 481: 4 O.W.N. 140.

(2) *Amrit Narayana* v. *Gaya Singh*, 45 C. 120 P.C.

(3) *Branomoye* v. *Kristo*, 2 C. 222 (224, 225).

Explanation (3).

2601. Compromise Decree.—Since the decree is to be made on a fair trial of the matter in suit, a question arises, and has been considered in several cases, whether a compromise decree binds the reversion. It was at one time held that it did not,[1] since a compromise was a contract, and a decree on a compromise was indistinguishable from an alienation *inter vivos*, which did not bind the reversion. How could it then become (it was said) more binding by the mere fact that it was embodied in a decree? But a compromise decree may still be a fair decree more favourable to the reversion than what a decree might have been if passed on contest. It cannot, therefore, be asserted as a general rule that no compromise binds the reversioner. The more correct rule would appear to be that, though the reversioner, as such, cannot *ipso facto* reject a decree passed on a compromise, the question whether he is or is not bound by such a decree, depends upon whether it answers the general test: Was it *bona fide* and made with due care and caution in the interest of the estate? Moreover, a compromise may amount to a family settlement, and the reversioner will then be bound by it. It is immaterial whether it is called a compromise, for even a compromise is valid, if it is a fair settlement of rival claims. It has been so held by the Privy Council,[2] in which the reversioner had contended, on the strength of the earlier cases, that a compromise was indistinguishable from an alienation, but the Privy Council overruled this contention, holding that the compromise had been made under the advice of the District Officer, and that as a settlement of the family dispute, it bound the reversioners.

These cases have overruled the contrary held by the Indian Courts and settled the rule that a decree passed on a fair compromise will equally bind the reversioners if it is a fair settlement,[3] the burden of proving which is said to rest on the alience,[4] but it is not an alienation or subject to its restrictions.[5]

Compromise Out of Court.

2602. A compromise out of Court stands on the same footing and its validity is subject to the same test, *viz.*, it is valid and would bind the reversioners, if it is a fair and *bona fide* compromise made by the female owner for the protection or benefit of the estate and not merely

(1) *Sunt Kumar* v. *Deo Saran*, 8 A. 365; *Gobind* v. *Khunnilal*, 29 A. 48; *Mahandli* v. *Baldeo*, 30 A. 75; *Indro Kuar* v. *Abdool*, 14 W.R. 146; *Imrit* v. *Roop Narain*, 6 C.L.R. 60 (81); *Sheo Narain* v. *Kanurao*, 10 C.L.R. 337; *Radha Kissen* v. *Nauratan*, 6 C.L.J. 490 (525); *Rajlakshmi* v. *Katyayani*, 38 C. 638 (673), followed in *Tirupatiraju* v. *Venkayya*, 45 M. 504 (511) F.B.; *Jeram* v. *Veeraven*, 5 Bom.L.R. 885; *Rama* v. *Daji*, 20 Bom.L.R. 947: 48 I.C. 125.

(2) *Khunni* v. *Govind*, 33 A. 356 (367) P.C.; *Hiram Bibi* v. *Sohan Bibi*, 18 C. W.N. 929: 24 I.C. 309; *Hardie* v. *Bhagwan Singh*, 50 I.C. (A.) 812 P.C.; *Thakur Prasad* v. *Mt. Dipa*, 10 Pat. 352.

(3) *Beharilal* v. *Daud Husain*, 35 A. 240; *Kambinayani* v. *Kambinayani*, 33 M. 473; *Kumarasami* v. *Subramania*, 31 M. L.J. 87; *Kadakkrai* v. *Nadakkannu*, (1921) M.W.N. 342: 62 I.C. 752, explained in *Tirupatiraju* v. *Venkayya*, 45 M. 504 F.B.; *Rama* v. *Narayanasami*, 51 M.L.J. 313: 96 I.C. 483: (1926) M. 609.

(4) *Tirupatiraju* v. *Venkayya*, 45 M. 504 F.B.

(5) *Gur Nanaka* v. *Jai Narain*, 34 A. 385; *Hiran* v. *Sohan*, 18 C.W.N. 929 P. C., following *Khunnilal* v. *Gobind*, 33 A. 356 P.C., overruling *contra* in *Sohan* v. *Hiran*, 1 I.C. (A.) 180, overruled O.A. *Hiran* v. *Sohan*, 18 C.W.N. 929 P.C.; *Kambinayani* v. *Kambinayani*, 33 M. 473; *Kadakkrai* v. *Nadakkannu*, (1921) M. W.N. 342: 62 I.C. 752; *Beharilal* v. *Daud Husoin*, 35 A. 240; *Mohendra* v. *Shamsunnesa*, 20 C.L.J. 157 (163), approved in *Ram Sumran* v. *Shyam Kumari*, 1 P. 741 (748) P.C.; *Upendra* v. *Bindeseri*, 20 C.W.N. 210.

for her personal advantage.[1] Moreover, the reversioner who has taken part in such compromise, and benefited himself thereby, would be stopped from disputing its validity. So, where the last owner's sister's son, *A*, disputed the right of the widow, *B*, to inherit her husband's estate but compromised his claim, by which the property was immediately divided amongst the widow and other members. *A* took share under the compromise but he was thereby recognized as the adopted son of another deceased uncle whose widow had taken a share, which she some six years later surrendered to him. On the death of *B*, four years later, *A* and his brother claimed the entire property as reversioners, but the Privy Council threw out *A's* claim, holding that *A*, having entered into and taken the benefit of the compromise, was precluded from claiming as the reversioner.[2]

Compromise When Invalid.

2603. But though the limited owner's right to compromise a claim is now beyond controversy, it must be a compromise, and not merely an alienation in the guise of a compromise. Every compromise presupposes a *bona fide* claim, and if there was no claim, there could be no compromise.[3] This is no exception to the rule that a compromise is binding if it is fair and made with due regard to the interests of the reversioners.

Alienation Distinguished.

2604. Since an alienation by the female heir stands upon a somewhat different footing, the distinction between a compromise and an alienation is of some importance. Apart from the obvious difference which exists between a transfer and a settlement of a doubtful claim, the latter implies the hushing of an antecedent title claimed through or under the last male holder.[4]

Explanation (2).

2605. Decree Against her Personally.—Again, since the heiress alone represents the estate, it has been held that in order to operate as *res judicata*, the decree should have been passed not personally, but as one representing the estate,[5] nor against some only of her representatives. So, where the widow executed a mortgage, on foot of which the mortgagee sued and obtained a decree against her, she preferred an appeal, but while her appeal was pending, she died, and the appeal was continued not by the reversioners but by the widow's personal representatives. It was dismissed and the mortgagee obtained possession. The reversioner sued him for possession, challenging his mortgage as fraudulent and without legal necessity. His suit having failed, he sued him again for redemption, on the ground that he was not bound by any proceedings continued since the death of the widow, and this contention was upheld by the High Court who held that since the decree of the trial judge merged in that of the court of appeal, and since that court had passed a decree against the widow's personal representatives, who could not represent the estate, there was no decree which bound the reversioner, and since there was a valid mortgage, as held in the previous suit against the reversioner, the latter was entitled to redeem it.[6]

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(1) *Mohendra Nath* v. *Shamsunnessa*, 19 C.W.N. 1280: 27 I.C. 954 P.C., followed in *Ramsumran* v. *Shyam Kumari*, 1 Pat. 741 P.C.; *Bhagwati* v. *Jagdam*, 2 Pat.L.J. 471.

(2) *Kanhai Lal* v. *Brij Lal*, 40 A. 487 P.C.

(3) *Anupnarain* v. *Mahabir*, 3 Pat.L.J. 83: 48 I.C. 95.

(4) *Bhagwati* v. *Jagdam*, 2 Pat.L.J. 471.

(5) *Lalit Mohan* v. *Dayamoyi*, 45 C. L.J. 404: (1927) P.C. 41: 15 Pat. 798; *Aurabinda* v. *Monorama*, 55 C. 903 (911); *Sheikh Ghasif* v. *Panchaman Singh*, 15 Pat. 798.

(6) *Kailash* v. *Girija*, 39 C. 925 (930); *Jathu Naik* v. *Venkatapa*, 5 B. 14, explained in *Devji Sambhu*, 24 B. 135 (141, 142); *Kanku* v. *Jadav*, 43 B. 869.

In another case, the widow had mortgaged her husband's land in 1857. In 1865 she sued for its redemption, but her suit was dismissed, on the ground that she had, in a deposition made in 1859, admitted that her right had become extinguished by the operation of the clause for foreclosure. Her suit was dismissed, wrongly, because the High Court had, in the previous year, adopted the equitable rule against the literal construction of such clauses.[1] The widow appealed, but her appeal was disposed of as "adjusted." She died in 1902, and her reversioner sued, within twelve years of her death, for redemption, which was allowed by the court holding that the dismissal of her suit on her previous admission created, only a personal estoppel which did not bind her reversioners.[2] Of course, where the decree is personal to the heiress, all that can be sold in execution is her right, title and interest in the property. It does not affect the reversioner's interest, which will, however, pass if the decree is made against her as representing the estate.[3]

2606. Questions for Execution.—Where a decree is passed against a widow or other limited owner, the question whether it is or is not executable against the reversioner, is one relating to execution, which it is competent to the executing court to inquire into. The decree-holder may then show that the decree is such as binds the estate in the hands of the reversioner, while the latter may show that it does not. This inquiry, being essentially one for execution, cannot be relegated to a separate suit. If the decree binds the estate, so does the sale held in execution of such a decree. But decrees are often passed without specifying the interest affected, in which case, the question whether on the sale of the right, title and interest of the widow in execution of a decree, the whole interest or only her own interest in the family estate passes, depends on the nature of the suit in which the execution of the decree takes place. If the suit is on a personal claim against the widow, then merely the widow's limited estate is sold. If, on the other hand, the suit is against the widow in respect of the family estate, or upon a cause not merely personal against her, then the whole of the inheritance passes by the execution sale. In order to ascertain the quantum of interest affected by the decree, it is permissible to examine the judgment upon which the decree is passed.[4] So, where the plaintiff sued for and obtained a decree for her maintenance against the widow, in execution of which she attached whatever right and interest the judgment-debtor had in the estate, the court held it to be a personal decree, and, as such, one which in the execution sale conveyed only the life-interest of the widow. "The real question is what was liable to be sold under the decree, and what, in fact, was sold. The purchaser may have made a mistake. He may have thought that the court was selling something which they did not sell, but he was informed distinctly by the notification that the court was selling the interest of the defendant in the estate, and that besides that interest no other interest was being sold. It appears, therefore, to their Lordships that what was intended to be sold was the widow's interest only and not the absolute estate."[5] But the mere fact that the pro-

Explanation (1).

(1) *Ramji* v. *Chinto*, (1864) 1 B.H. C.R. 199.
(2) *Kanku* v. *Jadav*, 43 B. 869.
(3) *Ishwari Prasad* v. *Babu Nandan*, 47 A. 563; *Moti Shah* v. *Chandharp*, 48 A. 637.
(4) *Jugul Kishore* v. *Jotendro*, 10 C. 985.
(5) *Baijun* v. *Brij Bhookun*, 1 C. 133 (139, 140) P.C., explained in *Jugul Kishore* v. *Jotendro*, 10 C. 985 (992) P. C.

clamation advertised for sale of the right, title and interest of the heiress is not conclusive, since it is still a question for enquiry as to what that interest is, and in many cases, although the right, title and interest of the widow had been sold, the whole interest in the estate was held to have passed and the reversionary heir bound by it.[1]

2607. The question, in such cases, depends, as already stated, upon the nature of the suit. As Sir Lawrence Jenkins, C. J., said: "Now, the cases make it clear that the courts, in determining the effect of an execution-sale, look to the substance of the whole matter and have declined to hold themselves fettered by any incorrect description, or by any informality in procedure, which can have no practical influence on the result. And so, it has constantly happened that where justice and equity require such a determination, it has been held that a greater or other interest in the property has passed than would be warranted by a strict adherence to the words of the sale notification or certificate in execution proceedings. Similarly, the whole estate of a deceased debtor has been held to be bound by proceedings in execution of a money-decree, though the actual heirs were not, in so many words, bound by the decree, but were substantially represented in the suit. And one can well understand how the courts, and more particularly the Privy Council, have declined to apply the more rigid test of English practice to proceedings in this country."[2] So, where the decree was passed against the widow, in respect of the rent of the estate due for a period when her husband was alive, the court held the sale to convey the absolute estate and not merely the interest of the widow against whom the decree was passed.

In some cases, the widow was held even to have sufficiently represented her minor sons living, who were held bound by the decree passed against her, unless they could show that the decree was not binding on the estate in their hands, by reason of the debt not being one for which the estate was liable.[3] The matters for consideration in such cases are:—

(1) What property could have been brought to sale in a properly constituted suit;

(2) What property was actually intended to be sold and bought; and

(3) Has there been such an error in the constitution of the suit or the conduct of the proceedings that effect cannot properly be given to the intention or, to state conversely, has there been a substantial representation of those interested in the property intended to be sold and bought?[4]

Explanation (2).

2608. Personal Decree.—Explanation 2 merely states the rule of construction, *viz.*, that the nature of the decree must be determined by the nature of the cause of action. If it was personal to the widow, so is the decree. If it affected the entire estate, so does the decree. If the cause of action was personal, the fact that the decree was passed both against the heiress and her reversioners, would not make the entire estate liable.[5]

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(1) *Jugul Kishore* v. *Jotendro*, 10 C. 985 (992) P.C.; *Nagendrabala* v. *Panchanan*, 60 C. 1230.

(2) *Deoji* v. *Shambhu*, 24 B. 135 (139).

(3) *Achut* v. *Manjunath*, 21 B. 539.

(4) *Devji* v. *Sambhu*, 24 B. 135 (146); *Jhari Koeri* v. *Bijai Singh*, 45 A. 613, explaining *Jugal Kishore* v. *Jotendro*, 10 C. 985; *Jiban Krishna* v. *Brojo Lal*, 30 C. 550, dissenting from *Kristo Gobind* v. *Hem Chandar*, 16 C. 511, following *Sitaram* v. *Khandu*, 45 B. 105; *Kesho Prasad Singh* v. *Chandrika Prasad*, 2 Pat. 217.

(5) *Nobin Chandra* v. *Hemchandro*, 19 C.W.N. 265.

361. (1) **A suit to avoid an alienation may be brought by the presumptive reversioner within twelve years and by a presumable reversioner within six years from the date thereof.**[1]

Limitation to avoid an alienation.

(2) And a suit for possession of the reversionary estate may be instituted as provided in the next section.[2]

2609. **Analogous Law.**—Art. 125 of the Limitation Act prescribes the period of limitation applicable to the suit of the nearest reversioner, which allows twelve years calculated from the date of alienation. But a remote reversioner must bring his suit within six years, under the general Art. 120, calculated from the same date.[3] Of course, neither the presumptive nor the presumable reversioner is bound to sue the heiress or the alienee during the former's lifetime. Their right of suit is a concession made with a view to having the question tried before evidence is lost by lapse of time.

But since the reversioner's suit is a representative suit, the cause of action arises on the date of the alienation, jointly and simultaneously for the entire body of the reversioners. If, therefore, an alienation by an heiress is not impeached in a declaratory suit, instituted, within the period of twelve years prescribed by Art. 125 of the Limitation Act, by the reversioners then in existence, a presumptive reversioner, though born after the lapse of twelve years from the date of the alienation, will be debarred from bringing a suit for a declaration in respect of it.[4] A collusive suit may, for the purpose of limitation, be treated as a private alienation, provided it is the necessary result of some collusive arrangement made by her to use the court as a medium of transfer, or in other words, if she intended to transfer the property and used the court-sale as a means to effect her purpose.[5] Otherwise, the alienation cannot be held to be made by the heiress within the meaning of Art. 125, and the only other article applicable would be Art. 120 and not Art. 125.

2610. On the death of the heiress, the reversioner gets another cause of action for recovery of possession of his estate for which he is entitled to institute a suit within twelve years of the heiress's death. If he has failed to set aside her alienation within the period mentioned in clause (1) he can ignore it in his suit for possession, and so drive the alienee to justify his alienation.[6]

Clause (2).

362. (1) **The reversioner is entitled to sue for possession of immovable property, to which he becomes entitled on the death of a female limited owner, at any time within twelve years from her death, as provided in Art. 141 of the Limitation Act; or in case of its forfeiture, within the same period calculated from when the forfeiture is incurred, as provided in Art. 143 of the Limitation Act;**[7]

Limitation for possession.

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(1) Arts. 125, 120, Limitation Act.
(2) *Ib.* Art. 141.
(3) *Guntupalli* v. *Guntupalli*, 24 M.L.J. 183: 18 I.C. 710.
(4) *Challagundla* v. *Madala*, 41 M. 659 F.B.
(5) *Ranga Rao* v. *Ranganayaki*, 35 M.L.J. 364; *Sheo Singh* v. *Jeoni*, 19 A. 524; *Ramsarup* v. *Ramdey*, 29 A. 239.
(6) S. 356, Ill. (*a*).
(7) *Subbi* v. *Ramkrishna*, 42 B. 69 (77).

(2) Where, however, the property to be recovered is movable, he must sue within six years from the same event, under Art. 120 of the Limitation Act:[1]

(3) Provided that where the heiress had at any time set up an adverse title against the reversioner, his claim will be barred by her adverse possession for twelve years.[2]

2611. Analogous Law.—The starting point of limitation for recovery of the estate is, since the Limitation Act of 1871, the death of the heiress, prior to which possession adverse to the heiress was held to constitute possession equally adverse to the reversioner. And if adverse possession commenced against the former, it was held to continue to run as such against the latter.[3] In other words, under the Limitation Act (XIV of 1858), the starting point of adverse possession was its commencement against the heiress, and its starting point under the later Acts has been her death,[4] the nature and extent of the alienation (whether for life or absolute)[5] and the sex of the reversioner being both immaterial.[6]

As regards movables the reversioner's suit for possession would be subject to Art. 49 of the Limitation Act[7] though in some cases the Privy Council have held Art. 120 as more appropriate.[8]

2612. Limitation for Possession.—The special starting point of limitation applicable to a reversioner suing for possession of the immovable property allowing him 12 years from the death of the widow is an exception to the general rule that adverse possession has the effect of extinguishing all rights.[9] Under S. 1 (12) of the Limitation Act, 1859,[10] which prescribed 12 years for the recovery of any interest in immovable property, to which no other provision of that Act applied, and as there was no other provision in that Act corresponding to Art. 141, the courts were constrained to hold the general article as equally applicable to a reversioner suing on the death of a Hindu widow.[11]

Clause (1).

A special provision shifting the starting point for limitation from the date of adverse possession to the death of the female was inserted

(1) *Runchordas* v. *Parvatibai*, 23 B. 725 P.C.

(2) *Sham Koer* v. *Rupan Koer*, 29 C. 664 P.C.; *Mahabir* v. *Adhikari*, 23 C. 942 P.C.

(3) *Amirtolall* v. *Rajooneekant*, 23 W. R. 214 P.C.

(4) *Runchordas* v. *Parvati*, 21 B. 646, affirmed O.A. 23 B. 725 P.C.; *Bijoy Gopal* v. *Krishna*, 34 C. 329 P.C.; *Persut* v. *Palut Roy*, 8 C. 442; *Srinath* v. *Prosunno Kumar*, 9 C. 934; *Harihar* v. *Dasarathi*, 33 C. 257; *Meeraw* v. *Girjanundan*, 12 C.W.N. 857; *Mukta* v. *Dad*, 18 B. 216; *Rakhmabai* v. *Keshav*, 31 B. 1; *Ram Kali* v. *Kedarnath*, 14 A. 156; *Hanuman* v. *Bhagauti*, 19 A. 357; *Amrit* v. *Bindesri*, 23 A. 448, dissenting from *Tikaram* v. *Shama Charan*, 20 A. 42; *Sreeramula* v. *Krishnamma*, 26 M. 143.

(5) *Ranchor Das* v. *Parbati Bai*, 23 B. 725 (736) P.C., affirming O.A.; 21 B. 646 (670) *Cursondas* v. *Vundrabandas*, 14 B. 482 (488).

(6) *Ranchordas* v. *Parvati Bai*, 23 B. 725 P.C.; *Jhumman* v. *Tiloki*, 25 A. 425; *Ram Dei* v. *Abu Jafar*, 27 A. 494; *Ram Singh* v. *Bhani*, 37 A. 117; *Sambasiva* v. *Ragava*, 13 M. 512.

(7) *Mahomed Riasat Ali* v. *Hasin Banu*, 21 C. 157 P.C.; *Runchordas* v. *Parvatibai*, 23 B. 725 (736) P.C., affirming O.A. 21 B. 646; *Aurabinda* v. *Monorama*, 55 C. 903 (916) (either Art. 49 or Art. 120 applicable).

(8) *Mahomed Riasat* v. *Hasin Banu*, 21 C. 157 (163) P.C., *Runchordas* v. *Parvati Bai*, 23 B. 725 (736) P.C. affirming O.A. 21 B. 646.

(9) *Ganpatibhatta* v. *Ramkrishnabhatta*, 42 B. 69; *Shambhu Prasad* v. *Mahadeo*, 55 A. 554.

(10) S. 1, Cl. (12), Act (XIV of 1859).

(11) *Nobin Chunder* v. *Guru Persad*, B. L.R. (Sup. Vol.) 1008; *Amrit Lal* v. *Rajonee Kant*, 15 B.L.R. 10 P.C.; *Vaithialinga* v. *Srirangath*, 48 M. 883 (904) P.C.

in the Limitation Act of 1871,[1] and it has been reproduced in the later Acts[2] under all of which the reversioner whether a male or a female[3] is entitled to sue within twelve years from the date of the death of the female, although she may have been out of possession for more than twelve years.[4]

2613. But since remarriage under the Act or complete renunciation of the world by the female have the same effect, limitation, in the one case, starts from the date of the forfeiture under Art. 143,[5] and in the other the renunciation of the world which is said to amount to civil death,[6] and, the reversioner's right to sue is taken to commence thereupon. A remarriage which involves no forfeiture will, of course, give the reversioner no right to possession, and consequently, no right to eject a trespasser.[7] For so long as she is not naturally or civilly dead, or her estate otherwise forfeited, no act or alienation by, or adverse possession against, the female heir affects the reversioner whose right to possession accrues only on her death, and it is consequently, only from that date that adverse possession can affect his right.[8]

The death of the female being the sole starting point, any act such as that she had set up an adoption and transferred the estate purporting to be absolutely in favour of the alleged adoptee or a transferee for or without value, would not start limitation against the reversioner, since none of these acts amounts to civil death of the female or entails the forfeiture of her estate giving the reversioner the present right to possession which he needs to protect by suit.[9] Where the estate vests in two or more female limited owners, with the right of survivorship *inter se*, limitation under Art. 141 would start from the death of the last survivor. The fact that one co-widow had surrendered her interest in favour of another, does not accelerate succession and has no effect upon the reversioner's right.[10] But while no adverse possession against the widow affects the reversioner's limitation, adverse possession by her affects his right. A decision against the widow who fails to recover her estate within twelve years of her husband's death, only affects her title and cannot operate as *res judicata* against the reversioner.[11] The case is, however, different if the trespass commenced against the last full owner, in which case, the limitation having started against all comers, the intervention of the widow could not

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(1) Art. 142, Act IX of 1871; *Ram Singh* v. *Bhim*, 38 A. 117; *Tulsa Bai* v. *Bhagwat Prasad*, 11 A.L.J. 333: 20 I. C. 179; *Mahran* v. *Quarutullah*, (1909) P.L.R. 121: 3 I.C. 984.

(2) Art. 141 (Act XV of 1877 and Act IX of 1908).

(3) *Ranchordas* v. *Parvati Bai*, 23 B. 725 P.C.; *Jhumman* v. *Tiloki*, 25 A. 425; *Ram Dei* v. *Abu Jafar*, 27 A. 494; *Ram Singh* v. *Bhani*, 37 A. 117; *Sambasiva* v. *Ragava*, 13 M. 512.

(4) *Bankey Lal* v. *Raghunath*, 51 A. 188 F.B.; *Amrit Dhar* v. *Bindesri*, 23 A. 448; *Jhumman* v. *Tiloki*, 25 A. 435; *Gajadhar* v. *Parbati*, 33 A. 312.

(5) *Doraiswamy, In re*, 12 M.L.J. 152: 15 I.C. 602; *Nathu* v. *Nai Bahu*, 11 N.L.R. 86.

(6) *Nobo Kishore* v. *Hari Nath*, 10 C. 1102 (1108) F.B.; *Hem Chunder* v. *Sarnamoyi*, 22 C. 354 (361).

(7) S. 2, Act XV of 1856.

(8) *Curson Das* v. *Vundravan Das*, 14 B. 482 (488), affirmed O.A. *Vundravan Das* v. *Curson Das*, 21 B. 646 (670), O. A. *Ranchordas* v. *Parvati Bai*, 23 B. 725 (736) P.C.; *Ram Shewak* v. *Sheo Gobind*, 8 W.R. 519; *Hanuman* v. *Bhagauti*, 19 A. 357.

(9) *Bhagwati* v. *Murarilal*, 15 C.W.N. 524: 7 I.C. 427; *Curson Das* v. *Vundraban Das*, 14 B. 482 (486), affirmed O.A. *Vundraban Das* v. *Curson Das*, 21 B. 646 (670), O.A. *Ranchordas* v. *Parbati Bai*, 23 B. 726 (736) P.C.; *contra* in *Ramkrishna* v. *Tripara Bai*, 33 B. 88; in *Sreeramulu* v. *Krishtamma*, 26 M. 143, both Arts. 141 and 144 held applicable.

(10) *Mutaiyala* v. *Buradagunta*, 39 M. L.J. 567.

(11) *Ramchandra* v. *Kakutur*, 32 M. L.J. 627: 42 I.C. 228.

arrest its operation, and if the widow is barred, so would be the reversioner.[1] So, again, where the widow sets up an adverse title on her own account, in which case, limitation against the reversioner commences to run as from the date of her assertion of such title, and he would be barred, unless he sues for possession within twelve years from that date, as provided in Art. 144 of the Limitation Act.[2]

2614. Limits of the Rule.—Art. 141 applies only to a reversioner succeeding to the estate of a female limited owner. It does not apply to cases in which the Hindu female had been in possession of the full estate and where the heir succeeds as her heir.[3] So, where a Dayabhag father died, leaving him surviving his two daughters and a daughter-in-law, being the widow of a predeceased son, who entered upon possession to the exclusion of the two daughters who were his rightful heirs. She sold the estate to the plaintiff, and the possession of these two was adverse for more than twelve years, which extinguished the title of the two daughters, after which one of them got into possession of the property, whereupon the plaintiff sued her and her sons. The court held that it could not decide on the title of the sons who had a mere contingency during the life of their mother, whom the plaintiff was entitled to oust on the ground of adverse possession. It was contended for her that since her sister had died within twelve years of the suit, and she had succeeded to her moiety by survivorship, the starting point for limitation against her was not the date of the daughter-in-law's adverse possession but her sister's death; but the court had no difficulty in holding that since the surviving sister succeeded not as reversioner to her sister but by survivorship, she could not claim the benefit of Art. 141 and was consequently subject to the ordinary rule regarding adverse possession.[4]

2615. Suit for Movables.—A suit for the recovery of movables or for compensation for wrongfully taking or injuring or wrongfully detaining the same is subject to Art. 49 of the Limitation Act.[5] But this Article has been held to apply only to a claim in respect of a *specific* movable property, and is inapplicable to a suit to establish a right to inherit the property of a deceased person,[6] or to recover it as such, to which Art. 120 would apply.[7] The question which of the two Articles should apply depends upon the nature of the claim made.

Clause (2).

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(1) *Mohendra Nath* v. *Shamsunnessa*, 19 C.W.N. 1280: 27 I.C. 954.

(2) *Jowala Buksh* v. *Dharum Singh*, 10 M.I.A. 511 (535); *Satgur* v. *Raj Kishore*, 24 C.W.N. 394 P.C.; *Sham Koer* v. *Dab Koer*, 29 C. 664 P.C.; *Lachan Koer* v. *Anant Singh*, 22 C. 445 P.C.; *Mahabir* v. *Adhikari*, 23 C. 242; *Kedar Nath* v. *Jatindra*, 9 C.L.J. 236: 4 I.C. 44; *Amrit* v. *Bindsri*, 23 A. 448; *Jhumman* v. *Tiloki*, 25 A. 435; *Gajadhar* v. *Parbati*, 33 A. 312.

(3) *Gobinda* v. *Dinanath*, 23 C.W.N. 977: 56 I.C. 141; *Malratijun* v. *Amrita*, 42 B. 714; *Municipal Council* v. *Foster*, 41 M. 538; *Soumya* v. *Kandasami*, 17 I.C. (M.) 136; *Chira Singh* v. *Gajraj*, 18 O. C. 289: 33 I.C. 371.

(4) *Sachindra Kishore* v. *Rajani*, 18 C.W.N. 904: 27 I.C. 250.

(5) *Aurabinda* v. *Manorama*, 55 C. 903 (916), *contra* in *Ranchordas* v. *Parvatibai*, 23 B. 725 (736) P.C., not followed.

(6) *Mahomed Riasat* v. *Hasin Banu*, 21 C. 157 (163) P.C.

(7) *Ranchordas* v. *Parvatibai*, 23 B. 725 (736) P.C., affirming O.A. 21 B. 646. (But in this case the applicability of Art. 49 was neither argued nor considered. It appears to have been overlooked altogether.)

2616. The reversioner's suit for possession may be barred by the adverse possession of the heiress,[1] as where the widow sets up her title to ownership of the property, of which she was given possession as only a maintenance grantee;[2] or as a limited owner. The subject will be more fully discussed under S. 364 (6).

Clause (3).

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(1) *Vaithilinga* v. *Srirangath*, 48 M. 883 (904) P.C.; *Sham Koer* v. *Dab Koer*, 29 C. 664 (671) P.C.; *Mahabir Pershad* v. *Adhikari*, 23 C. 942 P.C.; *Lachhan Kunwar* v. *Manorath Ram*, 22 C. 445 (450) P.C.; *Kedar Nath* v. *Jatindra*, 9 C.L.J. 236: 4 I.C. 44.

(2) *Sham Koer* v. *Dab Koer*, 29 C. 664 (671) P.C.; *Satgur* v. *Raj Kishore*, 42 A. 152 P.C.

CHAPTER XXVII.

STRIDHAN.

2617. Topical Introduction.—The law of stridhan is most difficult, as it is the least settled branch of Hindu Law. In its forefront stands its etymological definition by Vidnyaneshwar, and its repudiation by the Privy Council. The term "stridhan" literally means "woman's property," and Vidnyaneshwar defined it as such. But as has been seen before, woman's property is a generic term, and embraces property which a woman may acquire by inheritance or partition, or it may come to her by gift from her parents, husband or his or her other relations. Yadnyavalkya employed the term "stridhan" to denote the quality of the right in property which she obtained mostly by gift over which she had the absolute power of disposal. In describing such property he mentioned that which was obtained by gift from her husband *"et cetera"* (*"adi"*). Vidnyaneshwar seized hold of this word and explained *"et cetera"* to include all her other estate, however acquired, with the result, that if his explanation were accepted, all that woman acquires by inheritance and partition would fall into the same category as her bridal gifts, with the further result that they would all be at her absolute disposal and on her death pass to her own heirs. Now, as Vidnyaneshwar's scheme of woman's right was limited and followed the earlier conception of her dependance and cautious concession of enjoyment, the Privy Council would not allow the enlargement of her rights as the result of a single text, and one wholly out of keeping with the general tenor and purpose of his general scheme. In the very first case, which they had to try they repelled the logical deduction pressed upon them.[1]

2618. In later cases[2] they reiterated and reinforced their earlier stand-point with the result that Vidnyaneshwar's definition of stridhan stands repudiated, add the term stridhan must now be limited to comprise only such property as the woman acquires otherwise than by inheritance and partition, and over which she possesses plenary powers of disposal. Leaving out of account then all other property, stridhan has but a limited significance. It is a legal concept—a term of art and bears only the meaning assigned to it in **S. 364** where all the sources of her acquisition of such property are set out.

2619. This stridhan the owner may dispose of by a gift *inter vivos*, or by will. But before the legislative intervention liberalizing her rights acquired by gift or devise but sexual capacity was held to limit the estate of the donee at the devisee as the case may be, but now that disability remains limited to an estate acquired by inheritance.

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(1) *Thakoor Deybe* v. *Rai Bulukram*, 11 M. I.A. 139 (175).

(2) *Bhugwandeen* v. *Myna Baee*, 11 M. I.A. 481; *Chotay Lall* v. *Chunno Lall*, 4 C. 744 P.C.; *Sheo Shunkar* v. *Debi Sahai*, 25 A. 468 P.C.; *Sheo Pertab* v. *Allahabad Bank*, ib., 476 P.C.; *Debi Mangal* v. *Mahadeo*, 34 A. 234 P.C.; overruling O. A. *Debi Mangal* v. *Mahadeo*, 32 A. 253, also *Chhiddu* v. *Naubat*, 24 A. 67 (74, 76).

This is, again, anomaly, but when law creates artificial barriers, anomalies do creep in, and they abound in the law relating to succession, which follows no uniform general rule, but depends upon, at least six disturbing factors: (1) The kind of stridhan; (2) the fact whether the owner was a maiden or married; and (3) if married, whether she had children, or (4) was childless; (5) even the mode of her marriage; and (6) lastly, the school to which she is subject. Even in the case of the heirs when they are daughters preference is given to unmarried and indigent daughters over daughters who are married and well off; while the Bengal law discriminates between daughters who have a son or are likely to beget a son and those who are widowed and sonless.

It might be supposed that in the face of these numerous distinctions it would not be possible to generalize upon the law of succession to stridhan. And the text writers do not attempt it. But if the subject is analysed, it will be seen that there is a possibility of reducing it to a system.

In the first place, though stridhan is acquired in a variety of ways, an examination of the subject will show that all its sources are reducible to two main heads. Stridhan which the older Smritikars describe in detail, and which is all they provide for, has come to be understood as the technical or proper stridhan. It forms an inconsiderable part of woman's absolute estate. It, however, follows the special rules of devolution upon which there is the greatest conflict. Other stridhan, described in clauses 1-7 of **S. 364**, is subject to a more general rule, because it has only latterly become recognized, and its law of succession is not tramelled by any textual directions. It is then possible to formulate the general rules subject to which this description of stridhan passes. Both as regards its enjoyment and the law of its succession, it is not a wide departure from the general law. It is, however, natural that the mother's estate should first go to her female issue. As remarked in a case: "The law of succession, therefore, generally follows the female line."

363. (1) **"Stridhan," unless otherwise expressed or necessarily implied, means the woman's property acquired by her otherwise than by inheritance or partition, over which she possesses full power of disposal, and which, on her death, devolves upon her own heirs.**

"Stridhan" defined.

(2) It includes property into which it is converted by sale, exchange or otherwise.

Illustrations.

(*a*) *A* possesses two properties *B* and *C* as her stridhan. She makes a gift of *B* to *D* and devises *C* to *E*. Both the gift and the devise are valid as the properties being *A's* stridhan, she possessed the absolute power of disposal over them.

(*b*) *A* inherits the property *B* from her husband. She accumulates its income which she bequeaths to *C* by will. The bequest is void as though *A* possessed the absolute power of disposal over *B's* income, it was not her stridhan. She could not, therefore, bequeath it.

2620. Analogous Law.—The following texts support the rules stated in the section:—

Manu 194.—"What was given before the nuptial fire, what was given on the bridal procession, what was given in token of love, and what was received from a

brother, a mother, or a father, are considered as the six-fold separate property of a married woman.[1]

Yadnyavalkya.—"What has been given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife as also *any other* separate acquisition is denominated a woman's property."[2]

Mitakshara (citing Manu).—"The enumeration of six sorts of woman's property by Manu is intended not as a restriction of a greater number, but as a denial of a less.

"That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented (to the bride) by the maternal uncles and the rest (as paternal uncles, maternal uncles, etc.) at the time of the wedding before the nuptial fire; and a gift on a second marriage, gratuity on account of supersession as will be subsequently explained ('To a woman whose husband married a second wife let him give an equal sum as a compensation for the supersession) and also property which she may have acquired by inheritance, purchase, partition, seizure or finding are denominated by Manu and the rest *woman's property.*'"[3]

Dayabhag.—"20. Over that which has been received by her from any other but the family of her father, mother or husband or has been earned by her in the practice of mechanical art (as spinning or weaving) her husband has dominion and full control. He has a right to take it, even though no distress exists. Hence though the goods be hers, they do not constitute woman's property; because she has not independent power over them.

"21. But in other description of property excepting these two, the woman has the sole powers of gift, sale or other alienation.''[4]

2621. What is Stridhan.—With the exception of the Mitakshara all texts use the term *"stridhan"* to denote the property of a woman over which she has absolute power of disposal. Yadnyavalkya uses it in that sense, and illustrates his meaning by enumerating certain well-known kinds of that property, adding the word *'adya' i.e.,* 'and the like,' or *'et cetera'* as meaning that his enumeration is merely illustrative and not exhaustive. The author of Mitakshara takes advantage of this incomplete enumeration and explains the word *"adya"* to mean all other property acquired by a woman whether by inheritance or partition. It might at first be supposed that Vidnyanashwar, an ascetic and expositor of the conservative thought was striving to enlarge the rights of woman by conferring upon women absolute power of disposal over property, even acquired by them by inheritance or partition. But this does not appear to have been his object, though by enlarging the meaning of the term and giving it a wider significance he clearly intended all such property to descend to the woman's special heirs. This was in itself a serious innovation and was not submitted to by the other commentators and the courts who held that it did not descend in the special line prescribed for stridhan, strictly so called,[5] and that in this respect there was no distinction between a woman's property

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(1) Manu, IX-194 cited in Mit., II-XI-4.

(2) Yad., II-144.

(3) Mit., II-XI-5.

(4) Dayabhag, IV-I-21. IV-II-26 contains a long disquisition on the woman's *stridhan* explanatory of texts of Manu and Katyayan.

(5) *Thakoor Deyhee* v. *Rai Baluk Ram,* 11 M.I.A. 139; *Bhagwandeen* v. *Myna Baee,* 11 M.I.A. 47; *Chotay Lall* v. *Chunnoo Lall,* 4 C. 744 P.C.; *Muttu* v. *Dorasinga,* 3 M. 290 P.C.; *Chelikani* v. *Chelikani,* 25 M. 678 P.C.; *Sheo Shankar Lal* v. *Devi Sahai,* 25 A. 468 (473) P.C. reversing O.A. *Debi Sahai* v. *Sheo Shankar Lal,* 22 A. 353.

inherited from a male and that which she inherited from a female,[1] and that on this point there is no distinction between the Mitakshara and the Mayukh[2] or the Bengal laws.[3] In other words, property acquired by inheritance and partition[4] by a woman is not her stridhan and Vidnyaneshwar is not to be followed when he defines *stridhan* as including such property.[5]

2622. Ignoring, then the wider definition of the term "stridhan", contained in the Mitakshara, as incorrect, there remains its original connotation, and in that sense, the term has now come to be recognized, and will be used throughout in this chapter. Stridhan is sometimes spoken of and defined as property of a woman over which she possesses the unfettered power of disposal. But all property over which she possesses such power is not necessarily her stridhan. For example, she possesses an absolute power of disposal over the income of her inherited estate; but it is not her stridhan, because, on her death, it devolves upon the heir of the last owner, and not on her own stridhan heir. Only such property over which she exercises uncontrolled dominion when alive and which, on her death, devolves on her own heirs in her stridhan.[6] On the other hand, a sister in Bombay inheriting to her brother takes his property as her *stridhan*, because she has an absolute power of disposal over it during her lifetime and on her death it devolves upon her own heirs, namely, her own daughters.[7]

2623. This being then the test, in order to determine whether any property is a woman's stridhan or peculium, the question to inquire is not so much how it was acquired as what power of disposal she possesses over it. It is conceded that the following six kinds of property are undoubtedly her stridhan.

(1) Nuptial gifts (Katyayan 1-2).

(2) Gifts through affection made by the father-in-law, the mother-in-law and by the elders (Katyayan 3).

(3) Gifts by the father,[8] mother, brother[9] (Katyayan 3-6), the husband[10] or his relations.[11] It is equally conceded that this list is not exhaustive. Consequently, it has been held that whatever a woman acquires by her own exertion[12] or by adverse possession[13] becomes her stridhan. Property absolutely gifted or devised to the wife become her stridhan if it

(1) *Vijiarangam* v. *Lakshman*, 8 B.H.C.R. (O.C.) 244 (272); *Manilal* v. *Rewa*, 17 B. 758 (761); *Vira Sengappa* v. *Rudrappa*, 19 M. 110 (118); *Sheo Sankar Lal* v. *Debi Sahai*, 25 A. 468 (473) P.C.; *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 P.C.

(2) *Vijiarangam* v. *Lakshman*, 8 B.H.C.R. (O.C.) 244 (260); *Narmada* v. *Bhagwantrai*, 12 B. 505; *Manilal* v. *Rewa*, 17 B. 758 explained in *Sheo Shankar Lal* v. *Debi Sahai*, 25 A. 468 (474) P.C. reversing O.A. *Debi Sahai* v. *Sheo Shankar Lal*, 22 A. 353.

(3) *Huri Dayal* v. *Grish Chunder*, 17 C. 911 (916).

(4) *Debi Mangal* v. *Mahadeo*, 34 A. 234 P.C. overruling O.A. 32 A. 253 and *contra* in *Chhiddu* v. *Naubat*, 24 A. 67: *Sri Pal* v. *Surajbali*, ib. 82.

(5) *Janakisetty* v. *Miriyala*, 32 M. 521 (524); *Sengamalathammal* v. *Valayudu*, 3 M.H.C.R. 312.

(6) *Phukar Singh* v. *Ranjit Singh*, 1 A. 661.

(7) *Bhaskar* v. *Mahadeb*, 6 B.H.C.R. (O.C.) 1.

(8) *Guruprasad* v. *Nafar Das*, 11 W.R. 497; *Muthapudayan* v. *Ammani*, 21 M. 58.

(9) Manu IX-194; *Munia* v. *Puran*, 5 A. 310 F.B.

(10) *Radha* v. *Bisheshur*, 6 N.W.P.H.C.R. 279; *Thakro* v. *Goran*, 10 A. 197 P.C.; *E.* v. *Satnarayan*, 53 A. 437.

(11) *Hurry Mohun* v. *Shonatun*, 1 C. 275.

(12) *Narmada* v. *Bhagwantrai*, 12 B. 505; *Subramanian* v. *Arunachellam*, 28 M. 1 F.B.

(13) *Kantai* v. *Ameri*, 32 A. 189; *Mohim Chunder* v. *Kashi*, 2 C.W.N. 161; *Magli* v. *Ludli*, 13 I.C. 644.

was so intended.[1] So are the arrears of maintenance due to her.[2] Where it was shown that a childless Jain widow was by custom, entitled to deal with the property inherited by her, at her pleasure, it was held that that property becomes her stridhan.[3] It has already been stated that there is no presumption that property in possession of a woman is her stridhan (**S. 335,** Com.).

2624. Not Stridhan.—But property acquired by inheritance is not her stridhan notwithstanding the contrary laid down by the Mitakshara,[4] it being immaterial whether the person to whom she inherits was a male or a female, her husband or any other relations,[5] or whether the property is movable[6] or immovable. A maiden daughter inheriting the stridhan of her mother does not acquire it as her own stridhan.[7] Such is also the estate of one co-widow's stridhan.[8]

The case is, of course, the same when she inherits from her father.[9] So again, while nuptial gifts are stridhan, gifts made after marriage, such as ornaments made by the father to his daughter subsequent to her marriage are not her stridhan.[10] Savings from the income of a widow's life estate are not her stridhan, and if she has not disposed of them in her life, they follow the estate.[11] Under the Mithila law, immovable property, taken as a gift by the wife from her husband is heritable but not alienable, except for necessary purposes, even with the consent of the husband.[12] In this view she has only a disqualified right in her stridhan.

What property is stridhan.

364. The following property constitutes a woman's stridhan:—

(1) Property inherited by female heirs born in the family and subject to the Bombay School of Law.[13]

(2) Income and its savings from property inherited by female heirs elsewhere, not being an accretion thereto.[14]

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(1) *Thakro* v. *Ganga,* 10 A. 187 P.C.

(2) *Court of Wards* v. *Mohessur,* 16 W.R. 76.

(3) *Hukum Chand* v. *Sital Pershad,* 50 A. 232.

(4) *Debi Mangal* v. *Mahadeo,* 34 A. 234 (238) P.C.; *Janakisetti* v. *Miriyala,* 32 M. 521; *Sengamalathammal* v. *Velayuda,* 3 M.H.C.R. 312; *Panchhnund* v. *Lalshan,* 3 W.R. 140; *Janki Setty* v. *Miriyala,* 6 M.L.T. 196.

(5) *Debi Mangal* v. *Mahadeo,* 34 A. 234 P.C.; *Sheo Shankar* v. *Debi Sahai,* 25 A. 468 P.C.; *Sheo Pertab* v. *Allahabad Bank,* 25 A. 476 P.C.; *Chotaylall* v. *Chunnolall,* 4 C. 744 P.C.; *Bhagwandeen* v. *Myna Baee,* 11 M.I.A. 487; *Sengamalathammal* v. *Velayuda,* 3 M.H.C.R. 312; *Viragangappa* v. *Rudrappa,* 19 M. 110; (Madras Law the same); *Sooryudu* v. *Hanumayya,* 32 M. 521; *Muthu* v. *Dora,* 8 I.A. 99 (rule applicable to Carnatic) *contra* in *Sri Pal* v. *Surajbali,* 24 A. 67 (82) overruled by the contrary held by the Privy Council.

(6) *Chandan* v. *Ishri,* (1884) A.W.N. 67.

(7) *Sheo Shankar* v. *Debi Sahai,* 25 A. 468 (474) P.C.; *Sooryudu* v. *Hanumayya,* 32 M. 521; *Janakisetty* v. *Miriyala,* 6 M. L.T. 196.

(8) S. 355, *Aviswary Anandaji* v. *Sivaji,* 49 M. 116 (152); *Raghavalu* v. *Kausalya,* (1937) M. 607.

(9) *Chotay Lall* v. *Chunnoo,* 22 W.R. 496.

(10) *Gopal* v. *Ram Chandra,* 28 C. 311 following *Jadu Nath* v. *Bussunt,* 19 W.R. 264.

(11) *Ishri* v. *Hansbutti,* 10 C. 324; *Apparao* v. *Gopala,* 31 M. 321.

(12) *Hitendra* v. *Rameshwar,* 4 P. 510.

(13) Mayukh, IV-X-26; *Vijiarangam* v. *Lakshuman,* 8 B.H.C.R. (O.C.) 244 (261); *Bhagirathi Bai* v. *Kanhujirav,* 11 B. 285 (303, 310); *Gandhi* v. *Jadab,* 24 B. 192; *Gulappa* v. *Tayawa,* 31 B. 453.

(14) *Sheo Lochan* v. *Saheb Singh,* 14 C. 387 (393, 394) P.C.; *Saodamini* v. *Administrator-General,* 20 C. 433 (442) P.C.; *Raja Bahadur* v. *Indarpal,* 26 C. 871 878) P.C.; *Nabakishore* v. *Upendrakishore,* 26 C.W.N. 322 (325) P.C.; *Akhanna* v. *Venkayya,* 25 M. 351 (359, 360).

(3) Property acquired by grant, gift, or devise from a relation or a stranger which confers an absolute power of disposal.[1]

(4) Property given for the purpose, or in lieu of maintenance, not being property allotted on partition to a wife or widow.[2]

(5) Accretions to and purchases made out of such property.[3]

(6) Property acquired by adverse possession.[4]

(7) Property acquired by self-exertion.[5]

(8) Wedding gifts, and more particularly the following[6]**:—**

(*i*) *Yautuk* including—

(*a*) *Adhyagnik* stridhan—gifts made before the nuptial fire, i.e., at the actual marriage ceremony, and

(*b*) *Adhyavahnik* stridhan—gifts received at the time of the marriage procession.

(*ii*) *Sulk*—or gratuity.

(9) *Adhyavedanik*—or the compensation given by the husband to his wife on his marrying another wife.[7]

(10) *Anvadheyak*—or gifts made after marriage by her relations or by her husband's relations.[8]

2625. Analogous Law.—All the clauses of this section are drawn from the decided cases. Of the ten clauses, clauses 8-10 alone are referred to in the texts cited under the last section as constituting stridhan, but as the court remarked: "We are not prepared to hold that the rules of Hindu Law are so inelastic as to be capable of application only to such description of interests in the property as formed the subject-matter of transactions at the time when the rules were first formulated. Indeed, if the rules of Hindu Law were so narrowly construed and applied, it would be impossible to administer them because, in any case, the courts, would be called upon to hold a preliminary enquiry as to when a particular rule was first laid down and also as to what kinds of interest in property were recognized at that time."[9] Moreover, the six-fold description of property was never intended to be exhaustive.

The rest are generally described or necessarily implied. The woman's stridhan was formerly the battle ground for interminable logamachies being a topic on which, according to Kamalakar, "the lawyers fight tooth and nail,"[10] and Jimut Vahan himself was glad to close the subject with these words: "Thus has been explained the most difficult subject of succession to a childless woman's stridhan."[11]

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(1) Manu, IX-200; *Doorga* v. *Tejoo*, 5 W.R. (M.A.) 53; *Court of Wards* v. *Mohessur*, 16 W.R. 76; *Judoonath* v. *Bassunt*, 19 W.R. 264; *Salemma* v. *Lachman*, 21 M. 100; *Subramaniam* v. *Arunachelam*, 28 M. 1.

(2) *Doorga* v. *Tejoo*, 5 W.R. (M.A.) 53; *Nellai Kumaru* v. *Marakathammal*, 1 M. 166; *Subramania* v. *Arunachalam*, 28 M. 1.

(3) *Appa Rao* v. *Gopala*, 31 M. 321.

(4) *Lajwanti* v. *Safachand*, 5 L. 192 P.C.; *Kanhai Ram* v. *Amri*, 32 A. 189; *Mohini Chunder* v. *Kashi Kant*, 2 C.W.N. 161; *Maghli* v. *Ladli*, 13 I.C. 644; *Prattipati* (In re), 11 M.L.T. 261: 15 I.C. 403.

(5) Katyayan cited in Dayabhag IV-1-10 explained in *Salemma* v. *Lutchmana*, 21 M. 100 (102).

(6) Dayabhag, I-II-13, 14; May. VI-X-17; Sm. Ch., IX-III-13 *Ib.*, cl. (*a*) Manu, IX 194; Narad, (Jolly) 95; Mit., II-XI-2; *Churamun* v. *Gopi*, 13 C.W.N. 994 (996) *Ib.*, Cl. (1) (*b*) Manu, IX-194; *Bistoo Pershad* v. *Radha*, 16 W.R. 115 (*ii*) Mit., II-XI-6.

(7) Mit., II-XI-6.

(8) Manu, IX-194; Mit., II-XI 57; *Basanto* v. *Kamakshya*, 33 C. 25 P.C.; *Ram Gopal* v. *Narain*, 33 C. 315; *Gopal* v. *Ram Chandra*, 28 C. 311; *Sitabai* v. *Wasant Rao*, 3 Bom. L.R. 201.

(9) *Ram Gopal* v. *Narain*, 33 C. 315 (319).

(10) W. & B. H. L. (3rd Ed.) 145; Bannerji's Marriage and Stridhan, (4th Ed.). 290.

(11) *Ib.*, Dayabhag, IV-III 42 (Cole-

2626. Bombay Females.—It is now settled that females outside Bombay, to whatever school subject, do not acquire an absolute estate in property inherited by them whether from a male or a female, or obtained on partition (§§ **2416-2417**). But as has been seen before, in Bombay female relations born in the family take an absolute estate in the property inherited from a male other than the husband, and all females inheriting stridhan take the property so inherited as their stridhan which devolves upon their own heirs. (**S. 380.**)

Clause (1).

2627. Income and Its Savings.—A Hindu widow may dispose of by gift or will the savings of her limited estate.[1] The heiress being the owner[2] of her inherited estate, it follows that the income she receives therefrom is her own, and she may keep or invest it at her discretion.[3] Not being a trustee of the estate, she is not bound to capitalize her savings, nor can the reversioner call her to account for the unexpended surplus in her hands. This view of the law has now been settled after some conflict on the subject of the woman's power over her income. In some earlier cases even the Privy Council said: "If she took the estate only of a Hindu widow, one consequence, no doubt, would be that she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate."[4] Four years later this view was modified in a case in which it was said: "It, therefore, becomes unnecessary to decide what might have been the effect of a distinct intention on her part, if it had been proved, to appropriate it herself and to sever from the bulk of the estate such purchases as she had made with the view of conferring them on her adopted son."[5] But in a later case decided in 1883 Sir Arthur Hobhouse pointed out that the ownership by the widow of her husband's estate clearly gave her the right to expend or to save its income, adding: "That it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give away the whole, may she not put some by? If she saves one year or month, may she not spend those savings the next year or month? If she may save and spend again may she not place her savings so as to get some income from them"?[6] He then added: "It was not possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow as to which she has not determined whether or no she will spend it."[7] "The true test to be applied to cases of this description is to determine from the surrounding circumstances the intention of the widow. Did she intend to treat the disputed property as part and parcel of the estate of her husband or did she treat it as a

Clause (1).

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brooke's translation omits the words quoted in the text).

(1) *Navaneetha Krishna* v. *Collector*, (1935) M. 1017.

(2) *Vesonji* v. *Chanda Bibi*, 37 A. 369 P.C.

(3) *Soorjeemoney* v. *Dinobundho*, 9 M.I.A. 123, explained in, *Ishri Dutt* v. *Hansbutti*, 10 C. 324 (335) P.C.; *Lachmun* v. *Kallichurn*, 19 W.R. 292 P.C.; *Venkata* v. *Venkata*, 1 M. 281 affirmed, O.A. 2 M. 333 P.C.; *Saodamini* v. *Administrator-General*, 20 C. 433 P.C.; *Nabakishore* v. *Upendra Kishore*, 26 C. W.N. 322 (325) P.C.; 65 I.C. 305; *Charusila* v. *Mrinalini*, 64 I.C. (C). 531; *Keshav* v. *Maruti*, 46 B. 37; *Subramaniam* v. *Arunachelam*, 28 M. 1 (5); *Shyam Narain* v. *Jadu Nath*, 25 O.C. 41.

(4) (1870) *Bhabut Daee* v. *Bholanath*, 1 C. 104 P.C.

(5) (1874) *Gonda* v. *Oodey Singh*, 14 B.L.R. 159 P.C.

(6) *Ishri Dutt* v. *Hansbutti*, 10 C. 324 (334) P.C.

(7) *Ib.*, p. 337.

temporary saving liable to be applied by her subsequently for her own purposes."[1]

2628. Apart from such cases already discussed, (§§ **2435-2439**) it is now settled that the female heir is entitled to treat and dispose of in her lifetime the savings from her income as her own stridhan.[2] But while the courts are now agreed on this point, some of them seem to shudder at the consequence of their view. For if the property so acquired is at her absolute disposal, there is no reason why she should not be entitled to dispose of it by deed or will, and failing which, why its devolution should not follow the usual course of her stridhan.[3] (§ **2453**).

But the same latitude is denied by the other courts who, while conceding to her the unfettered power of disposal *inter vivos*, deny to her the right of bequest,[4] and even hold that the estate so undisposed of should be treated as an accretion to the corpus and follow the line of its devolution. It has, consequently, been held that where her agent had realized income, but failed to account for it to her, he was liable to account for it to the reversioner.[5] And so where a widow in possession of her husband's estate did not collect a mortgage debt due to her during her lifetime, it was held to become an accretion to the estate.[6] But, on the other hand, where the widow had mortgaged with possession her husband's estate, but, on her death, her reversioners took possession of the properties, and realized the rents that had accrued due during the widow's lifetime, the moneys so realized were held to be assets of the widow in the hands of the reversioners, and, as such, liable to satisfy the claim of the mortgagees.[7]

2629. In another case, the widow purchased certain lands out of the savings of her estate, which she had inherited from her husband, and which she sold during her lifetime. On her death, her reversioner sued to eject her alienee on the ground that the properties were accretions to the estate. The trial Judge upheld the alienee's contention, which, however, was reversed by the High Court who upheld the reversioner's contention. The alienee appealed to the Privy Council who said: "Now there can, their Lordships think, be no doubt that whatever stridhan she possessed was due to the accumulated savings from the income of the property, which she received from her husband's estate, and though, it is true, that when that property had been received, it would be possible for her to so deal with it that it would remain her own, yet it must be treated and shown to have been so dealt with, and in this case, there is no sufficient evidence of this having been done."[8] Their Lordships mentioned two facts

(1) *Bhakabati* v. *Sohoodra*, 16 C.W.N. 834: 13 I.C. 691 (693).

(2) *Sowdaminee* v. *Administrator-General*, 20 C. 433 P.C.; *Naba Kishore* v. *Upendra Kishore*, 26 C.W.N. 322 (325) P.C.: 65 I.C. 305; *Subramaniam* v. *Arunachalam*, 28 M. 1 (5); *Keshav* v. *Marwti*, 46 B. 37; *Ahkanna* v. *Venkayya*, 25 M. 351; *Nihal Khan* v. *Hur Churn*, 1 Agra 219; *Puddo Monee* v. *Dwarka Nath*, 25 W.R. 335 (340); *Narain* v. *Jadu Nath*, 25 O.C. 41 and cases cited *supra*.

(3) *Subramaniam* v. *Arunachelam*, 28 M. 1 (5); followed in, *Veeraraghava* v. *Kota*, 3 M.L.W. 422: 33 I.C. 532; *Pethasari* v. *Sendamarai*, 8 M.L.T. 284: 8 I.C. 385; *Aviswaryanandaji* v. *Sivaji*, 49 M. 116: (1926) M. 84; *Latur Rai* v. *Bhagwan Das*, (1936) Pat. 80.

(4) *Sarat Chandra* v. *Charusila*, 55 C. 918 (933, 934) (dissented) from in *Mohini Mohan* v. *Rashbehari*, I.L.R. (1937) C. 229 (232); *Sridhar* v. *Kalipada*, 16 C.W.N. 106; *Wahid Ali* v. *Tori Ram*, 35 A. 551 (555); *Rivet Carnac* v. *Jevibai*, 10 B. 478; *Sasiman* v. *Sibnarayana*, 1 Pat. L. W. 375; 39 I.C. 755 *contra Vikrama* v. *Vikrama*, 33 M.L.J. 665; *Akanna* v. *Venkayya*, 25 M. 351. *See* § 2453.

(5) *Sridhan* v. *Kalipada*, 16 C.W.N. 106.

(6) *Hadi* v. *Parbati*, 9 O.L.J. 312.

(7) *Chhannu* v. *Raj Kuar*, 9 O.L.J. 24.

(8) *Naba Kishore* v. *Upendra Kishore*, 26 C.W.N. 322 (325) P.C.: 65 I.C. 305.

in support of their view, *first*, that some of the property comprised the acquisition of the rights of tenants belonging to her inherited estate; and *secondly*, that in her own recitals in the sale-deed she had justified the sale on the ground of necessity. This case is then a further reiteration of the rule now sufficiently settled that all savings of the female heir from the income of her inherited estate, and the property to which they may be converted become her stridhan, and are, as such, at her absolute disposal.

2630. A case on the other side of the line was decided on the following facts. A widow had purchased out of her savings her brother's property at a court sale and reconveyed it to him. On her death, the reversioner sued to dispossess the brother, but the court dismissed his suit, holding that the conduct of the widow clearly showed that she did not intend that the property should form an accretion to her husband's estate.[1]

These cases are only reconcilable on the ground that the widow being the owner of two estates one limited and another unlimited, the close inter-relation between the two makes it essential that there should be something to show that the one was intended to be maintained distinct from the other, and that where such evidence is lacking, the two may well be treated as one, which will then follow the usual course of devolution. A more correct view of the law suggests the rule that all savings and property into which they are converted, being her stridhan, it should be so treated even for the purpose of devolution, unless the reversioner can show that the last female owner had made it an accretion to her inherited estate. And it has been so held in Madras[2] and was even conceded in a decision of the Privy Council,[3] though the tendency of the courts has been rather in the direction of presuming accretion casting the onus of proving the contrary upon her stridhan heirs [**S. 336** (5)].

2631. Grant and Gift.—It is now settled that a grant or gift to the wife made by the husband or any of his or her relations conferring upon her an absolute power of disposal is her stridhan.[4] Such is also a gift received from a stranger.[5] This is in accordance with the recognized texts:—

Clause (3).

Narad.—"What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give away excepting immovable property."

Vyas.—"What has been given to a woman by her husband she may consume as she pleases."[6]

Vivad Chintamani.—"177. Katyayan thus explains the first three kinds (of *stridhan*). 'What is given to a woman at the time of their marriage, before the sacred fire, is denominated by sages their property bestowed before the nuptial fire; (*adhyagni*) what is given means what is presented by any person.'"

(1) *Keshav* v. *Maruti*, 46 B. 37.

(2) *Akkamma* v. *Venkatadri*, 46 M. 351; *Parthasarathy* v. *Venkatadri*, 46 M. 190 (220); *Aviyaswarya* v. *Sivaji*, 49 M. 116 (149, 150) *Kailasanatha* v. *Vadivansi*, 58 M. 488 (508, 509).

(3) *Rajah of Ramnad* v. *Sundara*, 42 M. 581 P.C.; *Jaadamba* v. *Wazir Narain*, 2 Pat. 319 P.C. (Acquisitions by male treated as separate acquisitions); *contra* in *Naba Kishore* v. *Upendra Kishore*, 42 M.L.J. 253 (256) P.C.: 65 I.C. 305 (307).

(4) *Hitendra Singh* v. *Rameshwar*, 4 P. 510; *Bhupendra* v. *Goonendra*, 32 C.W.N. 133; *Venka Reddi* v. *Hanumant Gonda*, 57 B. 85.

(5) *Muthukaruppa* v. *Sellathammal*, 39 M. 298.

(6) Cited in Sm. Ch., IX-11 and in *Venkata* v. *Venkata*, 1 M. 281 (287); *Bhujanga* v. *Ramayamma*, 7 M. 387.

"191. Apastamb thus speaks of the gifts of affectionate kindred: 'Ornaments are the exclusive property of a wife, and so is wealth given to her by kinsmen or friends, according to some lawgivers..'"

Her power over movables being thus admitted, the question arises whether the texts control her power of disposal over immovables. It has been held that her power in this respect is subject only to the general law that whatever is absolutely given to the wife by the husband, whether movable or immovable, is equally at her disposal by gift or devise at her discretion[1] and that the same rule applies to property acquired by her by grants, gifts or devise from any other relation, such as her father,[2] mother,[3] son,[4] brother,[5] husband's father's sister's son,[6] or a complete stranger[7] such as the Government.[8]

So where a widow at a partition by her husband's undivided brothers was given a share which they agreed she should hold absolutely with a power of free alienation, it was held that the grant so made became her stridhan.[9] Jewels made out of family funds for the exclusive use of a female member become her stridhan.[10]

Property granted or gifted to a woman by her husband or his or her own relation is called *saudayik*[11] over which she possesses unfettered power of disposal by gifts or devise even during coverture as will be presently seen.[12] The case is not different where the grant comprises the income of the estate.[13]

2632. It has been seen before, that any property acquired by deed or devise, that is to say, otherwise than by inheritance or partition,[14] may be stridhan if it is taken absolutely.[15] Such would be the assignment of a life-policy by the husband to her.[16] Such was held to be the case of

(1) *Luchmun* v. *Kallichurn*, 19 W.R. 292 P.C. followed in *Venkata* v. *Venkata*, 2 M. 333 (335) P.C., affirming O.A. 1 M. 281; *Thakoo* v. *Ganga Prasad*, 10 A. 197 P.C. *Kesserbai* v. *Hunsraj*, 30 B. 431 P.C. reversing O.A. *Hunsraj* v. *Kasserbai*, 6 Bom. L.R. 17; *Jairam* v. *Kesowjee*, 4 Bom. L.R. 555; *Kurdaram* v. *Hinibhai*, (1879) B.P.J. 8; *Jeewun* v. *Sona*, 1 N.W. P.H.C.R. 66; *Radha* v. *Bisheshar*, 6 N.W. P.H.C.R. 279; *E.* v. *Sat Narain*, 52 A. 437 (441); *Bhujanga* v. *Ramayama*, 7 M. 387; *Kashee Chunder* v. *Gour Kishore*, 10 W.R. 139.

(2) *Mutappudayan* v. *Ammani*, 21 M. 58; *Guru Prosad* v. *Nafar Das*, 11 W.R. 497; *Judoonath* v. *Bussunt*, 19 W.R. 264; *Pura Sundara* v. *Biraj Nopani*, 37 C. 362. *Ameer Singh* v. *Kanh Singh*, (1870) P.R. 56.

(3) *Churamon* v. *Gopi*, 37 C. 1; *Janaki* v. *Mirivala*, 32 M. 521.

(4) *Doorga* v. *Tejoo*, 5 W.R. (Mis.) 53.

(5) *Gosaien* v. *Kishanmunnee*, 6 B. S. R. 90; *Basanta* v. *Kanikshya*, 33 C. 23 P.C.; *Munia* v. *Puran*, 5 A. 310.

(6) *Hurry Mohun* v. *Shonatun*, 1 C. 275.

(7) *Suleman* v. *Lachman*, 21 M. 100.

(8) *Suleman* v. *Lachman*, 21 M. 100; *Subharaya* v. *Mudali*, 23 M. 47; *Gosaein* v. *Kishenmunee*, 6 B.S.R. 90; *Doorga* v. *Tejoo*, 5 W.R. (M.R.) 53 *contra* Narad, 1, 28; Dayabhag, IV-1-20; Virmitrodai, V-1-4 (Setlur 442); Sm. Ch., IX-1-16; *Ramdulal* v. *Joymoney*, 2 Mor. Dig. 65 which declare the wife's immovable property as subject to the control of the husband as no longer tenable.

(9) *Subbayya* v. *Chirumamella*, (1914) M.W.N. 875: 25 I.C. 412; *Amibai* v. *Musso*, 4 S.L.R. 271: 10 I.C. 982.

(10) *Alamelu* v. *Numberumal*, 15 M.L. T. 352: 23 I.C. 824.

(11) *Lit Sau* Love *day* given: Love offering, through love.

(12) *Bhau* v. *Raghunath*, 30 B. 229 (240), *Muthukaruppa* v. *Selathammal*, 39 M. 298.

(13) *Guruprasad* v. *Nafar Das*, 11 W.R. 497; *Mohini Mohan* v. *Rashbehari*, (1937) C. 229.

(14) *Thakoor Deyhee* v. *Baluk Ram*, 11 M.I.A. 182; *Bhagwandeen* v. *Myna Bai*, Ib., 487; *Chotay Lall* v. *Chunoo Lall*, 4 C. 544 P.C.; *Sheo Sankar* v. *Debi Sahai*, 25 A. 468 P.C.; *Sal Sheo Pertab* v. *Bahadur*, ib., 476 P.C.; *Debi* v. *Mahadeo*, 34 A. 234 P.C.

(15) *Kunj Behari* v. *Premchand*, 5 C. 684; *Ram Narain* v. *Peary Bhagat*, 9 C. 830; *Bhobotarini* v. *Peary Lal*, 24 C. 646; *Annaji* v. *Chandrabai*, 17 B. 503; *Moti Lal* v. *Rati Lal*, 21 B. 170; *Parshottam* v. *Keshav Lal*, 57 B. 164.

(16) *Shamdas* v. *Savitribai*, (1937) S. 181.

an Oudh Taluqdar whose estate had been confiscated in 1858 by the British Government by virtue of Lord Canning's proclamation. The estate belonged to one Rai Charan Singh, and at the time of its confiscation, it was in the possession of his junior widow Kublas Kuar, upon whom the Government finally conferred it by a sanad, which declared that, in the event of her dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture, and that all her successors should have full power to alienate the estate. On the question arising whether the estate became Kubla's stridhan descendible to her own heirs, the Privy Council held that the sanad was a fresh grant and had made Kublas an absolute owner of the estate. They added: "If the interest which Kublas, as the widow of her deceased husband, originally took in the property had remained unaltered, she would have had no power of alienation either in her lifetime or by will. The estate would have descended to the heirs of her husband, and not to her heirs; but her interest as widow and that of the reversionary heirs were absolutely destroyed, and put an end to, by the confiscation under Lord Canning's proclamation, by which it was declared that 'the whole proprietary right in the soil is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting.' In disposing of that right by the sanad, the Government granted to Kublas and her heirs male, according to the law of primogeniture the full proprietary right and title to the estate."[1] It was contended that upon her acquisition Kublas became a trustee for those who would have been entitled to it, if it had not been confiscated, to which their Lordships replied: "To hold that such a trust arose would reduce to a nullity the confiscation, and disposal by the Government of the property confiscated. The power of alienation by sale, mortgage or gift, or bequest was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband."[2] In another case, the land in dispute formed part of the emoluments attached to the office of *Mantem* in a Government village. The husband was the *Mantem*, but was dismissed for embezzlement and his wife appointed in his place. On her death the question arose whether her daughter or her husband was the preferential heir. In other words, was the property her stridhan or not. It was held that inasmuch as the land had been granted to her by Government, it became her own earnings, or was a gift from a stranger, and as such, became her stridhan descendible to her own daughter in preference to the husband.[3] Such was held to be the nature of an absolute grant made to a woman in whose favour a service grant was enfranchised.[4]

2633. But stridhan inherited by female heirs does not become the latter's stridhan. The female heirs take only a limited woman's estate in the property. The fact that property inherited as stridhan does not make it stridhan of the heir[5] results in the consequence that upon the latter's death succession must be traced from the last owner and not from the last holder.[6] But this is the general rule which admits of many exceptions, one of which is the case of a daughter, sister or niece in Bombay, who

(1) *Brij-Indar* v. *Janaki*, 1 C.L.R. 318 (322) P.C.
(2) *Ib.*, p. 323.
(3) *Salemma* v. *Latchmana*, 21 M. 100 (105).
(4) *Venkataramadas* v. *Pachigolla*, 43 M.L.J. 153 following *Venkata* v. *Veerabhadrappa*, 44 M. 643 P.C.
(5) *Sheo Shankar* v. *Debi Sahai*, 25 A. 468 P.C. *Prankissen* v. *Noyanmoney*, 5 C. 222; *Huri Dayal* v. *Grish Chunder*, 17 C. 911; *Jogendra* v. *Phani Bhushan*, 43 C. 64.
(6) *Madhumala* v. *Laxman*, 20 C.W.N. 627: 22 I.C. 518.

inherits an absolute estate, and which is treated as her stridhan for the purpose of further devolution.[1]

Where the husband during his lifetime always represented that certain immovable property belonged to his wife, it was held that purchasers from her could not be equitably turned out of the property in favour of his heirs, since his heirs would be as much bound by the representations of the owner as the owner himself.[2]

Clause (4).

2634. Property given for Maintenance.—Property given for the purpose, or in lieu of maintenance[3] not being property allotted on partition to a wife or widow[4] is stridhan. So Devala cited in the Dayabhag says: "Her sustenance, her ornaments, her perquisite, and her gains, are the separate property of a woman."[5] In this view, arrears of maintenance due to a widow at her death do not revert to the estate from which they were to be derived, on the ground that they were not separated from the *corpus* of that estate during her life.[6] So property purchased by a widow out of her maintenance is her absolute property.[7]

So where a sum of money was given to a widow without restriction in lieu of maintenance by her deceased husband's family, it was held that it became her stridhan which she was competent to dispose of *inter vivos* or by will.[8] Maintenance is a personal right and all arrears due to a woman on account of maintenance constitute her stridhan.[9]

Property which comes from father to a daughter before her marriage under a testamentary devise is her stridhan according to the text of Katyayan. "That which has been given to her by her kindred goes, on failure of kindred, to her husband."[10]

Clause (5).

2635. Accretions and Purchases.—Accretions made to stridhan themselves become stridhan.[11] One Autar Singh had purchased a Darpatni mahal in the name of his wife, whom her declared to be its owner. In several suits relating to the estate, he made similar averments. The wife sold the estate to another whom Autar's adopted son sued to eject. Autar's widow pleaded a gift of the estate to her by her husband which was not proved. It was falsely recited in her sale-deed that the consideration of Rs. 3,200 was her stridhan, but it was found that she was poor and had no money of her own. The purchaser had no notice of it, whereupon the Privy Council held the plaintiff bound by his father's disclaimer and misrepresentation. They said: "It appears to their Lordships that there was a misrepresentation on the part of the father in allowing the property to be taken by the wife

(1) *Gulappa* v. *Tayawa*, 31 B. 453; *Kasear Bai* v. *Hunsraj*, 30 B. 431 P.C.

(2) *Luchmun* v. *Kalichurn*, 19 W.R. 292 (296) P.C.

(3) *Doorga* v. *Tejoo*, 5 W.R. (M.A.) 53; *Nellaikumaru* v. *Marakathammal*, 1 M. 166; *Subramaniam* v. *Arunachellam*, 28 M. 1.

(4) *Court of Wards* v. *Mohessur*, 16 W. R. 76; *Debi* v. *Mahadeo*, 34 A. 234 P.C.

(5) Dayabhag, IV-1-15.

(6) *Court of Wards* v. *Mohessur*, 16 W.R. 76.

(7) *Pethasari* v. *Sendamarai*, 8 M.L. T. 284: 8 I.C. 385; *Girja Bai* v. *Babu Lal*, 93 I.C. 624: (1926) N. 342.

(8) *Chandranath* v. *Ramjai*, 6 B.L.R. 303; *Doorga* v. *Tejoo*, 5 W.R. 53; *Neelai Kumaru* v. *Marakathammal*, 1 M. 166.

(9) *Court of Wards* v. *Mohessur*, 16 W. R. 76.

(10) *Judoo Nath* v. *Bussunt*, 19 W.R. 264 (265); *Muthu* v. *Sellathammal*, 16 M. L.T. 587: 26 I.C. 785; *Janakisetty* v. *Miriyala*, 32 M. 521.

(11) *Luchmun* v. *Kalichurn*, 19 W.R. 292.

under a deed of sale representing that the purchase money was her stridhan and in all his acts, both public and private, during his lifetime representing that the property was his wife's. After the representation on the part of the father, his heirs were no more entitled to recover, than the father who had been, in his lifetime. And it appears to their Lordships that the minor claiming by descent from the father is equally bound by those representations and that he cannot, as heir to his father, set up that that property belonged to the father when the father could not in his own lifetime under similar circumstances have set up that the property belonged to him."[1]

2636. In another case, the wife had received money presents from her husband from time to time, and on his death, partly out of such property and partly from other funds raised by the pledge of jewels admitted to be her stridhan, the wife purchased an estate which she devised to the defendants whom her reversioner sued to eject. The defence was that the defendant's alienor had acquired the estate by her own exertions and was, therefore, her stridhan. All the courts upheld the defence and the contrary contended for was disposed of by the Privy Council in the following words: "It is suggested that where the funds are shown to have come wholly or in part from the husband and to have been afterwards invested in land by his widow, the same law which governs the devolution of immovable estate derived from the husband is to govern that acquisition, but their Lordships cannot find any trace of authority to support such a distinction. It is clearly the law that, from the time the funds were given to the widow by the husband, they became her stridhan and that she had full power of disposition over them. Years after the death of the husband she chooses to invest them in land. Can it be contended with any plausibility that that was land which was derived from the husband. Their Lordships can see no ground for establishing this subtle distinction, or for thus arbitrarily interfering with the power of investment and application and disposition which the general law gives to a Hindu female over her stridhan."[2] These last words are significant. They were used with reference to the plea of perpetual dependance of woman, and the restraint upon her power of alienation, analogous to that imposed upon a Hindu father by his sons,[3] for which in the opinion of their Lordships there was no justification as a Hindu woman was, as regards her own property, subject only to the general law.

The subject has already been examined in the preceding discussion.

2637. Adverse Possession.—The acquisition of title by adverse possession is the creature of law which is independent of Hindu Law. The title so acquired is absolute without reference to the sex of the acquirer.[4] A female may acquire a complete title against all comers including her own reversioners. But in such case, the question depends upon whether she took such possession as representing her husband's estate, or in her own right, and the ordinary presumption would be against her, though it is open to her legal

Clause (6).

(1) *Luchmun* v. *Kalichurn*, 19 W.R. 292 (297) P.C.

(2) *Venkata* v. *Venkata*, 2 M. 333 (335) P.C. affirming O.A. 1 M. 285; following *Luchmun* v. *Kalichurn*, 19 W. R. 292 P.C.

(3) *Venkata* v. *Venkata*, 1 M. 285 (286).

(4) S. 28 and Art. 144, Limitation Act. *Brij Indar Bahadur* v. *Janki Koer*, 1 C.L.R. 318 P.C. *Mohin Chander* v. *Kashi Kant*, 2 C.W.N. 161; *Kashi Ram* v. *Amri*, 32 A. 189.

representatives to show that her *animus possidendi* was adverse.[1] The fact that she obtains possession to the exclusion of the rightful heirs would make her possession *prima facie* adverse, unless it is otherwise explained away or accounted for.[2] So the possession by the widow of a portion of the joint family estate in lieu of her maintenance is not adverse to the other members of the family,[3] and she cannot render it adverse even by an assertion of her unqualified title thereto.[4] But the fact that the widow claimed the estate as the heir of her husband would not qualify her title,[5] and since a widow ordinarily takes only a limited estate, her acquisition of property by adverse possession against strangers would ordinarily be deemed to be an accretion to her estate. In other words, it does not *ipso facto* become her stridhan descendible to her special heirs.[6] But this is only a presumption limited to the widow and cannot be extended to all females, and, even in the case of a widow, it is subject to rebuttal, since she is not debarred from acquiring an absolute estate if she had asserted such title to the estate and intended to hold it otherwise than an accretion to it. In short, while her adverse possession against the reversioner clothes her with an indefeasible title,[7] her adverse possession against a stranger may or may not be an accretion to her limited estate according to her intention. But where of two joint brothers *A* and *B*, *A* died leaving a widow *C* and a fortnight later *B* died leaving his mother *D* as his sole heir. *C* however, took possession of the estate as against the mother and continued in possession for 12 years, it was held that *C's* possession was adverse to *D* and that on the expiry of the statutory period, the estate became her stridhan descendible to her own heirs.[8] So where on the death of the father-in-law, his daughter-in-law, being the wife of predeceased son, assumed possession to the exclusion of his grandson and his wife, her possession was held to be adverse to reversioners who, on her death, could not lay claim to her estate.[9]

It was contended in this case that property acquired by a female by adverse possession is not her stridhan, but the court had no difficulty in overruling this contention by reference to precedents, apart from which reference to S. 28 combined with Art. 144 of the Limitation Act is a sufficient answer.

2638. Acquisition by Self-exertion.—The prototype of this clause is Katyayan's text cited in the Dayabhag.[10]

Clause (7).

Katyayan.—"The wealth which is earned by the mechanical arts or which is received through affection from any other [but the kindred] is always subject to her husband's dominion. The rest is pronounced to be the woman's property."

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(1) *Suraj Balli* v. *Tilakdhari*, 7 Pat. 163; *Prattipati* (In re), 11 M.L.T. 261: 15 I.C. 403; *Parbati* v. *Ram Prasad*, 7 Luck. 320.

(2) *Jowala Buksh* v. *Dharune Singh*, 10 M.I.A. 511 (535); *Lachhan Kunwar* v. *Manorath Ram*, 22 C. 445 P.C.; *Sham Koer* v. *Dah Koer*, 29 C. 664 P.C.; *Satgur* v. *Raj Kishore*, 42 A. 152 (157) P.C. and cases cited in § 1150.

(3) *Bhagwani Kuar* v. *Mohan Singh*, 23 A.L.J. 589: 88 I.C. 385: (1925) P.C. 132.

(4) *Bhagwan* v. *Mohan Singh*, (1925) P.C. 132 (135, 136) P.C.; followed in *Rashik Lal* v. *Radha*, I.L.R. (1937) A. 424 (428); *Bhagwan Din* v. *Ajudhia*, 87 I.C. 1021, (1925) O. 729.

(5) *Satgur* v. *Raj Kishore*, 42 A. 152 (157) P.C.; explained in *Umau Shankar* v. *Aisha*, 45 A. 729 (735); *Lachhan Kunwar* v. *Manorath*, 22 C. 445 (449) P.C.

(6) *Lajwanti* v. *Safachand*, 5 L. 192 P.C.; followed in *Chakradhar* v. *Shah Kant*, 88 I.C. 767: (1925) P. 460; *Jag Mohan* v. *Prayag*, 87 I.C. 473: (1925) P. 523; *Dungar Singh* v. *Maid Kunwar*, (1933) A. 822; *Mahan* v. *Purho*, 11 L. 424; *Parbati* v. *Ram Prasad*, 7 Luck. 320.

(7) *Lachhan Kunwar* v. *Manorath*, 22 C. 445 (449) P.C.; *Sekkara* v. *K. Ramoraju*, 86 I.C. 296: (1925) M. 1066.

(8) *Maghli* v. *Ladli*, 13 I.C. (A.) 644.

(9) *Kanhi Ram* v. *Amri*, 32 A. 189 (193) following *Brij Indar* v. *Janki*, 1 C.L.R. 318 P.C.; *Mohni* v. *Kashi*, 2 C.W.N. 161).

(10) Dayabhag, IV-I-19.

Devala.—"Her subsistence, her ornaments, her perquisites and her gains are the separate property of a woman."[1]

Dayabhag explains the mechanical arts to mean "spinning and weaving" which was the only occupation of women when the texts were composed. The woman, being regarded as the chattel of her lord, all her exertions went to his benefit. But the text does not say so. It merely exempts from stridhan the product of mechanical labour pronouncing the "rest to be the women's property." All products of her individual skill and industry will, therefore, constitute her stridhan.[2] Such was the case of the woman who purchased certain immovable property and re-mortgaged it as security for the price, which she afterwards paid presumably out of its income.[3] So where the wife had acquired her husband's office and its emoluments since enfranchised, it was held that the land became her stridhan which she may dispose of at her discretion, and which on her death devolves on her heirs.[4] So where a widow in possession of her husband's estate, exercised, in virtue of such possession, her right to pre-empt another property, the price of which she paid by mortgaging a part of the pre-empted property, her acquisition was held to be her separate property in the absence of any intention to show that she intended to treat it as a part of her husband's estate.[5] So whatever is acquired with profits earned by both husband and wife in a joint trade is their joint property, and on the death of the wife, her heirs are entitled to inherit her share.[6]

Gains of Prostitution.—The question whether the gains of prostitution by a woman married or unmarried constitute her stridhan has been on a review of authorities answered in the affirmative by a Full Bench of the Calcutta High Court,[7] a view also taken in other cases,[8] though the contrary has also been held elsewhere.[9] It has been held in Madras that all self-acquisitions of a dancing girl by the practice of her calling are her stridhan and on her death her heir, *e.g.*, her daughter would inherit an absolute estate, but that if she reverted to the life of a householder, both her acquisitions, as those of her female heirs by inheritance from her would constitute the female's limited estate.[10]

2639. Wedding Gifts.—Wedding presents given to a woman in the shape of jewels, clothes and the like, at the time of her marriage, are her separate property intended to be enjoyed by herself, and there is no presumption that they form part of the family property.[11]

Clause (8) (i).

Clauses (8) to (10) deal with stridhan specially mentioned in the old texts and which is, therefore, sometimes called technical or proper stridhan, all else being non-technical or improper stridhan. This stridhan is, generally speaking, wedding gifts, though the classical writers discriminate and describe it

(i). Yautak.

(1) Cited in Dayabhag Ch. IV-Seth. I-§ 15; Virmitroday Ch. V Pt-I-§ 7; Madaviya (Burnell's Tr.) P. 46; Saraswati Vilas § 276.

(2) *Subramaniam* v. *Arunachalam*, 28 M. 1 F.B.; *Tadiboyina* v. *Debha Kutti*, 28 M.L.J. 495: 29 I.C. 184.

(3) *Tadiboyina* v. *Debha Kutti*, 28 M. L.J. 495; 29 I.C. 184.

(4) *Salemma* v. *Lutchmana*, 21 M. 100 (102).

(5) *Sri Ram* v. *Jagadamba*, 43 A. 374 F.B.

(6) *Ramakrishna* v. *Goundan*, 38 M. 1036.

(7) *Hiralal* v. *Tripura*, 40 C. 650 (661, 662) F.B.

(8) *Mandaram* v. *Mandaram*, 24 M.L.J. 223: 18 I.C. 601; *Jagannath* v. *Narayan*, 34 B. 553 (559).

(9) *Maharana* v. *Thakur Pershad*, 14 O. C. 234: 12 I.C. 778; *Ramprasad* v. *Subu*, 4 N.L.R. 31 (33). In *Chandrabhaga* v. *Vishwanath*, 9 L.R. 102 (107, 109) the real question appears to have been misunderstood.

(10) *Balasundaram* v. *Kamakshi*, (1936) M. 958.

(11) *Thayalambal* v. *Krishna*, 32 I.C. (M.) 955.

with particular minuteness. Of these *yautak*[1] and its analogous *ayautak* are thus described:

Manu.—"Property given to the mother on marriage (*yautak*) is the share of her unmarried daughter."[2]

Dayabhag (Citing the last).—"Here *yautak* signified property given at a marriage, the word *yut* derived from the verb *yu* to 'mingle' imports 'mingling' and 'mingling' is the union of men and women as one person, and that is accomplished by marriage. For a passage of the scripture expresses: 'She becomes identified with his bones, flesh with flesh, skin with skin.'[3] Therefore, what has been received at the time of the marriage is denominated *yautak*."[4]

Smriti Chandrika.—"Yautak is wealth given by any one to the bride and bridegroom while seated together at a marriage or the like. It is said in the Nighantu [dictionary] that the word *yautak* is derived from being then joined together [*yut*]. The meaning is that wealth given to the bride and bridegroom is denominated *yautak*, the term *yautak* deriving its origin from *yut* (mingling)."[5]

Dayakram Sangrah.—"The order of succession requisite to be observed in regard to women's peculiar property generally, whether *yautak* or 'ayautak' on a failure of heirs, including all yet enumerated, will be hereafter declared. But at first we treat of the order of succession in regard to wealth not received by women at the time of nuptial termed *ayautak*."[6]

Ayautak.

2640. The gift is *ayautak* if made before or after the marriage, though in fulfilment of promise made at the marriage, since *ayautak* refers to the time when the gift is made, and not to the time when it is promised.[7] So where at the time of the marriage of a woman, subject to the Dayabhag law, her brother promised to give her some land as dowry, which he gave seven years later, the court held it to be her *ayautak* stridhan which on her death devolved on her brother in preference to her husband.[8] The burden of proving that property purchased by a woman, long after her marriage was *ayautak* property, because the purchase was made from a special fund obtained during her nuptial ceremony is on the person who asserts it.[9]

Adhyagni: Adhyavahani

2641. Gifts are further subdivided into (*a*) *adhyagni* or gifts made before the nuptial fire, *i.e.*, at the actual marriage ceremony,[10] and (*b*) into *adhyavahnik* or gifts at the time of the marriage procession, or at a time during the continuance of the marriage rites before or after the crucial ceremony of marriage. "Given before the nuptial fire" is, however, only a term to signify all gifts made during the continuance of the marriage ceremony.[11] So the pandits opined in a case.[12] "A gift of ornaments or other effects to a woman of any one of the four classes, at the time of her marriage, by a member of the family, either of a husband or her parents or by a stranger is, by law termed *adhayagni* stridhan, or in other words, the woman's peculiar property bestowed before the nuptial fire. It becomes her exclusive property and the husband's mother or other persons have no right to share it with her.[13]

(1) Lit. "Conjugal"—from Yut (Lat. *Jugam*) a yoke.
(2) Manu, IX-131.
(3) Veda.
(4) Written both as "Yautak" and "Yautauk".
(5) Sm. Chand., IX-III-13; (Setlur 266).
(6) Dayakram Sangrah, II-IV-1 (Setlur 129).
(7) *Mahendra* v. *Giris Chandra*, 19 C. W.N. 1287: 31 I.C. 561; *Muthukaruppa* v. *Sellathammal*, 39 M. 298.
(8) *Mahendra* v. *Giris Chandra*, 19 C. W.N. 1287: 31 I.C. 561.
(9) *Deldlumey* v. *Pranbati*, 22 C.W.N. 990: 45 I.C. 879.
(10) Manu, IX-194; Mit., II-XI-2; *Churamun* v. *Gopi*, 37 C. 1.
(11) *Bistoo* v. *Radha*, 16 W.R. 115.
(12) Case 2 in Macn. H.L. 108, 109; 3 Dig. 559, 560.
(13) *See* this term explained in Viramitroday, Ch. V-1-3, (Setlur 440). So in Dayakram Sangrah, II-II-3 (Setlur 121). Gifts "at the time of the marriage"

2642. The term *"sulk"* is explained in the Mitakshara as gratuity for the receipt of which a girl is given in marriage.[1] *Sulk* was originally the bride-price received by the father on the marriage of his daughter, but as the property over children ceased, *kanyadan* or the gift of a daughter was exalted to a virtue. The price was still received but treated as the wife's dowry. Virmitrodai cites Vyas who describes it as "what is given to bring to her husband's house is called the fee or *sulk*."[2] Evidently, the *sulk* differed according to the needs of the wife and the means of the husband. So we have the following description of it by Katyayan: "Whatever has been received as a price of work on houses, furniture and carriages, milking vessels and ornaments is denominated *sulk* or a fee."[3] Citing this, the Dayabhag explains it as "the price of labour, since its purpose is to engage a labourer"[4] or "what is given by way of bribe or the like to induce her to go to the house of her husband,"[5] or rather to induce the father to part with her to go to her husband. Virmitrodai, speaking of the *sulk*, says: "Both these descriptions of property belonged to the woman, for to her alone they are given."[6]

(ii). Sulk (Gratuity).

2643. Adhyavedanik.—Solatium on re-marriage or *adhyavedanik* is another species of stridhan, being compensation given by the husband on his marrying another wife. The Mitakshara explains it as a "gratuity on account of supersession,"[7] paid as provided by Yadnyavalkya:—

Clause (9).

Yadnyavalkya.—"To a woman whose husband marries a second wife, let him give an equal sum [as compensation] for the supersession, provided no separate property has been bestowed on her, but if any had been assigned, let him allot half."[8]

Mitakshara (citing the last).—"She is said to be superseded over whom a marriage is contracted. To a wife so superseded as much should be given on account of the supersession as is expended [in jewels and ornaments, or the like] for the second marriage provided separate property had not been previously given to her by her husband or by her father-in-law. But if such property had been already bestowed on her, half the sum expended on the second marriage should be given. So much, therefore, should be paid as will make the wealth already conferred on her equal to the prescribed amount of compensation. Such is the meaning."[9]

2644. That *adhyavedanik* gifts by the husband to the wife on the occasion of his remarriage are not unusual was admitted by the Privy Council who said: "It is not unusual for a husband upon his being about to marry a second wife to make a present to his first wife and if he does so, the property so presented becomes her stridhan according to the doctrine above laid down."[10] In that case the question arose with reference to a village measuring 679 *bighas* 2 *biswas*, which the wife, in her evidence stated, had been gifted to her in 1847, by her husband on the eve of his second marriage. There was no actual proof of that fact, but the Privy Council thought it not improbable "that the husband when about to marry a second wife, should have stated to his first wife that he would appropriate that

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(Yautak) are explained as made between "the time occupied by the ceremony commencing with the performance of funeral obsequies for the departed ancestors, and concluding with the prostration of the husband at the feet of his wife."

(1) Mit. II-IX-6.
(2) Virmitroday, V-I-3 (Setlur) 441.
(3) Cited in Dayabhag, IV-III-19.
(4) *Ib.*, p. 20.
(5) *Ib.*, p. 21.
(6) V-I-3 (Setlur 441).
(7) Mit., II-XI-2.
(8) Yad., II-143; cited in Mit., II-XI-34.
(9) Mit., II-XI-35; Virmitrodai, V-1-43 (Setlur) 441.
(10) *Thakro* v. *Ganga Prasad*, 10 A. 197 (203) P.C.

part of the property, which he had purchased in his own name, as a present, to her in consideration of his being about to marry the second wife."[1]

The latter had gifted the share to her own daughters in 1878 from which the plaintiff, the son, sued to eject them alleging that the defendant's mother was permitted to hold the share *benami* for her husband. The Privy Council threw out the suit holding the wife's version more probable and that it constituted the share her stridhan over which she had full disposing power.

2645. Anvadheyak.—Anvadheyak is a post-marital gift made by her husband[2] or the husband's relations or by her own and is comprised in the six-fold stridhan specified in the text,[3] and is described as follows :—

Clause (10).

Dayabhag.—"Katyayan defines a gift subsequent. What has been received by a woman from the family of husband at a time posterior to that of marriage is called a gift subsequent, and so is that which similarly received from the family of her kindred. Whatever is received by a woman after her nuptial either from her husband or from her parents through the affection of her giver, Bhrigu pronounces to be a subsequent."[4]

Anvadheyak stridhan may then include property received from the parents[5] or from a brother.[6] It includes all jewels presented to her for ordinary use but not family jewels lent to her for occasional use only.[7]

365. (1) Notwithstanding anything hereinbefore contained, stridhan in the provinces subject to the Bombay school means and includes property acquired by a woman in partition or by inheritance otherwise than from her husband.

Stridhan in Bombay.

(2) For the purpose of succession, the Mayukh subdivides stridhan into (*a*) technical or proper and (*b*) non-technical or improper.

Technical and non-Technical stridhan.

(3) Technical or proper. Stridhan means and includes—

(*a*) a woman's marriage presents, and

(*b*) gifts and bequests made to her by the blood relations.

(4) Non-technical or improper stridhan means and includes—

(*a*) property inherited by her from a male;

(*b*) or received from a stranger;

(*c*) her own earnings, and

(*d*) her maintenance grant.

(5) Succession to stridhan, technical and non-technical, follows the special rules laid down in the Mayukh, and hereafter set out in sections 370 and 380 (2).

2646. Analogous Law.—The Bombay view of stridhan is the subject of a long disquisition in the Mayukh from which the following passage is abstracted :—

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(1) *Thakro* v. *Ganga Prasad*, 10 A. 197 (203, 204).

(2) *Jagannath* v. *Narayan*, 34 B. 553.

(3) Manu, IX-194; Mit., II-X-5-7.

(4) Dayabhag, IV-1-2; Cited in Virmitrodai, V-1-3 (Setlur) 441.

(5) *Sitabai* v. *Wasontrao*, 3 Bom. L.R. 201 dissenting from *Harry Shankar* v. *Krishnarao*, Bombay unreported S. N. 84 of 1876.

(6) *Basanta* v. *Kamikshya*, 33 C. 23 (27) P.C.; *Mahendra* v. *Girishchandra*, 19 C.W.N. 1287: 31 I.C. 561.

(7) Devala cited in Dayabhag, IV-1-15; May., IV-X-6; Sm. Ch., IX-1-11; *Rukman* v. *Gungaram*, (1883) P.R. 81.

Mayukh[1] (Abstracted).—"Stridhan is of two kinds: (*i*) technical and (*ii*) non-technical. Technical stridhan is the property expressly recognized as stridhan by the older sages such as Katyayan, Manu and Yadnavalkya, that is (*a*) gifts from strangers at marriage called Yautak,[2] and (*b*) gifts from relations made at any time called *ayautak*."[3]

Non-technical stridhan comprises every other kind of property belonging to a woman and more particularly that mentioned in clause[4].

2647. Stridhan in Bombay.—Women subject to the Mayukh are allowed larger rights over property inherited by them from any relation other than the husband.[4] Such property is their stridhan.[5] The Mayukh subdivides stridhan property into *paribhashik* or technical, and *aparibhashik* or non-technical, also called stridhan proper and stridhan improper, the course of devolution being dependent upon whether it is stridhan of the one kind or of the other.[6] The *paribhashik*, technical or proper stridhan, comprises that expressly mentioned in the sacred texts, while the *aparibhashik*, non-technical or improper stridhan is that otherwise recognized. Generally speaking, the one devolves on the female heirs in preference to the males, while in the other the preferable heirs are, in the first instance, the son, the grandson and the great-grandson, and failing them, the daughter. The subject will have to be further discussed in the sequel, (**S. 372**).

366. A woman cannot alien or devise her Stridhan other than saudayik[7] during coverture without her husband's consent.

Husband's control.

2648. Analogous Law.—The following texts define the term *saudayik* :—

Katyayan.—"Whatever is obtained by a married woman or damsel from the house of her husband or her father or from her brother or parents is called *saudayik*."

Ib.—"Having obtained *saudayik* wealth, women have independent power over it, because it was given them for maintenance out of affection. The independence of a woman in respect of *saudayik* is ever celebrated both as regards sale and gift, even in respect of immovables."[8]

Vivad Chintamani (*citing the last*).—"The word 'husband' is also connected with 'house'; the word 'Sardha' is an incorrect reading. 'Brother' is used illustratively. The meaning, therefore, is that what is obtained by a married or unmarried woman from her father or his family or from her husband or his family is called her *saudayik*. The allotment for maintenance that follows is an extension of this. The same author thus states her power of disposal over it."[9]

Manu.—"A woman should never make (any) expenditure out of the family property belonging to several or even (out of) her own wealth without the assent of her husband."[10]

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(1) Contains an extended disquisition citing all texts; Mandlik, pp. 91-99.

(2) From *yuta*—joined together; *yuyum*—a yoke. Dayabhag, 1-II-13, 14. Mayukh IV-X-17; Smriti Chandrika IX-III-13.

(3) That not "Yautak."

(4) *Manibhai* v. *Shankarlal*, 54 B. 323 (325); *Hunsraj* v. *Keserbai*, 6 Bom. L.R. 17; the same rule obtains in Berar which is subject to the Mayukh; *Krishna* v. *Bayaji*, 87 I.C. 1010: (1925) N. 342.

(5) *Bhaskar* v. *Mahadev*, 6 B.H.C.R. (O. C.); *Hari* v. *Damodar*, 3 B. 17; *Babaji* v. *Balaji*, 5 B. 660; *Gulappa* v. *Tayawa*, 31 B. 453; contra *Dalpat* v. *Bhagwan*, 9 B. 301 (303).

(6) *Manilal* v. *Rewa*, 17 B. 758; *Hunsraj* v. *Monghibai*, 7 Bom. L.R. 622; *Dayaldas* v. *Savitri Bai*, 34 B. 385.

(7) *Bhau* v. *Raghunath*, 30 B. 229 (240); *Venkatareddi* v. *Hanmant Gouda*, 57 B. 85.

(8) Cited in Mit., Ch. II-I, § 2; Virmitroday, I, 215, p. 1; Mayukh (Mandlik's Tr.) pp. 93, 94; Vivad Chintamani (Setlur) 255, 256.

(9) *Ib.*

(10) IX-199.

Viramitrodaya.—"In the disposal of woman's property, however, females have no independence without the permission of their husbands."[1]

This section may be regarded as laying down an exception to the general rule applicable to all stridhan due to the woman's subjection to her husband during her coverture.[2] Moreover, the general spirit of Hindu Law is not to allow women independence as regards disposition of property. In the case of females, property or ownership has reference, to the right of possession and the right of enjoyment. The third element of ownership, namely, the power of disposition, is not recognized by Hindu lawyers. The right of absolute disposal did not enter into Vidnyaneshwara's conception of the essentials of ownership, and is a later development.

2649. The one case in which this question was decided arose on the following facts. The parties hailed from Nasik where the right to a *vritti* or a religious office, to which were attached monetary emoluments, vested in one Gangabai who had inherited it from her deceased husband. She transferred her right by a gift *inter vivos* to her daughter, and granddaughter, Krishna Bai, who bequeathed it, during the lifetime of her husband Bhau, to one Raghunath who obtained probate of the will, but was prevented by Bhau from officiating and receiving the emoluments of the *vritti*. The devisee sued the husband for an injunction and other reliefs, and the question was whether Krishna Bai could, during the lifetime of her husband, make a valid will of her stridhan. For the purpose of the case it was assumed that the property she had received by gift from her grandmother constituted her stridhan, but it was held that, under Hindu Law, a woman during coverture had no power, without her husband's consent, to dispose of her stridhan *inter vivos* or by will.[3] This case is a clear authority for the rule formulated in the section, though its validity might be questioned on the grounds that it is of the essence of stridhan that the owner should possess full power of disposal and any fetter placed on her power of disposal would be inconsistent with the right of ownership. This right was conceded in a later case in which the wife had lived apart from her husband who had remarried and had practically abandoned her.[4]

2650. Husband's Right to Seize Wife's Property.—The wife's subjection to her husband is evidenced by a right conferred on the husband to seize the property of his wife in case of extreme necessity as prescribed in the record of the following texts :—

Katyayan.—"Neither the husband nor the son, nor the father, nor the brothers can assume the power over a woman's property to take it or bestow it."[5]

Mitakshara.—"In a famine, for the preservation of the family or at a time when a religious duty must indispensably be performed, or in illness or "during restraint" or confinement in prison or under corporal penalties, the husband being destitute of other funds and, therefore, taking his wife's property, is not liable to restore it. But if he seize it in any other manner or under other circumstances he must make it good."[6]

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(1) VI-Pt. I, 5 (Sarkar's Tr.), p. 224 cited *per curium* in *Bhau* v. *Raghunath*, 30 B. 229 (238).

(2) Manu, V-147-149; Narad, IX-1, 2; 7 S.B.E. 49; West and Buh. (3rd Ed.), 318-320; Mandlik, p. 93; Jolly's H.L. 253; Bannerjee's Marr. and Stridhan, (4th Ed.), 340; *Vijiarangam* v. *Lakshman*, 8 B.H.C.R. (O.C.) 244 (265, 266); *Bhau* v. *Raghunath*, 30 B. 229 (240).

(3) *Bhau* v. *Raghunath*, 30 B. 229 (240) following *Vijiarangam* v. *Lakshman*, 8 B. H.C.R. (O.C.) 244 (264); Mit., I-I, §§ 20, 25; West & Buh. (3rd Ed.) p. 92.

(4) *Bhagwanlal* v. *Divali*, 27 Bom. L.R. 633: 88 I.C. 750: (1925) B. 445.

(5) Cited in Sm. Ch., IX-II-13.

(6) Mit., II-XI-32; Dayabhag, IV-I-19-25; Mayukh, IV-X-7-10; (Mandlik's Tr.) p. 94; Viv. Chint. (Setlur) 225; *contra* Sm. Ch., IX-II-14 (Setlur) 261.

The texts on the subject of the husband's right to seize his wife's stridhan are conflicting, and those that recognize the rights are, it is submitted, obsolete. Civil law cannot recognize what criminal law will punish as robbery, and the tendency of the courts is to encourage no usurpation of property by appeal to the *jus maritii*. At any rate, the husband's control over his wife's *saudayik* is, as stated before, S. 27 (6), limited, and merely suspends her right which is set free on his death, irrespective of whether the stridhan had been acquired by her during her maiden-hood or coverture.[1]

367. Save as provided in the last section, the owner of stridhan possesses the power to dispose it of *inter vivos* or by will.[2]

Disposal by will.

2651. Analogous Law.—The following texts are held to support this section.

Narad (cited in Smriti Chandrika).—"What has been given by an affectionate husband to his wife, she may continue as she pleases when he is dead, or may give it away excepting immovable property."[3]

Vyas.—"What has been given to a woman by her husband she may consume as she pleases."[4]

2652. The limitation on the wife's power of disposal over her stridhan is stated in the last section, but it appears to be one of questionable legality. The true rule appears to be that the woman owning stridhan possesses the full and unfettered power of disposal *inter vivos* or by will. Consequently, the testamentary power of a Hindu female over her stridhan, being commensurate with her power of disposal over it in her lifetime, and both being absolute, no distinction can be taken as regards a widow's power of disposal by will over the immovables which constitute her stridhan.[5] This is another right which the woman owes to the absence of any text limiting her testamentary power over her stridhan property.[6] Of course, the text limits her power over inherited estate,[7] and it has been held that her testamentary power in respect of technical stridhan obtained from her husband is limited to movables.[8] But the language of the Privy Council, in the cases already cited, does not appear to warrant this distinction, and it is possible to invest money so received into land over which her power of disposal by will is admitted.[9] And no property can be stridhan which does not possess its essential incident, namely, the unfettered power of disposal.[10]

368. On the death of a maiden, her stridhan is inherited by her heirs in the following order:—

Succession to maiden's stridhan.

(1) *Brij Indur* v. *Janki Koer*, 1 C.L.R. 318 P.C.; *Venkata* v. *Venkata*, 1 M. 281 (286).

(2) *Venkata* v. *Venkata*, 2 M. 333 P.C.; *Motilal* v. *Ratilal*, 21 B. 170.

(3) IX-II-page 10.

(4) Cited in *ib.*, and in *Venkata* v. *Venkata*, 1 M. 281 affirmed O.A. 2 M. 333 P.C.

(5) *Luchmun Chunder* v. *Kalli Churn Singh*, 19 W.R. 292 P.C.; *Venkata* v. *Venkata*, 1 M. 281 affirmed O.A. 2 M. 333 P.C.; *Mulchand* v. *Bai Mancha*, 7 B. 491; *Motilal* v. *Ratilal*, 21 B. 170 (173); *Koonjbehari* v. *Premchand*, 5 C. 684.

(6) *Venkata* v. *Venkata*, 1 M. 281 (286) affirmed O.A. 2 M. 333 P.C.; *Madavarayya* v. *Tirthasami*, 1 M. 307; *Nallai Kumaru* v. *Marakathammal*, 1 M. 166.

(7) *Gadadhar* v. *Chandrabhagabai*, 17 B. 690 F.B.; *Motilal* v. *Ratilal*, 21 B. 170; *Gurivi* v. *Chinnamma*, 7 M. 93.

(8) *Venkata* v. *Venkata*, 2 M. 333 P.C. explained in *Hoorbai* v. *Sooleman*, 3 Bom. L.R. 790 (792).

(9) *Venkata* v. *Venkata*, 2 M. 333 P.C.

(10) *Brij Indar* v. *Janki*, 1 C.L.R. 318 (325) P.C.; *Behary Lal* v. *Juggo*, 4 C. 1 (6); *Nellai Kumaru* v. *Marakathammal*, 1 M. 166.

(1) Uterine brothers.
(2) Mother.
(3) Father.
(4) The father's sapindas.[1]
(5) The mother's sapindas.
(6) Her own sapindas.[2]

2653. Analogous Law.—The following texts support this section :—

Baudhayan.—"The wealth of a deceased damsel, let the uterine brethren themselves take. On failure of them shall it belong to the mother, or if she be dead, to the father."[3]

Mitakshara (citing the last).—"Should a damsel anyhow affianced, die before the completion of the marriage, what is to be done in that case. The author replies: "If she die [after troth plighted], let the bridegroom take back the gifts which he has presented; paying, however, the charges on both sides." 30. If a betrothed damsel die, the bridegroom shall take the rights and other presents, or the nuptial gratuity which had been previously given by him [to the bride] "paying, however, the charges on both sides" that is, clearing or discharging the expense which has been incurred both by the person who gave the damsel and by himself, he may take the residue. But her uterine brothers shall have the ornaments for the head, and other gifts which may have seen presented to the maiden by her maternal granfather [or her paternal uncle], or the relations, as well as the property, which may have been regularly inherited by her. For Baudhyayan says, "The wealth of a deceased damsel, let the uterine brethren themselves take. On failure of them, it shall belong to the mother; or if she be dead, to the father."[4]

The Virmitrodai contains an elaborate discussion on the subject of succession to maiden's stridhan,[5] but most of it is of little practical value.

2654. Maiden's Heirs.—The heirs of a maiden's stridhan are, as stated in the section, her uterine brothers, mother, and father and failing them, the nearest relations.[6] "It has been held that these relations must mean the father's sapindas, since his sapindas are also the mother's sapindas by virtue of her identity with her husband of half of his body.[7] But this identity is limited to his legitimate relations. For even if the husband be a shudra, the fact that his illegitimate son is his heir (**S. 314**), does not make him his married wife's sapinda, so as to entitle him to inherit her stridhan.[8] After the father's sapindas, the mother's sapindas, and after these her own sapindas take in succession. Thus, a father's paternal uncle's son is entitled to succeed in preference to the father's sister,[9] and a sister is preferred to the father's brother's son,[10] the father's sister to his gotraj sapindas five or six degrees removed[11] the father's mother's sister to a maternal grandmother[12] and a stepmother to a mother's sister."[13] In the case of a prostitute, her sister is her heir in preference to the Crown.[14]

(1) Only legitimate—*See* S. 314 (5), *Subramania* v. *Rathnavelu*, 41 M. 44 F.B.; *Ayiswarya* v. *Sivaji*, 49 M. 116 (136, 137, 154, 155).
(2) *Janglubai* v. *Jetha*, 32 B. 409 (413); *Narayan* v. *Lakshman*, 51 B. 784.
(3) Cited in Mit., II-XI-30.
(4) Mit., II-XI-29, 30.
(5) Ch. V (Setlur) 438-456.
(6) *Gurdial Singh* v. *Bhagwan Devi*, 8 L. 366 (371).
(7) *Dwarka Nath* v. *Sarat Chandra*, 39 C. 319 (323); *Janglubai* v. *Jetha*, 32 B. 409 (413).
(8) *Subramania* v. *Rathnavelu*, 41 M. 44 (72) F.B.; *Ayiswarya* v. *Sivaji*, 49 M. 116 (136, 137, 154, 155).
(9) *Sundaram* v. *Ramasamia*, 43 M. 32; *Kamala* v. *Bhagirathi*, 38 M. 45; *Janglubai* v. *Jetha*, 32 B. 409; *Tukaram* v. *Narayan*, 36 B. 339.
(10) *Dwarka Nath* v. *Sarat Chandra*, 39 C. 319.
(11) *Tukaram* v. *Narayan*, 36 B. 339 (359) F.B.
(12) *Janglubai* v. *Jetha*, 32 B. 409; *Gandhi* v. *Jadab*, 24 B. 192 (212).
(13) *Kamala* v. *Bhagirathi*, 38 M. 45.
(14) *Narayan* v. *Lakshman*, 51 B. 784.

Succession to stridhan of woman with children.

369. (1) Except as otherwise hereinafter provided, the stridhan of a woman married in the Brahm form with children devolves on her following relations:—

(*i*) Unmarried daughters;
(*ii*) Married daughter who is poor or childless;
(*iii*) Married daughter who is well-to-do whether she has children or not;
(*iv*) Daughter's daughter;[1]
(*v*) Daughter's son;
(*vi*) Son;
(*vii*) Son's son;
(*viii*) Husband;
(*ix*) His nearest sapindas;
(*x*) Her own blood relations.

(2) The heirs of a woman married in the Asur or some other unapproved form of marriage are her—

(*i*) Mother;
(*ii*) Father;
(*iii*) Father's sapindas.

2655. Analogous Law.—This section is drawn from the Mitakshara in which this order of succession is set out and explained.[2]

2656. Unmarried Daughter.—The first heir to a mother's stridhan is her unmarried daughter, and she is so declared in the Mitakshara.[3]

Clause (1), (i).

A question arises, and has been raised, whether a betrothed daughter is unmarried. The Mitakshara uses the expression *apratta* (अप्रत्ता) to designate an unmarried daughter, and it has been held that reading contextually it means that the daughter must also be unbetrothed.[4] But it is submitted that the term "*appratta*" means really a virgin and would include a betrothed but unmarried daughter.

2657. Married Daughter.—The succession of a married daughter is provided in the following text:—

Clause (2), (ii-iii).

Mitakshara.—"Hence, if the mother be dead, daughters take her property in the first instance, and here, in the case of competition between married and maiden daughters, the unmarried take the succession; but on failure of them the married daughter; and here again in the case of competition between such as are provided for and those who are endowed, the unendowed take the succession first, but on failure of them those who are endowed. Thus Gautam says, a woman's property goes to her daughter unmarried or unprovided[5] or provided, as is implied by the conjunctive particle in the text. Unprovided are such as are destitute of wealth or without issue."[6]

Referring to this text Sir Gurudas Banerjee writes: "I think Vidnyaneshwar's meaning is that the rich daughters, whether they have children or not, should all be excluded by the indigent daughters, whether they are childless or have children. And I presume that the childless daughters would be preferred to those having issue, only when the com-

(1) Preferred to Son's Son; *Ram Kali* v. *Gopal Dei*, 48 A. 48; but no preference of unmarried over married.—*ib.*
(2) Mit., II-XI-13-25.
(3) *Ib.*; *Ram Kali* v. *Gopal Dei*, 48 A. 648.
(4) *Sreenath* v. *Surbo*, 10 W.R. 438 (490); *contra* Bannerji's stridhan, (4th Ed.), 367.
(5) Gautam, 22, 28. The Sanskrit word is अप्रातष्ठिता which means unprovided.
(6) Mit., II-XI-13.

petitors are not poor, and their means and circumstances are equal. In the case of daughters who are poor in different degrees, no hard and fast rule can be laid down, but a court of justice should take into account the circumstances of each case, and order distribution accordingly."[1] It will be noted that no preference is ordered by the Mitakshara, as it is by the Dayabhag, to a daughter who has, or is likely to have, male issue over a daughter who is barren or a childless widow,[2] while in Mithila the distinction between the rich and poor is immaterial. The difference in the three schools is due to the interpretation of the word *"apratishthits"* in Gautam's text which has been translated "unprovided for," "without wealth" by some, and "without children" by other commentators. It is now settled that the former is the Mitakshara and the latter the Dayabhag view. In the first view, however, a minute enquiry into the question of comparative poverty is not called for. When the difference in wealth is marked, the whole property passes to the poorest daughter.[3] Since the distinction is based on a special text which is limited only to the succession amongst daughters *inter se*, it cannot be extended to other female relations, *e.g.*, sisters by analogy.[4] Where several daughters inherit jointly they take as tenants-in-common without any right of survivorship.[5]

As stated in the sequel, unchastity and illegitimacy are no bars to succession to stridhan, though being a prostitute the daughter is regarded as neither married nor unmarried, and therefore, takes only in default of them.[6] But the contrary has been laid down in Allahabad, where it is pointed out that consanguinity and not any theoretical spiritual benefit is the sole rule of succession to stridhan.[7]

2658. Daughter's Daughter.—After the daughters the daughter's daughter takes the succession under an express text,[8] which further provides: "If there be a multitude of those [grand-daughters] children of different mothers and unequal in number, shares should be allotted to them through their mothers, as directed by Gautam. Or the partition may be according to the mothers and a particular distribution may be made in the respective sects."[9] That is, daughter's daughters inherit *per stirpes* and not *per capita*.[10] Daughters of predeceased daughters do not take anything in competition with daughters though the Mitakshara does not altogether ignore them. "But if there be daughters as well as daughter's daughters, a trifle only is to be given to the grand-daughters. So Manu declares: 'Even to the daughters of those daughters something should be given as may seem fit from the assets of their maternal grandmother, on the score

Clause (2), (iv).

(1) Bannerji's Marriage and Stridhan (4th Ed.), 367.

(2) *Wooma* v. *Gokoolanund*, 3 C. 587 P.C.

(3) *Wooma* v. *Gokoolanund*, 3 C. 587 593) P.C.; *Totawa* v. *Basawa*, 23 B. 229; *Poli* v. *Narotum*, 6 B.H.C.R. 183; *Bahubai* v. *Manchhabai*, 2 B.H.C.R. 5; *Audh Kumari* v. *Chandra Dai*, 2 A. 561; *Danno* v. *Darbo*, 4 A. 243 (245); *Simmani* v. *Muttammal*, 3 M. 265 (269).

(4) *Bhagirathi* v. *Baya*, 5 B. 264.

(5) *Karuppai* v. *Sankaranarayanan*, 27 M. 300 (303, 314) F.B.; *Parson* v. *Somli*, 36 B. 424 contra *Sengamalathammal* v. *Velayuda*, 3 M.H. C.R. 312, (317); *Venkatarama* v. *Bhujunga*, 19 M. 107.

(6) *Advayapa* v. *Rudrava*, 4 B. 104; *Tara* v. *Krishna*, 31 B. 495.

(7) *Ganga* v. *Ghasita*, 1 A. 46 (49, 50); *Nagendra* v. *Benoy*, 30 C. 521; *Angammal* v. *Venkata*, 26 M. 509.

(8) Mit., II-XI-15; *Ram Kali* v. *Gopal Dei*, 48 A. 648; *Amarjit* v. *Alguchaabe*, 51 A. 478; *Subramanian* v. *Arunachelam*, 28 M. 1; *Dhanna Mal* v. *Parmeshari*, (1928) L. 9.

(9) Mit., II-XI-16; Manu, IX-193; Sm. Ch. IX-III-21.

(10) *Subramaniam* v. *Arunachelam*, 28 M. 1.

of natural affection.' "[1] But this trifle is not a share and not claimable as such. In regard to such succession daughter's daughters whether married or unmarried take equally in preference to son's son.[2]

2659. Daughter's Son.—Yadnavalkya's text contains no provision regarding the rights of a daughter's son and Vidnyaneshwar expressly mentions him as the next heir and supports his view on a text of Narad which says: "Let daughters divide mother's wealth or, on failure of daughters, their male issue."[3] According to the Smritichandrika the daughter's sons take like daughter's daughters,[4] but only after the latter.[5] As such, they would take *per stirpes*.[6] They are, of course, preferred to a son who comes after them.[7]

Clause (1), (iv).

The question whether a daughter's son would also include an adopted son, and if so, what would be his share in competition with an *auras* son has not yet arisen, but it is submitted that since such succession is solely based upon affinity, in which the question of spiritual benefit has no place, and since an adoption is more an act of the husband than of the wife, an adopted son is no heir to his grandmother's stridhan[8]

2660. Son.— The son is next assigned a place in the line of succession both by Yadnyavalkya[9] and Vidnyaneshwar.[10] The view of the Dayabhag school will be noticed later. The son in this connection means only a legitimate son,[11] and certainly not a son born of adulterous intercourse.[12] And though this would be the view of Hindu law where the widow of the predeceased husband remarries, still her remarriage being now legalized, her son by her former husband will inherit equally with her son by her second husband, since both are her sons.[13] The question whether the son here includes also an adopted son has been answered both ways in the decided cases, it being held that, since the highest Hindu authorities place a son on adoption in the category of an *auras* son[14] he must be so treated for succession to stridhan (§ 706). On the other hand, the contrary has been laid down in other cases[15] in one of which the Pandits opined: "If a man appoints another his adopted son, that person so adopted stands in relation to him of his son, and offers up his funeral oblations and is heir to his estate, but the person so appointed does not become the adopted son of the adopter's wife, nor does he offer funeral oblations to her, nor succeed to her property."[16] So, in Bomaby, it has been held that "a son adopted by a widow with her husband's consent will not inherit her property, which will go to her father's brothers."[17] Of course, a woman cannot adopt a son to herself, and such adoption confers no right of inheritance on the adoptee.[18] A woman's step-son is not in the same position as her own son, though he

Clause (1), (vi).

(1) Manu, IX-193; Mit., II-XI-17.
(2) *Ram Kali* v. *Gopal Dei*, 48 A. 648.
(3) Narad. XIII-1; Mit., II-XI-18; Mayukh, IV-X-20.
(4) IX-III-25.
(5) *Sham Behari* v. *Ram Kali*, 45 A. 715.
(6) Banerji's Stridhan, (4th Ed.), p. 37.
(7) *Dhauna Mal* v. *Parameshri*, (1928) L. 9.
(8) Banerji's Stridhan, (4th Ed.), p. 375.
(9) Yat., II-118.
(10) Mit., II-XI-19; *Karuppai* v. *Sankhara*, 27 M. 300 F.B.
(11) *Ayiswarya* v. *Sivaji*, 49 M. 110: (1929) M. 84.
(12) *Jagannath* v. *Narayan*, 34 B. 553.
(13) *Bapu* v. *Kashinath*, (1934) B. 113.
(14) Datt. Ch. (Suth.) 219; Dayakram Sangrah, V-I-1; Macn. H.L. 39, 40, followed *Teencowree* v. *Dinonath*, 3 W.R. 49; *Sham Kuar* v. *Gaya Din*, 1 A. 255 F.B.; *Anandi* v. *Hari*, 33 B. 404 (410).
(15) *Sree Narain* v. *Bhya Jha*, 2 B.S.R. 29 (34): 6 I.D. (O.S.) 380 (384) (a Mithila case).
(16) *Ib.*, p. 34: 6 I.D. (O.S.) 380 (384).
(17) 2 S.A.R. 178 cited in 1 Norton's L.C.H.L. 101.
(18) *Narendra* v. *Dina*, 36 C. 824.

comes in after the husband as his sapinda.[1] It has been held that co-heirs inheriting stridhan take as tenants-in-common, with no right of survivorship[2] because this is a succession to obstructed heritage, but the Privy Council point out that this is by no means an infallible test, nor indeed, universally true.[3] Still, both under the Mitakshara and the Mayukh, sons inheriting property from their mother succeed to them not as joint tenants but as tenants-in-common without benefit of survivorship.[4]

Clause (1), (vii).

2661. Grandson.—Failing sons, son's sons inherit;[5] grandsons by different sons inherit *per stirpes* and not *per capita*.[6] If the adopted son takes a share he will share equally with an *auras* son.[7]

Clause (1), (vii, ix, x).

2662. Husband's Nearest Sapinda.—On failure of the grandson, her husband and other nearest sapindas inherit,[8] that is to say, the estate devolves as if she had died issueless.[9] As such, her husband is a preferential heir to his son by another wife.[10] Failing her husband's sapindas,[11] stridhan devolves on her own blood relations.

Clause (2).

2663. The heirs of a woman, married in an unapproved form, are those of a maiden, the reason being that by such marriage the woman does not pass into the *gotra* of her husband, but retains that of her father, and her heirs are those of an unmarried female.[12] As such, her sister takes before her sister's son,[13] or her paternal uncle.[14]

Succession of stridhan of issueless woman.

370. (1) The stridhan of an issueless woman devolves on her husband if she was married to him in the *Brahm* form, which will be presumed, and failing him, on his nearest sapindas in the order of their succession to him, and failing them, on her own blood relations.[15]

(2) But if she was married to him in the *Asur* form (or some other unapproved form) it devolves on her mother, then on her father, and then on the father's or mother's nearest sapinda in the order of their succession to them.[16]

2664. Analogous Law.—The rule here stated is deduced from the following texts:—

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(1) *Bhimacharya* v. *Ramacharya*, 33 B. 452 (462).

(2) *Karuppai* v. *Sankara*, 27 M. 300 F.B.; *Parson* v. *Somli*, 36 B. 424; but *see* Mit., I-IV-2; 3 Dig. 603; *Katama Natchiar* v. *Raja of Shivganga*, 9 M.I.A. 543 (615); *Venkayamma* v. *Venkataramanayamma*, 25 M. 678 (687) P.C.

(3) *Venkayamma* v. *Venkataramanayamma*, 25 M. 678 (687) P.C.

(4) *Karuppai* v. *Sankara*, 27 M. 300 F. B.; *Kanakammal* v. *Ananthamathi*, 37 M. 293; *Parson* v. *Somlu*, 36 B. 424; *Ganpat* v. *Secretary of State*, 45 B. 1106 (1111); *Jumma Das* v. *Kunwar Bai*, (1925) A. 447.

(5) Gautam, XII-32; Yad., II-50; Mit., II-XI-24; *Sham Behari Lal* v. *Ram Keli*, 45 A. 715 P.C.; *Raman* v. *Jagjivan Das*, 41 B. 618.

(6) Sm. Chand, IX-III-25.

(7) *Nagin Das* v. *Bachoo*, 40 B. 270 P.C.

(8) Mit., II-XI-25; *Tukaram* v. *Narain*, 36 B. 339.

(9) Mit., II-XI-9; *Umrao Kuar* v. *Sarabjit Singh*, 85 I.C. 618: (1925) O. 620.

(10) *Bhimmacharya* v. *Ramacharya*, 33 B. 452 (462).

(11) *Kanakammal* v. *Ananthamathi*, 37 M. 293; *Ganpat* v. *Secretary of State*, 45 B. 1106; *Motichand* v. *Kunwar Kalika*, 48 A. 663 (665).

(12) *Kesserbai* v. *Hunsraj*, 30 B. 431 (451) P.C.; *Janglubai* v. *Jetha*, 32 B. 409 (412, 413).

(13) *Raju* v. *Ammani*, 29 M. 358.

(14) *Govind* v. *Savitri*, 43 B. 173.

(15) *Vithal* v. *Balu*, 60 B. 671 (676).

(16) Mit. II-XI-2; *Vijiarangam* v. *Lakshuman*, 8 B.H.C.R. (O.C.) 244; *Dwarka Nath* v. *Sarat Chandra*, 39 C. 119.

Mitakshara.—"If a woman die 'without issue', that is, having no progeny, in other words, having no daughter, nor a daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest as will be (forthwith explained).

"10. The kinsmen have been declared generally to be competent to succeed to a woman's property. The author now distinguishes different heirs according to the diversity of the marriage ceremonies. 'The property of a childless woman married in the form denominated Brahm, or any of the four (unblamed modes of marriage) goes to her husband; but if she have progeny, it will go to her (daughter's) daughter, and in other forms of marriage (as the Asur, etc.) it goes to her father and mother on failure of her own issue.'[1]

"11. Of a woman dying without issue as before stated and who has become a wife by any of the four modes of marriage denominated Brahm, Daiv, Arsh and Prajapatya, the whole property as before described, belongs, in the first place, to her husband. On failure of him it goes to her nearest kinsmen (*Sapinda*) allied by funeral oblations. But in the other forms of marriage called Asur, Gandharb, Rakshash and Paishach, the property of a childless woman goes to her parents, that is to say, her father and mother. The succession devolves first and the reason has been before explained,[2] on the mother, who is valuably exhibited (first) in the elliptical phrase *pitrigami* implying goes (*gacheti*) to both parents (*pitaram*), that is to the mother and to the father. On failure of them their next of kin take the succession."[3]

2665. Meaning of Words.—"Issueless woman" means without legitimate issue.[4] But a woman with an adopted son is not issueless, though she is issueless if she is possessed of only a stepson, *i.e.*, son of the husband by a co-wife.[5] A woman is issueless if her issue had predeceased her.[6]

2666. Stridhan on Brahm Marriage.—It has already been seen that of all the eight forms of marriage, only two forms, the Brahm and the Asur survive (§ **337**). The question of stridhan succession then depends upon whether the woman was married in one form or the other. And since law presumes that, in the absence of anything appearing to the contrary, all marriages are performed in the Brahm form[7] (§ **451**) it follows that clause (1) lays down the normal rule of devolution of stridhan and clause (2) only applies to exceptional cases.

Clause (1).

The same presumption applies equally to Shudras if the parties belong to a respectable family. Such a presumption was made in the case of Kamathis who were held to be "an intelligent and respectable section of the Hindu community"[8] and there is no room for any other presumption in the case of non-Hindus such as the Cutchi Memons who follow the Hindu law without following the Hindu religion,[9] though the special rules as to the devolution of stridhan do not apply to Khoja Mahomedans.[10] "The legal consequences of the classes of marriage, the approved and the disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not and suggest the inference that it is the quality and not the form of the marriage that decides that course of devolution; where the marriage is approved, the husband and his side come in, when disapproved, they do not."[11]

(1) Yad., II-146.
(2) Mit., II-XI-2.
(3) Mit., II-XI-10, 11; *Kishan* v. *Sheo Paltan*, 23 A.L.J. 981: 90 I.C. 358.
(4) *Jagannath* v. *Narayan*, 34 B. 553.
(5) *Gangadhar* v. *Hiralal*, 43 C. 994.
(6) *Chandrabhaga* v. *Vishwanath*, 9 N. L.R. 102: 20 I.C. 557.
(7) S. 28; *Jagannath* v. *Ranjit Singh*, 25 C. 354 following *Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M.I.A. 139; *Gojabhai* v. *Shahajirao*, 17 B. 114; *Jagannath* v. *Narayan*, 36 B. 553 (559); *Girdharilal* v. *Government*, 1 B.L.R. 44 P.C.; *Authi Kesavalu* v. *Ramanujam*, 32 M. 512.
(8) *Jagannath* v. *Narayan*, 34 B. 553 (559).
(9) *Moosa* v. *Haji Abdul*, 30 B. 197 (203).
(10) *Karim* v. *Pardhan*, 2 B.H.C.R. 276.
(11) *Moosa* v. *Haji Abdul*, 30 B. 197 (203); *Govind* v. *Daulat*, 6 N.L.R. 3; 5 I.C. 426.

2667. Husband's Sapindas.—Assuming, however, that all marriages are of the approved form and class, the wife's stridhan goes to the husband and his nearer sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male, that is to say, the husband takes the property as his own, and is then competent to transmit it to his own heirs as his self-acquired property.[1] It does not go to the wife's parents or relations at all, except in the last resort in competition with the Crown.[2]

It is, however, said that the order of proximity in the case of the husband's sapindas, must be in accordance with Brihaspati's text quoted in the sequel (§ **2672**).

2668. According to the text of Mitra Misra, on failure of these, the inheritance devolves on the stepson, his sons and grandsons, because under such circumstances, these offer the natural oblations, and pay the debts, and because it has been ordained in this manner in the above text of Manu.[3] Then on the failure of these, though sapindas, such as a father-in-law, may be living, the sister's son and the rest have a right to inherit, according to the scale of their nearness mentioned in the text of Brihaspati, the property of their mother's sister and the rest, by virtue of the special text (of Brihaspati) which cannot have any other application. This order not only accords with the text of Brihaspati but also with that given in the Mayukh[4] and the Smriti Chandrika,[5] but being in conflict with that indicated in the Mitakshara, the latter must prevail,[6] and has been upheld by the Privy Council who held that the co-widow was entitled to succeed to the property of a woman dying without issue, in preference to her husband's brother or husband's brother's son on the ground that a wife was a sapinda of her husband, and therefore, on failure of the husband, the co-widow was his nearest sapinda and entitled to the property in suit.[7] Referring to Brihaspati's text their Lordships said: "They are of opinion that the text of Brihaspati should be read distributively as regards the property of woman married according to one of the approved forms and the property of those married in one of the lower forms. In the one case those of the heirs enumerated in Brihaspati who are blood relations of the husband, *viz.*, the husband's sister's son, the husband's brother's son and the husband's brother will succeed to the women's property and in the other cases the relations of the father will succeed. In the diversity of opinion amongst the text-writers whether Brihaspati's series of heirs take in the order in which they are enumerated, their Lordships think that the better opinion is that the order of succession is not indicated."[8]

2669. According to this view, Kamlakar enumerates the following relations as ranking next to the husband:—

(1) The stepson.

(2) The stepgrandson.

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(1) *Thakoor Deybee* v. *Rai Baluk Ram*, 11 M.I.A. 135 (175); *Champat* v. *Shiba*, 8 A. 393 (395); *Ganesh* v. *Ajudhit*, 28 A. 345; *Jagannath* v. *Ranjit Singh*, 25 C. 354 (366); *Marya Pillai* v. *Sivabhagyathachi*, 36 M. 116; *Kanakammal* v. *Ananthamathi*, 37 M. 292; *Marya* v. *Sivabagyanthachi*, (1911) 2 M.W.N. 168; *Mathosri*, v. *Sivaji*, (1920) M.W.N. 501: 59 I.C. 265.

(2) *Kanakammal* v. *Ananthamathi*, 37 M. 293; *Ganpat* v. *Secretary of State*, 45 B. 1106; *Motichand* v. *Kunwar Kalika*, 48 A. 663 (665).

(3) Manu, IX-183.

(4) May., IV-X-30 explained in *Kesserbai* v. *Hunsraji*, 30 B. 431 P.C.

(5) Sm. Ch., IX-III-36.

(6) Bannerji's Stridhan (4th Ed.), 387.

(7) *Kesser Bai* v. *Hunsraj*, 30 B. 431 P.C. affirming O.A. *Kesser Bai* v. *Monghibai*, 5 Bom. L.R. 244 reversing 6 Bom. L.R. 17; *Krishnai* v. *Shripati*, 30 B. 333.

(8) *Kesserbai* v. *Hunsraj*, 30 B. 431 (451) P.C.

(3) The rival wife.
(4) The stepdaughter.
(5) The husband's other gotraj sapindas, and
(6) Bandhus, in the order, in which they inherit his property.

This view is endorsed by the Bombay Court[1] in a case in which the stepgrandson was held entitled to a woman's stridhan in preference to a co-widow or to the husband's brother's son, and a co-widow was preferred to the grandchildren of the father-in-law's brother, because she was the nearest sapinda of the deceased husband,[2] and the whole brother of the husband to his half brothers[3] or to the deceased woman's stepbrother.[4] So in Madras the stepson is preferred to the sister's son,[5] and following the same rule the grandson of a co-widow is preferred to a nephew and co-widow[6] and so the Privy Council preferred a co-widow to the husband's brother or the husband's brother's son,[7] and the same high tribunal in another case confirmed the rights of the collateral heirs of the husband,[8] and the Allahabad Court maintained the rights of a collateral relation who was the near sapinda of the brother of the deceased husband in preference to the brother of the deceased,[9] and in Madras, the husband's brother's daughter's son is placed before the sister's daughter's son.[10] But as compared with the collateral sapindas of the husband his co-wife's daughter is held entitled to preference.[11] Some modern text-writers, however, favour the right of the deceased's stepdaughter as against the collateral relations of the husband.[12] In the Punjab, the husband is held to be the preferential heir to the woman's parents, sisters and other heirs.[13]

Since the husband's sapindas succeed to the stridhan of his wife, there can be no distinction between his natural and adopted son as both are the sapindas of their father and would take equally.[14]

2670. On the failure of the husband's heirs, her own blood relations are held to come in before the Crown.[15] There is no textual authority for this view, though it is otherwise abundantly justified. As such, on the death of one such widow the court divided her estate equally between the brother and sister.[16] Of her own relations, the mother takes precedence of the brother, but a brother's widow, though a *sagotra sapinda*, is not entitled to succeed as heir in Madras,[17] though she would be so entitled in Bombay.

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(1) *Gojabai* v. *Shahajirao*, 17 B. 114; approved in *Kesserbai* v. *Hansraj*, 30 B. 431 P.C.
(2) *Krishnaji* v. *Shripati*, 30 B. 333.
(3) *Paramappa* v. *Shiddappa*, 30 B. 607.
(4) *Gunamani* v. *Prasanna*, 23 C.W.N. 1038; *Debi Prasanna* v. *Harendra*, 37 C. 863 (Dayabhag case).
(5) Sm. Ch., IX-III-38; *Brahmappa* v. *Papama*, 13 M. 1-8.
(6) *Jagannath* v. *Rumjit Singh*, 25 C. 354 (367).
(7) *Kesserbai* v. *Hunsraj*, 30 B. 431 P. C.
(8) *Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M.I.A. 139 (175).
(9) *Champat* v. *Shiba*, 8 A. 393.
(10) *Venkatasubramaniam* v. *Thayarammah*, 21 M. 263.
(11) *Marya* v. *Sivabhagya*, 36 M. 116.
(12) Golap Shastri's H.L. (4th Ed.), 580; *Bhattacharya's* H. L., 580; Bannerjees Marriage and Stridhan, (4th Ed.), 389; but see *Marya* v. *Sivabagyathachi*, 36 M.116 (118, 119).
(13) *Manni* v. *Purat Singh*, (1909) P.R. 39: 1 I.C. 720.
(14) *Padma* v. *Court of Wards*, 8 C. 302 P.C.; *Joy Kishore* v. *Panchoo*, 4 C. L.R. 538 (555); *Gangadhar* v. *Hira Lal*, 43 C. 944 (956).
(15) W. & B., p. 544; *Kanakammal* v. *Ananthamathi*, 37 M. 293; *Ganpat* v. *Secretary of State*, 45 B. 1106; *Vithal* v. *Balu*, 60 B. 671 (676).
(16) *Vithal* v. *Balu*, 60 B. 671 (676).
(17) *Kanakammal* v. *Ananthamathi*, 37 M. 293.

Mithila law.

2671. The same principle governs the Mithila country where the text of Brihaspati has been deserted in favour of the Mitakshara[1] according to which the husband's brother's son[2] is preferred to the husband's sister's son[3] and they both are preferred to his paternal great-grandfather's great-grandson.[4]

The Mitakshara is silent as to who are to take on a total failure of the husband's heirs. In Bombay, it is suggested that in that case the father's sapindas next inherit.[5] This view is deduced from a text quoted in the Mitakshara that "on failure of relations on both sides (the husband's and the parent's) the king becomes the supporter and master of a female" and is endorsed by Sir Gurudas Banerji who, however, adds "that it is not clear whether the paternal kinsmen should come after the husband's sapindas or after his samanodaks."[6]

Clause (2).

2672. Heirs of Asur Marriage.—The Asur form of marriage has been already described. Asuras were the aborigines of India before the Aryan settler by whom *Asur* marriage was regarded as demoniacal. Its leading characteristic is the payment of a price for the purchase of the bride from her father,[7] as distinguished from a present made to the bride.[8] In spite of the textual objurgations against it, it is quite commonly practised amongst Hindus of all castes, amongst Brahmins in Bengal[9] as amongst the Brahmins and other high caste residents of western,[10] and southern India where Sir Thomas Strange doubted whether any other form was observed.[11] Many variations of the Asur form have come into vogue, and if the question were ever put to the text, whether a given marriage was Brahm or Asur, it might not always be easy to furnish the answer. What would, for example, be the class of a Gandharba[12] a Santigrihit[13] of a Katar marriage in which the wife is held to occupy a distinctly inferior position to a married wife. And there are several other marriages which defy classification according to the orthodox view of marriage.

Turning next to the heirs to stridhan of a woman married in the Asur form, it has already been seen that Mitakshara expressly mentions the mother, the father the father's next of kin, and the mother's next of kin in the other of succession.[14] In this view, after the parents the heirs to her stridhan would be, her sister's son, her husband's sister's son, her husband's brother's son, her brother's son, her son-in-law and her husband's younger brother in accordance with the following text:—

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(1) *Bachha* v. *Jugmohan*, 12 C. 348 (356, 357); *Mohun Pershad* v. *Kishen Mohun*, 21 C. 344; *Kamla Prasad* v. *Murti Manohar*, 13 Pat. 550 (559).

(2) *Basha* v. *Jugmohan*, 12 C. 348 (356, 357).

(3) *Kamla Prasad* v. *Murli Manohar*, 13 Pat. 550 (584).

(4) *Mohun Pershad* v. *Kishen Mohun*, 21 C. 344.

(5) 1 W. and B., p. 243.

(6) Marriage and Stridhan, (4th Ed.), 406.

(7) Manu, III-31; *Chunilal* v. *Suraj Ram*, 33 B. 433.

(8) *Jaikisondas* v. *Harikisondas*, 2 B. 9 (15).

(9) Bannerji's Marriage and Stridhan (4th Ed.), 83.

(10) Steel's Law of Caste, 159.

(11) 1 Str. H. L., 43.

(12) *Hajmu* v. *Bhadoorun*, referred to in (1846) B.S.D.A. 340; 7 B.S.R. 355 (356); *Mokund* v. *Bissessuree*, (1853) B. S. D.A. 159; *Fanindra* v. *Rajeswar*, 11 C. 463 P.C.

(13) *Prandhur* v. *Ramchander*, (1861) B.S.D.A. 166; *Durrapsing* v. *Buzzurdhun*, 2 Hay 335.

(14) Mit., II-IX-II; *Vijiarangam* v. *Lakshuman*, 8 B.H.C.R. (O.C.) 244; *Dwarka Nath* v. *Sarat Chandra*, 39 C. 119.

Brihaspati.—"The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother are pronounced similar to mothers. If they have no son born in lawful wedlock, nor daughter's son, nor his son, then the sister's son and the rest shall take their property."[1]

As already observed, the Privy Council have held that this text of Brihaspati, is illutrative and not exhaustive and that it should be read distributively as regards the property of women married according to one of the approved forms, and the property of those married in a disapproved form; in the one case, those of the heirs enumerated in the text who are blood relations of the husband will succeed, and in the other case the relations of the father will succeed.[2] Under the Mayukh, however, the kinsmen enumerated by Brihaspati take in the order named by him. With this difference there is no other difference[3] between the Mitakshara and the Mayukh order of succession to the stridhan of a woman married in either form. Amongst the distant kinsmen gotrajas take precedence over bandhus.[4] But the wives of gotraj sapindas and samanodaks possess the right of inheritance co-extensive with those of their husbands after whom they are entitled to take.[5] According to the custom in Agambadia caste, the stridhan property of a widow, without issue, goes to her parents in preference to the husband's kindred.[6]

Devolution of Sulk.

371. (1) Both under the Mitakshara and the Dayabhag systems, *sulk* goes first to the uterine brothers, then to the mother, then to the father, and in default of them, it goes to the heirs of the other stridhan:

(2) Provided that in the Dayabhag country, the heir ranking next after the father is the husband.

2673. **Analogous Law.**—This and the next section state special rules governing the devolution of certain classes of technical stridhan. The rule here stated is with the variation noted in clause (2) applicable alike to the Mitakshara[7] and the Mayuk[8] schools.

The texts on this point somewhat differ as will be apparent from the following:—

Gautam[9] (one reading).—"The sister's fee belongs to the uterine brothers after the death of the mother."[10]

Ib. (another reading).—"The sister's fee belongs to the uterine brother; after them it goes to the mother, and next to the father. Some say before her."[11]

Ib. (another reading).—"The sister's fee belongs to her uterine brothers, if her mother be dead. Some (declare, that it belongs to them) even while the mother lives."[12]

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(1) Cited in May., I-XV-30.
(2) *Kesar Bai* v. *Hunsraj*, 30 B. 431 P. C.
(3) *Krishnaji* v. *Shripati*, 30 B. 333; *Kesar Bai* v. *Hunsraj*, 30 B. 431 P.C.; *Parmappa* v. *Shiddappa*, 30 B. 607.
(4) 1 W. & B., p. 215.
(5) *Lakshmi Bai* v. *Jayaram*, 6 B.H.C. R. (A.C.) 152; *Lallubhai* v. *Mankuvarbai*, 2 B. 338.
(6) *Vellaichami* v. *Mamundi*, 23 I.C. (M.) 124.
(7) Mit., II-XI-14.
(8) May., IV-X-32; *Sitabai* v. *Wasantrao*, 3 Bom. L.R. 201.
(9) "भगिनीशुल्कं सादयोणामूर्ध्वं मातुः"
(10) Gautam, XXVIII-23, as cited in Mit., II-XI-14. Same Translation in May., IV-X-32.
(11) Gautam, XXVIII-23 as cited in Dayabhag, IV-III-27; Virmitrodai (Sarkar) 242; Sm. Ch., IX-III-32, 33; Vivad Chint. (Tagore) 270.
(12) Gautam, XXVIII-25, 26; 2 S. B. E. 303.

But the variation in the reading is immaterial, since the brother being mentioned first, he was probably intended to take first, and this is the view now generally held.[1]

After the brother and the mother the course of devolution follows the other stridhan.

2674. **Mithila.**—In the Mithila country after the brother and the mother, the father takes, which is also consistent with one reading of the text before cited accepted by the Vivad Chintamani which is a local authority in the Mithila country.

2675. **Dravid Departure.**—In the Dravid country where the Smriti Chandrika is a special local authority, the variation in the reading before noticed is accepted, so that the *sulk* is first inherited by the mother and then by the full brother.

Devolution of certain other stridhan.

372. In the Mayukh and the Dravid countries, the following classes of stridhan follow a special line of devolution:—

(1) *Yautak* stridhan goes to the maiden daughters in the first instance.

(2) *Anvadheyak, Adhiavedanik* and *Pitri-Dutt* stridhans are shared equally by (*i*) the sons and unmarried daughters, and (*ii*) the sons and married daughters, and failing them, they are inherited by the daughter's children and son's son:

Provided that in the case of stridhan mentioned in the last clause, widowed daughters are excluded and the widows of gotraj sapindas do not inherit any stridhan.

2676. **Analogous Law.**—The first clause stating that the *yautak* stridhan goes first to the unmarried daughters alone, and not to the sons, is in accordance with Manu,[2] followed both in the Mitakshara[3] and the Mayukh.[4]

As to *Anvadheyak* stridhan,[5] Manu declares that it shall be in inherited by her children[6] but Mitakshara's gloss upon it, however, is that sons inherit only in default of daughters. The Mayukh dissents from this view holding both sons and daughters its equal participants,[7] and it has been so held[8] the son taking in preference to a grandson of a predeceased son[9] while a stepson is no heir at all.[10] As amongst daughters the unmarried are preferred to the married.[11] The same rule extends to Southern

(1) 2 Vyavastha Chandrika, 423, 550; Bhattacharya's H.L., (2nd Ed.), 578; Cunn. H. L., p. 119.
(2) Manu, IX-139.
(3) Mit., II-XI-13.
(4) Manu, IX-139 cited and followed in May., IV-X-17.
(5) Manu, IX-195; May. I-V-X-14 (Mandlik) 95.
(6) Means a gift to a woman from her husband or his family subsequent to her marriage. *Hurry Shankar* v. *Krishnarao* Cited in *Dayal Das* v. *Savitri Bai*, 34 B. 385 (389).
(7) Mandlik's Hindu Law, p. 95 Explained in *Dayal Das* v. *Savitri Bai*, 34 B. 385 (389, 390).
(8) *Ashabai* v. *Haji Tyeb*, 9 B. 115 (126) followed in *Sitabai* v. *Wasant Rao*, 3 Bom. L.R. 201 (208); *Dayal Das* v. *Savitri Bai*, 3 B. 385; *Jagannath* v. *Narayan*, 34 B. 553 (558).
(9) *Dowlatram* v. *Narainbas*, 14 S.L.R. 231: 60 I.C. 929.
(10) *Bhimacharya* v. *Ramacharya*, 33 B. 452; *Lal Singh* v. *Girdhari Das*, 14 S.L.R. 224: 60 I.C. 263.
(11) *Dayal Das* v. *Savitri Bai*, 34 B. 335.

India[1] except that widowed daughters are excluded from inheriting it[2] and the widows of gotraj sapindas do not take as they do under the Mayukh.[3] Consequently, neither the brother's widow[4] nor the daughter-in-law[5] will take as heir.

2677. **Pitri-Dutt.**—Is a species of *anvadheyak* and follows the same rule.[6]

2678. **Ayautak.**—The rule of succession regarding *ayautak* stridhan appears to be the same, in areas outside the influences of the Mayukh and the Dravid schools. Thus according to the Calcutta High Court, sons and the maiden daughters take equally the *ayautak* stridhan, married daughters being postponed.[7]

373. The heirs to the *sulk, ayautak, anvadheyak* and gifts received during maidenhood of an issueless woman, subject to the Dayabhag law, are, in the first instance, her—

Dayabhag Succession of Sulk and Anvadhayak.

(1) brothers of the whole blood;

(2) mother;

(3) father;

(4) husband;

and it then follows the line of succession applicable to other stridhan, a brother's son being entitled to succeed in preference to a step-daughter's son.[8]

2679. **Analogous Law.**—This section is supported by an express text of the Dayabhag,[9] the scheme of which is thus explained: "For the purposes of inheritance Jimut Vahan divides stridhan property into two broad classes, namely, *ayautak*, or property given to a female at a time other than that of marriage, and *yautak* or property given to a female at the time of marriage. The rules laid down for these two classes which are mutually exclusive are subject to modifications in the cases of (*a*) maiden's property, and (*b*) *pitri-dutt* or property given by the father, for which special rules are laid down. . . If we refer to S. 3 which deals with succession to the *stridhan* property of a childless woman, we find it laid down in para. 29 that 'the property goes first to the whole brother; if there be none, to the mother; if she be dead, to the father; but on failure of these it devolves on the husband.'' This passage in our opinion contains the rule laid down by Jimut Vahan regarding the order of succession to the *ayautak* stridhan of a childless woman. No doubt, the passage comes immediately after a discussion upon the question of the right of inheritance to the kind of stridhan called *sulk* or gratuity, but we do not think that

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(1) Sm. Chand., IX-III-1-11; *Muttu v. Dorasingha*, 3 M. 290; *Sengamalathammal* v. *Valaynda*, 3 M.H.C.R. 312 (313, 316); Sm. Chand., I-X III-1-11; *Venkatarama* v. *Bhujanga*, 19 M. 107.

(2) Sm. Chand., I-X-III-9.

(3) *Bandam* v. *Bandam*, 4 M.H.C.R. 180; *Thayammal* v. *Annamalai*, 19 M. 35.

(4) *Thayammal* v. *Annamalai*, 19 M. 35; *Kanakammal* v. *Ananthamathi*, 37 M. 293.

(5) *Bandam* v. *Bandam*, 4 M.H.C.R. 180.

(6) *Jagannath* v. *Narayan*, 34 B. 553 (558).

(7) *Delanney* v. *Pranbari*, 22 C.W.N. 990: 45 I.C. 879.

(8) *Krishnabihari* v. *Sarojinee Dasi*, 60 C. 1061.

(9) Dayabhag, IV-III-25-28.

the passage can be restricted in its application to that kind of stridhan alone."[1]

2680. Ayautak: Anvadheyak.—The terms *ayautak* and *anvadheyak* are not mutually exclusive since a gift may be *ayautak*, because it was given to a woman by her father after her marriage,[2] and it may be *anvadheyak*, because it is a post-nuptial gift.[3]

Dayabhag Devolution of Stridhan.

374. The stridhan of women subject to the Dayabhag law, other than *sulk*, *ayautak* and *pitri-dutt* and other special classes of stridhan, hereinafter provided for, devolves on the following heirs:—

(1) The son and unbetrothed daughter;[4]
(2) Married daughter having or who is likely to have a son;
(3) Son's son;
(4) Daughter's son;
(5) Son's son's son;
(6) The son of a rival wife;
(7) Her son's son;
(8) A barren daughter or sonless widowed daughter;
(9) The parents;
(10) Brother;
(11) The husband.

2681. Analogous Law.—The Dayabhag law on the subject of this section is supported by the following texts:—

Devala.—"A woman's property is common to her sons and unmarried daughters, when she is dead; but if she have no issue, her husband shall take it, her mother, her brother or her father."[5]

Dayabhag (citing the last).—"Here it is expressly declared that the mother's goods are common to the son and unmarried daughter and if the maiden daughter were exclusively entitled to the whole of her mother's estate [notwithstanding the existence of the brother] the special text of Manu and others [which will be cited] concerning [*yautak*] wealth given at the nuptials, would be unmeaning, since she should have the right to all cases indiscriminately."[6]

2682. Son and unbetrothed Daughter.—The next heir to the mother's stridhan is her son and "unbetrothed" daughter.[7] The Sanskrit word for *"unbetrothed"* (*apratta*)[8] is so understood. The fact that the daughter is betrothed but not married is immaterial since both fall into a class apart.[9] But this view is combated, by Jagannath who writes: "Shri Krishna Tarkalankar and others hold that unmarried daughters whether verbally betrothed or not, shall at the same time take equal shares. Does it not appear from the separate mention of them in the text of Gautam, that their title is successive? To this we reply, since it is acknowledged that the succession

Mithila Law.

(1) *Ram Gopal* v. *Narain Chandra*, 33 C. 315 (321, 322) followed in *Mahendra* v. *Girish Chandra*, 19 C.W.N. 1287: 31 I.C. 561.

(2) *Ram Gopal* v. *Narain Chandra*, 33 C. 315 (320).

(3) Daya., Ch. IV, Sec. III, §§ 15, 16.

(4) Ornaments presented before or after marriage, go to the son in preference to the daughter; *Bhupendra* v. *Goonendra*, 32 C.W.N. 133.

(5) Cited in Dayabhag, IV-II-6.

(6) Dayabhag, IV-II-7.

(7) In *Basanta* v. *Kamikshya*, 33 C. 23 (27) P.C., it was conceded that an "unmarried daughter" succeeds to the *Ayautak* Stridhan, in the absence of a son.

(8) Sanskrit, "अप्रत्त"

(9) *Sreenath* v. *Surbo*, 10 W.R. 488 (490): "The daughter not verbally betrothed, whom the legislator calls a virgin daughter."—3 Dig. 591.

of a daughter who has been betrothed is barred by the claim of one who has not been affianced, both cannot have an equal right to inherit with their brother; one who has an equal title with the preferable heir, cannot be reduced to an equal succession with one who would have been excluded by that heir; for stronger and weaker claims cannot, in the same circumstances, be equal. But as a son, who would be debarred by the existence of his own father, has an equal claim to the patrimony with his paternal uncle who had an equal right with his father, likewise in the present instance, a betrothed daughter who would have been debarred by a daughter not betrothed has an equal title with a son who had an equal title with a daughter who was not betrothed."[1]

Clause (2).

2683. **"Married daughter having or who is likely to have an issue."**—The meaning of this phrase has already been examined in the preceding pages, while dealing with the general law of inheritance.

Clause (3).

2684. **Son's Son.**—The son's son takes precedence of a daughter's son for it is reasonable, since the married daughter is debarred from the inheritance by the son, that the son of the debarred daughter shall be excluded by the son of the person who bars her claim.[2]

Clause (4).

2685. **Daughter's Son.**—The daughter's son takes next, for as the text of Manu expresses: "Even the son of a daughter delivers him in the next world, like the son of son."[3] But a daughter's daughter's son is no heir.[4]

Clause (5).

2686. **Son's Son's Son.**—The son's grandson is placed on the authority of Shri Krishna.[5]

Clause (6).

2687. **Son of a Rival Wife.**—His claim was affirmed in an old case decided in 1836[6] on the authority of the court Pandit, who cited Dayakram Sangrah in support of his opinion. Golap Shastri assigns him even a higher place—between (3) and (4).[7]

Clauses (7) and (8).

2688. **Grandson and Great-grandson.**—According to the Dayabhag, barren and widowed daughters should come in after the daughter's son, but both Shri Krishna[8] and Raghunandan support the order given here, and Shri Krishna's views are considered as preferable in this matter.

Clause (9).

2689. **Barren or Widowed Daughter.**—A barren or sonless daughter is placed here for reasons last given. According to the Dayabhag, her place is after the daughter's son in the list of heirs.[9]

Clauses (10)-(12).

2690. **Other Heirs.**—In default of her children, her step-sons or their male issue, the heirs to succeed are the heirs of a childless woman, *viz.*, her father, mother,

(1) 3 Dig. 590.
(2) Dayabhag, IV-II-11.
(3) Manu, IX-139; cited in Dayabhag, IX-II-10; Dayatattwa, X-7 (Setlur, 500).
(4) *Dintarini* v. *Ambica Prasad*, 105 I.C. (C.) 841.
(5) Dayabhag, IX-II-12; *See* Colebrooke's *note*.
(6) *Chund* v. *Kishenmunee*, 6 B.S.R. 90 (95): 7 I.D. (O.S.) 734 (738).
(7) Sarkar's H.L. (3rd Ed.), 415.
(8) Dayatattwa, X-8; (Setlur) 500; Dayakram Sangrah, II-IV-7 (Setlur) 130; Bannerjee's Marriage and Stridhan (4th Ed.) 439.
(9) Dayabhag, IV-II-12.

brother and husband.[1] And it has been held that a woman's half sister's son is entitled to preference over the daughter's son of the great-grandson of the grandfather of the woman's husband.[2]

2691. Heirs to Ayautak.—The brother succeeds to the *ayautak* stridhan property of a married woman governed by the Dayabhag law in, preference to the husband irrespective of the form of the marriage.[3] Similarly in a competition between the father and the husband and the son of a co-wife the father is entitled to preference,[4] while sons are given preference to married daughters in the succession to *pitri-dutt ayautak* stridhan,[5] so is a brother's son in preference to a step-daughter's son.[6] A sister's son is no heir under the Dayabhag law.[7]

Succession to childless woman.

375. Except the *sulk* and *anvadheyak* stridhans, the heirs to the stridhan of a childless woman are—

(*a*) *If married in Brahm form—*

(1) Husband.[8]
(2) Brother.
(3) Mother.
(4) Father.[9]

(*b*) *If married in Asur form—*

(1) Mother.
(2) Father.
(3) Brother.
(4) Husband.[10]

(*c*) *After whom in whatever form married her heirs are—*

(5) Husband's younger brother.[11]
(6) Son of husband's elder or younger brother.[12]
(7) Sister's son, including step-sister's son.[13]
(8) Husband's sister's son.
(9) Brother's son.
(10) Daughter's husband.[14]
(11) Father-in-law.
(12) Husband's elder brother.[15]
(13) Her father-in-law's great-grandson in the male line.
(14) The paternal grandfather of her husband or his issue.[16]

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(1) *Basanta* v. *Kamikshya*, 33 C. 23 (27) P.C.

(2) *Sashi Bhusan* v. *Rajendra*, 40 C. 82.

(3) *Mahendra Nath* v. *Girish Chandra*, 19 C.W.N. 1287: 31 I.C. 561.

(4) *Baikunta* v. *Kasinath*, 16 I.C. (C.) 55.

(5) *Prasanna* v. *Surat Soshi*, 36 C. 86.

(6) *Krishnabihari* v. *Sarojenee*, 60 C. 1061.

(7) *Satish Chandra* v. *Haridas*, (1934) C. 399.

(8) Dayabhag, IV-III-2-24; *Bisto Pershad* v. *Radha*, 16 W.R. 115; *Suraj Deo Narain* v. *Ramdewan*, 103 I.C. 869: (1927) Pat. 392; *Bhagwan Das* v. *Gajadhar*, 9 N.L.J. 221.

(9) Dayakram Sangrah, II-III-16, 17 (Setlur) 128.

(10) *Ib.*

(11) Who comes before widow's step-brother; *Debiprasanna* v. *Harendra*, 37 C. 863. In *Toolsey* v. *Luckymoney*, 4 C. W.N. 743, Sale, J., placed a brother's son before the husband's younger brother of the half blood.

(12) This order is supported by Dayabhag, IV-III-31, as explained in *Kesserbai* v. *Hunsraj*, 30 B. 431 (451, 452) P. C.; *Bachha* v. *Jugmon*, 12 C. 348 (353).

(13) *Dashrathi* v. *Bipin Bihari*, 32 C. 261 P.C.; *Sashi Bhusan* v. *Rajendra*, 40 C. 82 P.C.

(14) In *Gossain* v. *Kishenmunee*, 6 B. S. R. 90: 7 I.D. (O. S.) 734, the son of a co-wife was preferred to the son of the daughter's son of the woman's paternal great-grandfather.

(15) Dayabhag, IV-III-39; Dayakram Sangrah, II-VI-10 (Setlur) 133; Dayatattwa, X-39 (Setlur) 504.

(16) 3 Dig. 623 citing Vishnu Puran.

(15) The paternal great-grandfather of her husband or his issue of the husband in order of propinquity.

(16) The Sakulyas[1]

(17) The Samanodaks.[2]

(18) The Samanpravars.

(19) The Crown.[3]

Heirs to property given by the father.

376. The heirs to stridhan given by the father are in the first instance—

(1) The full brother.

(2) The mother.

(3) The father.

(4) The husband.

2692. **Analogous Law.**—This section is based on the Dayabhag[4] and supported by judicial precedents.[5]

Heirs to Yautak.

377. 1. The *yautak* is in the first instance taken by—

(1) Unbetrothed daughters.

(2) Betrothed daughters.

(3) Married daughters who have[6] or are likely to have son.

(4) Barren and sonless widowed daughter.[7]

(5) The son.[8]

(6) Daughter's son.[9]

(7) The son's son.[10]

(8) The son's son's son.[11]

(9) The son of a rival wife.[12]

(10) Grandson of a rival wife.[13]

(11) Great-grandson of a rival wife.[14]

2. In default of the abovementioned heirs, her heirs are her—

(*a*) *If she was married in an approved form;*

(12) Husband;

(13) Brother;

(14) Mother;

(15) Father;

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(1) Dayakram Sangrah, II-V-11 (Setlur) 133.

(2) *Ib.*, II-V-13 (Setlur) 133. In *Ib.*, § 12 it is said that if the woman be a Brahmin the heirs are "inhabitants of the same village," but this view is overruled by the Privy Council in *Collector* v. *Cavaly*, 8 M.I.A. 500.

(3) 3 Dig. 623, Jagannath placed next mother's Sapindas and Samanodaks; but does not mention Samanpravars.

(4) Dayabhag, IV-III-10, 29; contra Raghunandan, Dayatattwa, X-10, 11, 26 who places the husband first except as regards the property given by parents during maidenhood, and Sri Krishna, who places him first also as regards gifts subsequent. Dayakram Sangrah II-V-3, 4. *See* this subject discussed *per* Dwarka Nath Mitter, J., in *Jadoo Nath* v. *Busunta*, 19 W.R. 264 (266, 267).

(5) *Judoonath* v. *Busunto*, 19 W.R. 264; *Hurry Mohan* v. *Sonatun*, 1 C. 275; *Gopal* v. *Ramachandra*, 28 C. 311; *Ram Gopal* v. *Narain*, 33 C. 313.

(6) "Married daughters who have a son" includes a *widowed* daughter having a son; *Charu Chunder* v. *Satish Chunder*, 18 C. 327.

(7) *Ib.*

(8) Dayabhag, IV-II-25; Dayakram Sangrah, II-III-8.

(9) Dayakram Sangrah, II-III-9.

(10) *Ib.*, § 10.

(11) *Ib.*

(12) *Ib.*, § 11.

(13) *Ib.*, § 13.

(14) Manu, X-131; Gautam, XXVIII-21, Yadnavalkya, II-117; *Bassanta* v. *Manikshya*, 33 C. 23 (27) P.C.

(b) If she was married in an unapproved form;

(12) Mother;
(13) Father;
(14) Brother;
(15) Husband;
(16) Husband's younger brother;
(17) Husband's brother's son;
(18) Sister's son;
(19) Husband's sister's son;
(20) Brother's son;
(21) Daughter's husband;
(22) Husband's heirs.

2693. **Analogous Law.**—Succession to *yautak*, under the Bengal school, follows the orthodox texts in favouring the exclusive succession of daughters, the only difference being in the order in which the daughters take. This, as explained before, arises from the significance attached to the word "*apratta*" and "*apratisthit*", which are interpreted to mean "unaffianced" and "not actually married."[1]

A widowed daughter having a son, himself disqualified to inherit, will still count as a married daughter having a son.[2]

378. Disqualified heirs. **(1) Persons disqualified from ordinary inheritance by reason of their disabilities mentioned in sections 304 to 307 (both inclusive) are equally disqualified to inherit stridhan.**

(2) But unchastity does not disqualify a woman from inheriting it.[3]

2694. **Analogous Law.**—The following texts support this section.

Manu.—"Impotent persons and outcasts are exeluded from a share of the heritage; and so are persons born blind and deaf as well as mad men, idiots, the dumb and those who have lost a sense (or limb)."[4]

Mitakshara (citing the last).—"The masculine gender is not here used restrictively in speaking of an outcast and the rest. It must be, therefore, understood that the wife, the daughter, the mother or any other female being disqualified for any of the defects which have been specified is likewise excluded from participation."[5]

This passage however refers to succession to a male. And the question arises whether it is equally a disqualification to succession to stridhan. On this point, it was observed in a case: "According to the Hindu lawyers, such and other infirmities are the signs of original sin, and it is the sin which is the cause of disinheritance, and this is used as a ground for bringing men to repentance. The stridhan heir, would not be affected by this, and the widow, though dumb, may recover this portion of the property, the daughter cannot."[6]

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(1) Dayabhag, IV-II-23; Dayakram Sangrah, II-II-5, 7.

(2) *Charu Chunder* v. *Nobe Sundari*, 18 C. 337.

(3) *Mynabai* v. *Uttaram*, 8 M.I.A. 400 (425, 426), on remand, 2 M.H.C.R. 196 (203, 204); *Ganga* v. *Ghasita*, 1 A. 46 F. B., followed in *Nogendra* v. *Benoy Krishna*, 30 C. 521; *Angammal* v. *Venkata*, 26 M. 509.

(4) Manu, IX-201.

(5) *Vallabhram* v. *Hariganga*, 4 B.H.C.R. (A.C.) 135 (139). *See* Bannerjee's Marriage and Stridhan (4th Ed.), 369, 370.

(6) Mit., II-X-8, explained in *Vallabhram* v. *Hariganga*, 4 B.H.C.R. (A. C.) 135.

Clause (2).

2695. Neither unchastity, as distinct from prostitution,[1] nor illegitimacy disqualifies an heir to stridhan: the reason for the one is the absence of any express disqualifying text,[2] while the other is supported by express texts in its favour quoted under the next section. It will be seen that under the Mitakshara law of inheritance to males only the unchaste widow is disqualified from inheriting to her husband, though under the Dayabhag such disqualification is more general (**S. 306**).

But so far as regards inheritance of stridhan this disqualification is generally absent, whether the heir be subject to the Mitakshara or the Dayabhag Law. In this respect, therefore, the rule stated in Clause (2) of the section affects the Dayabhag, more than it does the Mitakshara.

For further commentary to Clause (2), *see* §§ **2697, 2698.**

Inheritance by illegitimate children.

379. (1) Illegitimacy is no bar to succession to stridhan of which the heirs rank in the following order[3]:—

(*a*) Legitimate daughter;

(*b*) Legitimate son;

(*c*) Illegitimate daughter;

(*d*) Illegitimate son;

(*e*) Other blood relations of the Propositus in their order of propinquity.

(2) Provided that where the tie of marriage is not legally severed on the wife's immorality, her husband and his sapindas take in preference to her own blood relations.[4]

(3) On failure of the issue, legitimate or illegitimate, a child validly adopted by a woman inherits her stridhan in preference to her other heirs.[5]

2696. Analogous Law.—Abundant texts[6] exist in the early smritis recognizing one's natural affspring, and there is no authority against the existence of heritable blood between the woman and her offspring. As such, Hindu Law recognizes children whether legitimate or illegitimate as en-

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(1) *Nogendra* v. *Benoy Krishna*, 30 C. 521 (526).

(2) The text of Narad cited in Mitt. II-§ 10; Dayabhag, V-§ 13; Dayakram Sangrah, Ch. III—to the effect that vice disqualifies an heir is too vague and therefore obsolete; *Ganga* v. *Ghasita*, 1 A. 46 (47, 48) F.B.

(3) *Myna Bai* v. *Uttaram*, 2 M.H. C.R. 196; *Kojiyadu* v. *Lakshmi*, 5 M. 149; *Ganga Jati* v. *Ghasita*, 1 A. 46 F.B.; *Advyappa* v. *Rudrava*, 4 B. 104; *Hiralal* v. *Tripura*, 40 C. 650 (672) F.B.

(4) *Subbaraya* v. *Ramasami*, 23 M. 171; *Debi Prasanna* v. *Harendra*, 37 C. 868; *Gunamani* v. *Debi Prosanna*, 23 C.W.N. 1038; *Hiralal* v. *Tripura*, 40 C. 650 (674) F.B.; *Bisheshur* v. *Mata Gholam*, 2 N.W.P.H.C.R. 300; *Narain Das* v. *Tirlok Tiwari*, 29 A. 4; *Contra* blood relations preferred to husband and his sapindas—*Sivasungu* v. *Minal*, 12 M. 277; *Narasanna* v. *Gangu*, 13 M. 133; *Kaminey Bewah*, (In re), 21 C. 697; *Ram Prasad* v. *Mt. Subu Bai*, 4 N.L.R. 31; *Chandrabhaga* v. *Vishwanath*, 9 N.L.R. 102: 20 I.C. 557; *Maharani* v. *Thakur Prasad*, 14 O.C. 234: 12 I.C. 778.

(5) *Chalakonda* v. *Chalakonda*, 2 M.H. C.R. 56; *Kamalakshi* v. *Nagarathnam*, 5 M.H.C.R. 161; *Venku* v. *Mahalinga*, 11 M. 393; *Muttukannu* v. *Paramasami*, 12 M. 214.

(6) Manu, IX-35, 38.

titled to inherit to their mother[1] in the absence of legitimate issue.[2] But the rule is obviously inapplicable to the illegitimate issue of a married woman, on which we find the following text:—

Asahaya.—"When the widow having son possesses stridhan blinded by sexual passion forsakes the son, and takes to another husband with her, stridhan is taken by the other husband, and not by the son."

"But she who having no stridhan takes to another man with the property left by her husband that property is not taken by the other husband. To that personal wealth the sons are entitled."[3]

2697. Principle.—The law of succession to and by the unchaste females is a subject upon which the textual authority is meagre, and judicial authority, after a certain point, conflicting. But the subject is one which should not be suffered to rest in this state of uncertainty. So far as regards the general law or succession, it has already been seen that illegitimacy and unchastity are barriers against inheritance, since, except in the case of a Shudra, the illegitimate son of a twice born male and his unchaste widow and daughter are all excluded from inheritance. (**S. 302**). So far the law is well settled, but it is settled on the authority of texts which only refer and relate to inheritance to a male. There is no similar textual prohibition extending to the inheritance to a female. The question being thus left unfettered by authority, it was left to be decided on the basis of equity and justice, which it was held supported the natural claim of the children to inherit to their mother.[4]

And between them legitimacy and the fact that succession to stridhan preferably followed the female line established the precedence of legitimate offspring and the daughter.

And the further paucity of the texts distinguishing an inherited stridhan and that acquired otherwise by the owner, dispensed with the necessity of discriminating between the two classes of stridhan which both became subject to the same law of inheritance, except in Bombay, where the technical stridhan is held to follow the special line of shastric devolution.[5]

2698. But this raised the question of the comparative rights of the husband and his sapindas and the owner's own blood relations. One view was that since in the view of Hindu Law marriage was a sacrament and created an indissoluble union upon marriage from which there could be no divorce, neither unchastity nor prostitution sufficed to sever the marital tie, and therefore, the right of the husband and his sapindas to inherit to the wife remained unaffected by her lapse from virtue, while the other view was that the wife's continued immorality and the abandonment of her husband sufficed to sever the conjugal relationship, and with it the right of inheritance. "That she ceased to be her husband's heir was clear from the textual authorities. But here again the texts were silent on the husband's disqualification to inherit to his wife. And the same parity of

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(1) *Myna Bai* v. *Uttaram*, 2 M.H.C.R. 196 (203); *Arumagiri* v. *Ranganayaki*, 21 M. 40; *Dundappa* v. *Bhimava*, 45 B. 557; *Kasturi* v. *Late*, 16 N.L.R. 221: 56 I.C. 952.

(2) *Meenakshi* v. *Muniandi*, 38 M. 1144.

(3) Narad Tit, II-V-20.

(4) *Myna Bai* v. *Uttaram*, 8 M.I.A. 400 (425, 426), on remand, 2 M.H.C.R. 196 (203, 204).

(5) *Dayal Das* v. *Savitri Bai*, 34 B. 285; *Jagannath* v. *Narayan*, 34 B. 553 (558).

reasoning which admitted the right of her blood relations, were, it was argued, protected the right of the husband and his relations to inherit to her.

This view, however, concedes that where a divorce is sanctioned by custom, and prostitution entails a divorce, then the husband and his sapindas would walk out of the line of her heirs.[1]

It will be observed that in so far as the law now permits illegitimate children to succeed to their mother's stridhan Hindu Law sanctions one more anomaly, in that while a male is incompetent to transmit his property, even if self-acquired, to his illegitimate sons and unchaste wife and daughter, the latter possess greater rights in that they are competent to transmit their stridhan to their own offspring, even though illegitimate and unchaste. In this respect woman, who otherwise possesses very limited rights under Hindu Law, has acquired larger rights than are allowable even to man, the reason being that equity has filled in a *lacunæ* in Hindu Law and created rights out of all proportion to her other rights.

Clause (1).

2699. Prostitute's Children.—The rule is more applicable to professional prostitutes than to woman who have become degraded by unchastity. In the case of the former attached as *devadasis* to pagodas, the courts both in Bombay[2] and in Madras[3] have recognized the right of their illegitimate issue to inherit, daughters taking before sons. This is so by custom, if not by law.[4] But it is said that the pagoda girls should not be taken to determine the general law of their class, since they take more by custom than by law,[5] which creates no preference of daughters over sons as heirs.[6]

The question is, however, one upon which one cannot feel certain, since there are two views possible, and both are supported by a strong body of judicial opinions, since while on the one hand, it is held that "with prostitutes the tie of kindred being broken, none of their relations who remain undegraded in caste, whether offspring or not inherit from them. Their issue after their degradation succeed."[7] On the other hand, it has been held that "no tie of blood can be destroyed by unchastity, whatever personal disability may be imposed by express provisions of the law upon the person who has become unchaste; consequently, while inheritance is a right arising out of consanguinity, the unchastity or degradation of the Propositus or Proposita as the case may be, will not divert the descent of property, save where there is an express provision."[8] This

(1) *Jagannath* v. *Narayan*, 34 B. 553 (558).

(2) *Jaya Madhav* v. *Manjunath*, 19 Bom. L.R. 320.

(3) *Kamakshi* v. *Nagarathnam*, 5 M. H.C.R. 161; *Narasanna* v. *Gangu*, 13 M. 133; *Arunagiri* v. *Ranganayaki*, 21 M. 40; *Subharaya* v. *Ramasami*, 23 M. 171 (177); *Meenakshi* v. *Muniandi*, 38 M. 1144.

(4) *Venku* v. *Muttukannu*, 12 M. 214.

(5) *Meenakshi* v. *Muniandi*, 38 M. 1144.

(6) *S. Taleb Ali* v. *S. Abdul*, 29 C. W.N. 624: 89 I.C. 141: (1925) C. 748.

(7) Strange's Manual, § 363, p. 89: *Tara Munee* v. *Mottee*, 7 B.S.R. 325: 8 I.D. (O.S.) 247; *Kamineymoney* (In re), 21 C. 697; *Tripura* v. *Harimati*, 38 C. 495; *Myna Bai* v. *Uttaram*, 2 M.H.C. R. 196 (203); *Sivasangu* v. *Minal*, 12 M. 277; *Narasanna* v. *Gangu*, 13 M. 133 (134); *Maharana* v. *Thakur Pershad*, 14 O.C. 234: 12 I.C. 778; *Satish Chunder* v. *Mahabali*, 21 O.C. 272: 48 I.C. 750; *Ramchandra* v. *Subhu Bai*, 4 N.L.R. 31; *Chandra Bhaga* v. *Vishvanath*, 9 N.L.R. 102: 20 I.C. 557.

(8) *Hiralal* v. *Tripura*, 40 C. 650 (675) F.B.; overruling, *Tara Munnee* v. *Mottee*, 7 B.S.R. 325: 8 I.D. (O.S.) 247; *Ram Nath* v. *Durga*, 4 C. 550; *Kamineymoney* (In re), 21 C. 697; *Ramananda* v. *Taikishori*, 22 C. 347; *Sana Moyee* v. *Secretary of State*, 25 C. 254; *Sundari* v. *Pitambari*, 32 C. 871, dissenting from *Sivasangu* v.

view seems unquestionably right; for there is no authority for the proposition that when a woman had lapsed into prostitution, she becomes civilly dead, with the result that the tie of relationship which connects her to her kindred is completely severed. It has accordingly been held that the stridhan of a degraded married woman would follow the natural line of succession applicable to her stridhan.[1] As such the courts have upheld the claims of the husband,[2] step-son,[3] brother's son,[4] the daughter,[5] the mother[6] and the sister.[7]

2700. Degraded Married Woman's Heirs.—This clause describes the heirs of a married woman. It does not accord with the text cited (§ **2696**) which refers to the devolution of property possessed or acquired by a fallen married woman with or without issue. The subject requires examination. The following contingencies are possible: (*i*) The status of such women who had fallen before the succession opens; (*ii*) is she a qualified heir to her husband, and (*iii*) her father; (*iv*) the devolution of her property on her death; (*v*) her heirs to inherited estate; and (*vi*) her heir to her self-acquisition; (*vii*) the status of her bastard issue in relation to her legitimate issue; (*viii*) their rights, if any, *inter se*. The first three questions have already been dealt with in the preceding pages.[8] As regards the effect of her unchastity upon her heirs it is clear that unchastity does not amount to civil death, and it has no effect upon the enjoyment of her own inherited estate or upon the course of devolution of her estate. It is clear that where such woman is possessed of any property which she has acquired or inherited from her male relations such as the father or the husband its devolution would be unaffected by her taking to a course of immorality, since immorality does not destroy the kinship, and kinship determines the right to inheritance. Upon her death,[9] there are no doubt numerous texts[10] which represent the unchaste wife as civilly dead, but these are treated as mere moral objurgations which have no legal value.[11] If she remarried and her remarriage entails forfeiture of her interest in her husband's property as provided in S. 2 of the Hindu Widow's Remarriage Act,[12] then her reversioners will take the estate. In this case Hindu Law condones unchastity but no remarriage, because it involves no change of *gotra* and while penitence and reformation is possible in the one case it is not in the other. In a Calcutta Full Bench case the question was whether a brother's son was an heir to a degraded widow in respect of the gains of her prostitution. The case was one under the Dayabhag law, but the ultimate decision rested upon

Clause (2).

Minal, 12 M. 277; *Narasanna* v. *Gangu*, 13 M. 133, following *Bisheshur* v. *Mata Gholam*, 2 N.W.P.H.C.R. 300; *Ganga* v. *Ghasita*, 1 A. 46 F.B.; *Narain* v. *Tirlok*, 29 A. 4; *Adeyappa* v. *Rudrava*, 4 B. 104; *Tara* v. *Krishna*, 31 B. 495 (511); *Jagannath* v. *Tripura*, 34 B. 553 (559); *Kojiyadu* v. *Lakshmi*, 5 M. 149; *Subharaya* v. *Ramasami*, 23 M. 171; *Bhutnath* v. *Secretary of State*, 10 C.W.N. 1085; *Sundari* v. *Nemye*, 6 C.L.J. 372; *Tripura* v. *Harimati*, 38 C. 493; *Ram Prasad* v. *Subhu Bai*, 4 N.L.R. 31; *Meenakshi* v. *Muniandi*, 38 M. 114; *Mandaram* v. *Mandaram*, 24 M.L.J. 223: 18 I.C. 601; *Jagannath* v. *Narayan*, 34 B. 553 (559).

(1) *Hiralal* v. *Tripura*, 40 C. 650 F. B.

(2) *Narain* v. *Trilok*, 29 A. 4.

(3) *Subaraya* v. *Ramasami*, 23 M. 171.

(4) *Hiralal* v. *Tripura*, 40 C. 650 F.B.

(5) *Tara* v. *Krishna*, 31 B. 405.

(6) *Bhanga* v. *Din Mahomed*, (1922) 44 P.L.R. 8.

(7) *Narayan* v. *Lakshman*, 51 B. 784: (1927) B. 456.

(8) S. 254.

(9) *Debi Mangal*, v. *Mahadeo Prasad*, 33 A. 234 P.C.

(10) Manu, XI-183-186; Gautam, XX §§ 4-7, §§ 10-14; 2 S.B. E. 278, 279; Baudhyayan, II-I-36; 14 S.B.E. 216; Vasisth, XV-§§ 12-16; 14 S. B. E. 77; Yadnavalkya, III-295 (Mandlik) (270).

(11) *Hiralal* v. *Tripura*, 40 C. 650 F. B. (and cases there cited).

(12) Act XV of 1856.

a more general principle, for while the court held the property acquired by a prostitute as her stridhan,[1] and her brother's son her heir under an express text of Dayabhag,[2] still as regards its applicability to a prostitute it was held that a woman does not cease to be a Hindu or exempt from the Hindu Law by reason of her prostitution,[3] and this is the view also taken in other cases.[4]

2701. In this view the self-acquisition of a woman, married or unmarried whether made out of a moral calling or by prostitution would constitute her stridhan, and devolve upon her stridhan heirs (§ **2657**). The same conclusion was reached in an Oudh case,[5] but in this the *ratio decidendi* is in conflict with the Calcutta Full Bench. In that case the widow of a Halwai by whom she had a son became the mistress of a Brahmin by whom she had a daughter. Her paramour's brother had gifted some land to her, and the question arose whether on her death the land descended to her legitimate son's nephew or her illegitimate daughter, and the court held for the daughter under the rule of justice, equity and good conscience; but it also held that her acquisition of land by prostitution was not her stridhan, the very reverse of which has been laid down by the Calcutta High Court who had, however, before them the case of a widow.

But suppose a married woman with her husband and sons alive took to immoral ways and acquired property and had legitimate issue, who is to succeed to her illegitimate or her legitimate issue or both? If the former it would offend against the laws of morality. If the latter it would be unjust to her illegitimate issue. The succession of both may offer a solution, but it is still not unexceptionable.

2702. According to a Madras case in such a contest, and indeed in all cases, an illegitimate child of a prostitute cannot support his title to succession in preference to or along with a legitimate son, or even a stepson,[6] either under Hindu Law or on the ground of equity.[7] It has in fact no right of inheritance to either parent at all. This view proceeds on the ground that the illegitimate children of dancing-girls are allowed to succeed to their mother solely by custom,[8] but that custom cannot by analogy be extended to all prostitutes;[9] and that, apart from custom, neither Hindu Law nor equity favours their succession. As for the Hindu Law, it is pointed out, that although it speaks of the twelve kinds of sons, they refer to a primitive age long since past, and which was spoken of as past even in the Rigveda 3,000 years ago. At any rate, the Privy Council have held that, except an *auras* and an adopted son, the other sons have long since been obsolete,[10] and as the *dasi-putra* has only a place amongst Shudras, there is no textual authority to favour the succession of

(1) *Hiralal* v. *Tripura*, 40 C. 650 (661, 662) F.B., citing Dayabhag, Ch. IV, Sect. I § 18; *Brij Indar* v. *Janki Koer*, 1 C.L.R. 318.
(2) Dayabhag, Ch. IV, S. III § 37.
(3) *Hiralal* v. *Tripura*, 40 C. 650 (663) F.B.
(4) *Jagannath* v. *Narayan*, 34 B. 553 (559), followed in *Meenakshi* v. *Muniandi*, 38 M. 1144 (1154).
(5) *Maharana* v. *Thakur Pershad*, 14 O.C. 234: 12 I.C. 778. To the same effect *Ram Prasad* v. *Subu*, 4 N.L.R. 31 (33); *Chandrabhaga* v. *Vishwanath*, 9 N.L.R. 102 (107, 109).
(6) *Subharaya* v. *Ramasami*, 20 M. 171.
(7) *Meenakshi* v. *Muniandi*, 38 M. 1144 (1154).
(8) *Venku* v. *Mahalinga*, 11 M. 393; *Muttukannu* v. *Paramasami*, 12 M. 214.
(9) *Meenakshi* v. *Muniandi*, 38 M. 1144 (1154); *Guddati* v. *Ganpati*, 23 M.L.J. 493.
(10) *Jeebnath* v. *Court of Wards*, 14 W.R. 409 P.C.

illegitimate children.[1] What then remains but equity and equity cannot, it is said, favour illegitimate children against the legitimate.[2] But it was conceded that in the absence of legitimate children the illegitimate children would be heirs,[3] though later on a more unqualified statement was made denying to illegitimate children any right of inheritance, and the contrary held in Bengal was explained on the ground that those were cases decided under the Dayabhag law and were therefore inapplicable to the Mitakshara country. But the Calcutta cases did not proceed upon any dissenting text of the Dayabhag, but on the broad ground that the self-acquisition of a woman whether married or unmarried constituted her stridhan and would consequently devolve upon her own stridhan heirs.

2703. The question who are her stridhan heirs remains. Her own issue are certainly her heirs, but does the term "issue" include the illegitimate issue? This is the crux of the question, and it must be confessed that unless they come in under the capacious rule of equity they have no other right of inheritance.[4] And in the singularly meagre state of textual authority on the subject, the courts have decided the cases before them in accordance with the rule of justice, equity and good conscience.[5] This was the guiding test in a case in which the sister's son of a prostitute claimed the estate against her husband's brother's son. The court held that while the tie of blood could not be severed by unchastity, it was sufficient to sever the tie of marriage, and that the wife's desertion of the husband for purpose of prostitution for some 30 years and the latter's abandonment of the former was tantamount to her divorce which left the sister's son connected with her by marriage as her sole heritable heir.[6] That unchastity does not sever the tie of blood was held by a Full Bench of the Calcutta High Court,[7] who however refrained from deciding the difficult question whether it sufficed equally to sever the tie by marriage. But in either view the preferential heirs of such married woman are her own blood relations, and in view of the Calcutta High Court the fact of marriage does not alter the rule applicable to unmarried prostitutes.

2704. General Result Stated.—From the foregoing discussion it will be clear that the self-acquisition of a prostitute whether maiden or married are classed as her stridhan (§ **2701**) and that the right of illegitimate children of prostitutes of the dancing class to inheritance to their mothers is now recognized, but it is recognized as one arising out of custom and not under Hindu Law. In some cases the same rule is held to apply to other prostitutes, at any rate unmarried prostitutes, but this is regarded as an

(1) *Meenakshi* v. *Muniandi*, 38 M. 1144 (1152), following *Annoya* v. *Chunan*, 33 M. 366.

(2) *Meenakshi* v. *Muniandi*, 38 M. 1144 (1152) dissenting from *contra* in *Taramuni* v. *Motee*, 7 S.D.A.R. 273.

(3) *Myna Bai* v. *Uttaram*, 2 M.H.C.R. 196 O.A. *Myna Bai* v. *Dotaram*, 8 M.I.A. 400 (425); *Meenakshi* v. *Muniandi*, 38 M. 1144 (1153).

(4) *Kamineymony* (In re), 21 C. 697; *Maharana* v. *Thakur Pershad*, 14 O.C. 234: 12 I.C. 778; *Satish Chunder* v. *Mahabali*, 21 O.C. 272: 48 I.C. 750; *Chandrabhaga* v. *Vishwanath*, 9 N.I.R. 102: 20 I.C. 557; *Taramunee* v. *Motee*, 7 S.D.A.R. 273; *Myna Bai* v. *Uttaram*, 2 M.H.C.R. 196, O.A. remanded on a different point *Myna Bayee* v. *Otturam*, 8 M.I.A. 400 (425); *Sivasangu* v. *Minal*, 12 M. 277; *Narasannu* v. *Gangu*, 13 M. 133; *Subharaya* v. *Ramasami*, 23 M. 171 (177, 178); *contra* in *Meenakshi* v. *Muniandi*, 38 M. 1144 (1153).

(5) *Ram Prasad* v. *Subu*, 4 N.L.R. 31. To the same effect *Maharani* v. *Thakur Pershad*, 14 O.C. 234: 12 I.C. 778.

(6) *Ram Prasad* v. *Subu Bai*, 4 N.L.R. 31 (37) dissenting from *contra* in *Surnomoyee* v. *S-S*, 25 C. 254; *Sundari* v. *Nemye Charan*, 6 C.L.J. 372; *Narain Das* v. *Tirlok*, 29 A. 4.

(7) *Hiralal* v. *Tripura*, 40 C. 650 (677) F.B.

unwarranted extension of the custom. But upholders of the illegitimate children's right support it on equity which the other side do not recognize as tending to encourage immorality. The case of married women makes the question more difficult, for in their case the rights of the illegitimate children come into conflict with their legitimate issue. No case has gone so far as to deny to the one his legal right, though in the absence of the legitimate issue there are cases which would award the inheritance to the illegitimate issue and other blood relations of the degraded married woman in preference to her husband or his other sapindas. In the case of a married woman the order of succession to her would then be (*a*) her legitimate issue, firstly daughters and then sons; (*b*) her illegitimate issue in the same order; then, (*c*) either her husband and his sapindas or her own blood relations—a point upon which judicial opinions do not agree. But it seems that of the two the husband and his relations have undoubtedly a superior legal right, though her own blood relations may as plausibly appeal to equity in support of their claim.

2705. No Heirs.—The illegitimate children are at all allowed to succeed is a concession to custom. As such, their succession is limited to their own parent, since they have no right to collateral succession. Consequently, the illegitimate son of a Shudra is not entitled to inherit his married wife's stridhan.[1] But the rule cannot tolerate the recognition of other illegitimate concession, such as, for example, an illegitimate daughter of the sister of the deceased prostitute. In fact a sister's daughter is no heir to stridhan in any case.[2]

And following this view, it has been held that if a married woman deserts her husband and becomes the mistress of another man, her daughter born in lawful wedlock, who has since the degradation of her mother lived with her does not cease to be the daughter of her mother for the purpose of inheriting her stridhan by reason of the mother's expulsion from caste. The daughter of such a daughter is entitled to succeed to the stridhan of the degraded woman in preference to her illegitimate sons.[3] This is obvious, because even if the sons were legitimate they would be excluded by the daughter's daughter, and they can acquire no better right by reason of their illegitimacy.

2706. Right of Adopted Children.—Where adoption of a daughter is permitted by usage (§ **771**) it confers on the adopted child a right which is second only to the natural child. This is recognized in another connexion (§ **701**). It then follows that in the absence of the natural issue, whether legitimate or illegitimate, the next rightful claimant to succession is the adopted child.

Clause (3).

380. (1) Save as otherwise herein provided, stridhan inherited by a female heir does not become her own stridhan, since a female can inherit only a woman's limited estate therein, which on her death reverts to the heirs of her last predecessor-in-title:[4]

Female heir's estate in Stridhan.

(1) *Ayiswary* v. *Sivaji*, 49 M. 116 (136, 137), following *Subramania* v. *Rathnavelu*, 41 M. 44 (72) F.B.

(2) *Secretary of State* v. *Shahman*, 6 I.C. (A.) 210.

(3) *Mandatam* v. *Mandatam*, 24 M.L.J. 223, following *Subharaya* v. *Ramasami*, 23 M. 171 (177), dissenting from, *contra* in *Sivasangu* v. *Minal*, 12 M. 277 (281); *Narasanna* v. *Gangu*, 13 M. 133; *Taramunee* v. *Mottee*, 7 S.D.A. 273; *Kamineymoney* (In re), 21 C. 697.

(4) *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 P.C.; *Pandharinath* v. *Govind*, 32 B. 59.

(2) Provided that in the country subject to Bombay School of Law, females belonging to the family of the Proposita, by birth, take by inheritance an absolute interest in the stridhan, which they possess as such, and which, on their death, devolves upon their stridhan heirs.[1]

2707. Analogous Law.—The rule here stated contravenes the express text of the Mitakshara which runs as follows:—

Mitakshara.—"1. After briefly propounding the division of wealth left by the husband and wife ('Let sons divide equally both the effects and the debts, after the demise of their two parents'), the partition of a man's goods has been described at large. The author, now intending to explain fully the distribution of a woman's property, begins by setting forth the nature of it: 'What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition, is denominated a woman's property.'"

"2. That which was given by the father, by the mother, by the husband, or by a brother, and that, which was presented (to the bride) by the maternal uncles and the rest (as paternal uncles, maternal aunts, etc.), at the time of the wedding, before the nuptial fire, and a gift on a second marriage, or gratuity on account of supersession, as will be subsequently explained ('To a woman whose husband marries a second wife, let him give an equal sum as a compensation for the supersession,' § 34) and also property which she may have acquired by inheritance, purchase, partition, seizure or finding, are denominated by Manu and the rest, 'woman's property.'"

"3. The term (woman's property) conforms, in its import, with its etymology, and is not technical: for, if the literal sense be admissible, a technical acceptation is improper.

"4. The enumeration of six sorts of woman's property by Manu: What was given before the nuptial fire, what was presented in the bridal procession, what has been bestowed in token of affection or respect, and what has been received by her from her brother, her mother, or her father, are denominated the sixfold property of a woman and is intended, not as a restriction of a greater number, but a denial of a less."[2]

According to this definition all property which a woman inherits becomes her stridhan with all the incidents which belong to such property, and make it descendible as such in the special line prescribed for stridhan strictly so called.

2708. The Privy Council, have, however, in a series of cases held this definition of stridhan as too wide. They first made it clear that property inherited by a woman from a male was not her absolute property, and that it passed on her death not to her *stridhan* heir's but to the heirs of the male person from whom she inherited it.[3]

They then extended the same rule to property inherited by a female from a female[4] which was inevitable, since a woman upon inheriting to a male could not acquire absolute right, how could she acquire such right upon inheriting to a female.[5] This rule has often been expressed

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(1) *Bhau* v. *Raghunath*, 30 B. 229 (236, 237), and cases cited in § 2711.

(2) Mitt., Ch. II., Sec. XI-§§-1-4.

(3) *Thakoor Dayhee* v. *Rai Baluk Ram*, 11 M.I.A. 139; *Bhugwandeen* v. *Myna Baee*, 11 M.I.A. 487; *Chotay Lall* v. *Chunoo Lall*, 4 C. 744 P.C.; *Mutta Vaduganadha* v. *Dorasinga*, 3 M. 290 P.C.; *Chelikani* v. *Chelikani*, 25 M. 678 P.C.; *Sheo Shankar Lal* v. *Debi Sahai*, 25 A. 468 (473) P.C.; *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 (492) P.C.

(4) *Sheo Shankar Lal* v. *Debi Sahai*, 25 A. 468 (474) P.C.

(5) *Sheo Shankar* v. *Debi Sahai*, 25 A. 468 (475) P.C. overruling, O.A. *Debi Sahai* v. *Sheo Shankar*, 22 A. 353; *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 P. C. *Prankissen* v. *Mt. Bhagwatee*, 1 B.S. R. 4; *Gangopadhyaya* v. *Sarbona*, 2 B.L. R. (A.C.) 144; *Sengamalathammal* v. *Velayuda Mudali*, 3 M.H.C.R. 312 (314).

by saying that what has once descended as stridhan does not so descend again.[1]

Clause (2).

2709. This rule is another corollary flowing from the general dependence of women who are presumably incompetent to exercise unlimited right of ownership over property whether they acquire it by gift, bequest, partition or inheritance. And it is immaterial whether the property acquired by them was stridhan of the last owner or was itself a limited estate. If a stridhan, its fullest enjoyment is limited to its owner for the time being. Upon its descent to another it ceases to be stridhan. Since if the heir be a female the stridhan loses its all especial attributes and descends to her as her ordinary woman's limited estate,[2] and in its turn passes not to her stridhan heirs but to the heirs of her predecessor-in-title.[3]

2710. This is the logical outcome of the view now settled, that a female heir inheriting property from a male takes only a limited estate; how can she then inherit a larger estate from a female, since stridhan property can in no way be superior to other property held in full proprietary right. But though the female heir to stridhan takes only a limited estate, her heirs to it are not traced from the last male holder, but from the last female holder of the stridhan who possessed the absolute right of disposal. Consequently, where the stridhan of a mother was inherited by her daughter, the latter's heir is the mother's daughter's daughter and not her son's son.[4] But in their case no preference is given to a daughter's unmarried daughter over a daughter's married daughter, since such preference is only applicable to her own daughter.[5]

Clause (2).

2711. Exception.—The only exception to this rule is that now recognized in the country where the Mayukh law supplements and in part supersedes the Mitakshara, where all females whether belonging to the family of the Proposita by birth or married therein take and transmit an absolute interest in their stridhan.[6]

It was so held in a Full Bench case, in which the grandmother had inherited from her grand-daughter upon her death three days after her mother who had inherited to her husband.[7] It was agreed that in Western

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To the same effect, *Vijiarangam* v. *Lakshman*, 8 B.H.C.R. (O.C.) 244 (272); *Manilal* v. *Bai Rewa*, 17 B. 758 (761); *Venkata* v. *Bhujanga*, 19 M. 107; *Virasangappa* v. *Rudrappa*, 19 M. 110 (118); *Chotay Lal* v. *Chunnoolall*, 14 B.L.R. 235 O.A. 4 C. 744 P.C.

(1) *Sheo Shankar* v. *Debi Sahai*, 25 A. 468 (474) P.C. approving; *Hari Dayal* v. *Grish Chunder*, 17 C. 911 (916).

(2) *Sheo Shankar* v. *Debi Sahai*, 25 A. 468 P.C.; *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 P.C.; *Sham Behari Lal* v. *Ram Kali*, 45 A. 715; *Ram Kali* v. *Gopal*, 48 A. 648; *Prankrissen* v. *Noyanmoney*, 5 C. 222; *Huri Dayal* v. *Hurish Chunder*, 17 C. 911; *Jogendra* v. *Phani Bhushan*, 43 C. 64 (68).

(3) *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 (492) P.C.

(4) *Subramaniam* v. *Arunachelam*, 28 M. 1; *Huri Dayal* v. *Grish Chunder*, 17 C. 911, followed in *Sham Bihari* v. *Ram Kali*, 45 A. 715, explaining *Sheo Partab* v. *Allahabad Bank*, 25 A. 476 (489) P.C.; *Lakshmi Narain* v. *Sumarni*, 46 A. 439; *Dhauna Mal* v. *Parmeshri*, (1928) L. 9.

(5) *Ram Kali* v. *Gopal*, 48 A. 648 (654).

(6) *Bhau* v. *Raghunath*, 30 B. 229 (237); *Gulappa* v. *Tayawa*, 31 B. 453; *Pandharinath* v. *Govind*, 32 B. 59; *Daulat Rao* v. *Govind Rao*, 5 N.L.R. 13; 1 I.C. 243; *Laxman* v. *Bhau*, 48 I.C. (N.) 116 (Rule extends to Berar where the Mayukh is dominant).

(7) *Gandhi* v. *Jadab*, 24 B. 192 F.B.

India, daughters, sisters and nieces took an absolute estate when inheriting from a male and it was held that the same rule should be applied to all women when they inherited stridhan from a female, including even females who inherit as gotraj sapindas from females.[1]

381. The heirs to a stridhan take in severalty without the benefit of survivorship, even if they be members of a joint family.

Heirs take in severalty.

2712. **Analogous Law.**—It has already been stated that since the inheritance of stridhan is "obstructed," heirs take as tenants-in-common and not as joint tenants with benefit of survivorship.[2] (§ **1021**).

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(1) *Narayan* v. *Waman*, 46 B. 17 (21-23).

(2) *Karuppai* v. *Senkara*, 27 M. 300 (308) F.B.; *Parson* v. *Somti*, 36 B. 424.

CHAPTER XXVIII.

SUPPLEMENTARY PROVISION.

Shastras subject to equity.

382. (1) Questions should not be decided solely on the texts of the shastras but must be made conformable to reason.

(2) Where upon any matter the authority of the shastras is conflicting, it should be decided in conformity with the rules of equity.

2713. **Analogous Law.**—The two clauses merely paraphrase the following texts:—

Brihaspati.—"Decision should not be based only on the *Shastras*. By an unreasonable judgment there is loss of *Dharm*."[1]

Artha Shastra.—"Where the texts of the *Shastras* are at variance with equity with which *Dharm* always agrees, equity must prevail, the reading of the conflicting text of *Dharm Shastras* being considered to be erroneous."[2]

2714. **Principle.**—Shastric rules are merely general directions—neither framed with the studied accuracy of an Act of Parliament, nor intended to possess inflexible rigour of the laws of the Medes and the Persians. It is true that some of the *Shastras* profess to be revealed, but even they recognize the paramountcy of reason, justifying their infallibility on the ground that they referred to an age long past.

Rules in cases not expressly provided for.

383. In cases not provided for by this Code, or by any other law for the time being in force, the courts shall act according to justice, equity and good conscience.

2715. **Analogous Law.**—The principle of this section underlies the following text:—

Gautam.—"48. In cases for which no rule has been given, that course must be followed of which at least ten Brahmins who are well instructed, skilled in reasoning and free from covetousness, approve.

"49. They declare that an assembly shall consist at least of the ten following members, *viz.*, four men who have completely studied the four Vedas, three men who belonging to the three orders enumerated first, and three men who know three different institutes of law.

"50. But on failure of them the decision of one Shrotriya, who knows the Vedas and is properly instructed in the duties, shall be followed in doubtful cases.

"51. For such a man is incapable of unjustly injuring or unjustly favouring created being."[3]

2716. The Hindu Law as administered by the courts is the law as stated in the sacred books which is both imperfect and incomplete. This was recognized by the Smritikars who add a general statement to their

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(1) Cited in 1 Ghose H. L. (3rd Ed.), p. 34.

(2) Kautilya's Artha Shastra, Bk. III, Ch. 1, Tr. 3, Ghose's H. L. (3rd Ed.), 471.

(3) Gautam, XXVIII-48-51; 2 S. B. E., pp. 306, 307.

texts, to the effect that upon matters not therein expressly provided for, the law to be administered is, that which the learned men propound is good law. This is paraphrased in the several Indian enactments as the rule of justice, equity and good conscience (§ **182**). Acting upon this rule the Judges have built up a strong body of case-law, which has, to that extent, supplanted the rules deducible from the sacred texts. The Privy Council have recognized the force of equity in a case for which the Hindu Law, as such, provided no solution. The question in that case was whether a person could accelerate his own succession by his own wrong, *e.g.*, where he commits the murder of his predecessor-in-title. As already stated before, the Privy Council held that both he and his descendants were debarred from all succession.[1]

Res judicata.

384. Cases not subject to the statutory rule of *res judicata* are still subject to a similar rule of Hindu Law.[2]

2717. **Analogous Law.**—This section is supported by the following texts:—

Katyayana.—"If a person though defeated at law sue again, he should be answered, you were defeated formerly. This is called the plea of former judgment."[3]

The law of *res judicata* is based on the principle that there must be finality to a matter once fairly and fully settled by a court of law, otherwise there would be no security to title. S. 11 of the Civil Procedure Code enacts that rule, but the Privy Council have held it to have a wider stretch outside its limits.[4] The section here framed is intended to cover a part of that ground as in conformity with the texts of Hindu Law, cited by the Privy Council in the undernoted case,[5] which gave the same finality to a decision, by a probate court. In this case, the reversioner having opposed the grant of probate of the will of one Bashu Singh, *inter alia* on the ground that he was his reversioner, which the probate court found against him, he was precluded by the rule of *res judicata* from maintaining a separate suit for a declaration that he was the next reversioner and, as such, entitled to the estate of Bashu Singh on the death of his surviving widow. But his suit was thrown out on the ground that his status had been previously negatived by the probate court.

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(1) *Kenchava* v. *Girimallappa*, 48 B. 569 (575) P.C.

(2) *Sheo Parsan* v. *Ramnadhan*, 43 C. 694 (706) P.C.

(3) Cited *per* Manlik in Mayuk, p. 11, Mit., Bk. II, Ch. I (Ed. Gharpure, p. 11); *Sheo Parson* v. *Ramnadhan*, 43 C. 694 (706) P.C.

(4) *Ram Kirpal* v. *Rup Kuari*, 3 A. 633 P.C.; followed in *Hook* v. *Administrator-General*, 48 C. 499 (507, 508); *Munni Bibi* v. *Trilok Nath*, 53 A. 103 P.C.; *Mg. Sein* v. *Ma Pan*, 10 R. 322 P.C.; *Kallipada* v. *Durjapada*, 57 I.C. 24: (1930) P.C. 22.

(5) *Sheo Parson* v. *Ramnadhan*, 43 C. 694 (706) P.C.

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[N.B.—*In the following pages Arabic figures in the section refer to commentary, Arabic figures in the commentary refer to foot-notes*].

THE ANAND MARRIAGE ACT (VII OF 1909).

[22*nd October*, 1909.

An Act to remove doubts as to the validity of the marriage ceremony common among the Sikhs called Anand.

WHEREAS it is expedient to remove any doubts as to the validity of the marriage ceremony common among the Sikhs called Anand: It is hereby enacted as follows:—

Short Title and Extent.

1. (1) This Act may be called THE ANAND MARRIAGE ACT, 1909; and

(2) It extends to the whole of British India.

Validity of Anand marriages.

2. All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand shall be, and shall be deemed to have been, with effect from the date of the solemnization of each respectively good and valid in law.

3. Nothing in this Act shall apply to—

Exemption of certain marriages from Act.

(*a*) any marriage between persons not professing the Sikh religion, or

(*b*) any marriage which has been judicially declared to be null and void.

Saving of marriages solemnized according to other ceremonies.

4. Nothing in this Act shall affect the validity of any marriage duly solemnized according to any other marriage ceremony customary among the Sikhs.

Non-validation of marriages within prohibited degrees.

5. Nothing in this Act shall be deemed to validate any marriage between persons who are related to each other in any degree of consanguinity or affinity which would, according to the customary law of the Sikhs, render a marriage between them illegal.

THE ARYA MARRIAGE VALIDATION ACT (XIX OF 1937).

[14*th April*, 1937.

An Act to recognise and remove doubts as to the validity of the inter-marriages current among Arya Samajists.

WHEREAS it is expedient to recognise and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE ARYA MARRIAGE VALIDATION ACT, 1937.

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Paraganas, and applies also to all subjects of His Majesty within other parts of India, and to all Indian subjects of His Majesty without and beyond British India.

Marriage between Arya Samajists not to be invalid.

2. Notwithstanding any provision of Hindu Law, usage or custom to the contrary, no marriage contracted whether before or after the commencement of this Act between two persons, being at the time of marriage Arya Samajists shall be valid or shall be deemed ever to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to a religion other than Hinduism.

Both the Anand and the Arya Marriage Acts are validating Acts intended to validate all marriages contracted by the Sikhs between persons who are Sikhs and those who profess the Arya Samaj faith respectively. As previously stated both these faiths are converting off-shoots of Hinduism; they are open to converts from any caste or creed, though in practice, the bulk of them are Hindu converts and follow Hindu law, but observe no caste and inter-marry with Hindus.

But the Acts were enacts to legalize the two classes of sectarian marriages between persons who have joined those sects.

THE CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

[11*th April*, 1850.

An Act for extending the principle of section 9, Regulation VII, 1832, of the Bengal Code throughout the territories, subject to the Government of the East India Company.

Preamble.

WHEREAS it is enacted by section 9, Regulation VII, 1832, of the Bengal Code that "where in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company; It is enacted as follows[1]:—

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced.

1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights,[2] or property, or may be held in any way to impair or affect any right of inheritance,[3] by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste,[4] shall cease to be enforced as law[5] in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

(1) *Extent and Scope of the Act.*—Both Regulation VII of 1832 and Act XXI of 1850 applied to Oudh from the date of its annexation on the 13th February, 1856.

Consequently, a person converted before that date was held not entitled to the benefit of the Act.[1]

The persons relieved by the Act are those who (1) have renounced their religion; (2) have been excluded from the communion of a religion, and (3) those who have been deprived of caste.[2]

(2), (3) The Act applies whether the conversion or exclusion took place before or after the accrual of the right.[3] The phrase "*forfeiture of rights*" refers to rights apart from property, *e.g.*, of guardianship; while the "*right of inheritance*" would include survivorship. But only these two rights are safeguarded,—not any other right, *e.g.*, a title to hold property as *shebait* or *mahant*.

(4) The language of S. 1 of this Act is ambiguous on one point, namely, whether it is intended to remove the disqualification of the person who changes his religion or is deprived of caste or whether it removes the disqualification arising from any other person, *e.g.*, his ancestor changes his religion or is deprived of caste. The latter view is wider, the former narrower, limiting the removal to the convert personally. In the one view, if suppose, *A*, the father, becomes a convert to Mahomedanism, but his children remain Hindus, would they inherit to him under Hindu Law inspite of *A's* conversion, or would they be altogether excluded, because under Mahomedan law; to which *A* becomes personally subject, an infidel cannot be his heir. The wider view was taken in the Allahabad case of *Bhagwant Singh* v. *Kallu*,[4] and the narrower view in the Madras case of *Vaithilinga* v. *Ayyathorai*,[5] followed in the Lucknow case, of *Mitar San* v. *Maqbul Hasan*,[6] which was upheld on appeal by the Privy Council, the result being that, in the case supposed, while *A*, who became a convert, would not forfeit the property he had inherited as a Hindu or be disqualified to inherit to his relations, his own heirs would be determined by the Moslem law of succession, since with the change of religion he must be presumed to adopt its personal law also.[7] Consequently, where a Christian claimed to be a reversioner of his collateral Hindu relative, through his Christian grandfather, the court rejected his claim on the short ground that, since this Act only removes only personal disqualifications arising from the three cases enumerated above, it could not assist the plaintiff whose father and grandfather were both Christians.[8]

(5) "*Shall cease to be enforced as law.*"—The disability, if any, incurred; cannot receive recognition or protection of the court—not that it ceases by reason of the Act. Since a declaratory suit is a suit declaratory in form but results in the enforcement of a right, through the medium of the court, the clause is wide enough to cover such relief

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THE HINDU DISPOSITION OF PROPERTY ACT (XV OF 1916).

[28*th September*, 1916.

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the bene-

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(1) *Mitar Sen* v. *Maqbul Hasan*, 3 Luck. 154: (1928) O. 138, O.A. (1930) P.C. 251.

(2) *Vaithilinga* v. *Ayyathorai*, 40 M. 1118 (1119) approved in *Mitar Sen* v. *Maqbul Hasan*, (1930) P.C. 251; *contra* *Valinaksha* v. *Rajanikanta*, 58 C. 1392 (1398, 1399) holding that head (3) is not dependent of the previous clauses and must relate back to renunciation of religion is submitted unsound.

(3) *Ram Pergash* v. *Dahan Bibi*, 3 Pat. 152 (179).

(4) *Bhagwant Singh* v. *Kallu*, 11 A. 100, followed *Rupa* v. *Sardar Mirza*, 1 L. 376.

(5) *Vaithilinga* v. *Ayyathorai*, 40 M. 1118.

(6) *Mitar Sen* v. *Maqbul Hasan*, 3 Luck. 154: (1928) O. 138, O.A. (1930) P.C. 251.

(7) *Khunnilal* v. *Govind Krishna*, 33 A. 356 (366) P.C.

(8) *Vaithilinga* v. *Ayyathorai*, 40 M. 1118 (1120), approved in *Mitar Sen* v. *Maqbul Hasan*, (1930) P.C. 251 (252); *Sundarammal* v. *Ameenal*, (1927) M. 72; *Abdul Aziz* v. *Mahbub Singh*, (1936) A. 202; *Chidambaram* v. *Nyein Me*, 6 R. 243; *Bhagwan* v. *Digbijai Singh*, 6 Luck. 487: (1931) O. 301.

fit of persons not in existence at the date of such disposition; it is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE HINDU DISPOSITION OF PROPERTY ACT, 1916.[1]

(2) It extends, in the first instance, to the whole of British India, except the Province of Madras[2] Provided that the Governor-General in Council may, by notification in the *Gazette of India*, extend this Act to the Province of Madras.

(1) This Act was intended to supersede a rule of Hindu Law to which the Privy Council had referred in *Tagore* v. *Tagore*[1] to the effect that no gift or devise was valid under that law, if the beneficiary was not in existence when the disposition took effect. Madras had already passed a local Act (Madras Act I of 1914) rescinding that rule, but as that rule could not be rescinded without prescribing some limit to such dispositions, both the local and this Act extended certain sections of the Transfer of Property Act and the Succession Act to them. But as by the amendment of these Acts in 19292 the provisions herein specified have been included in the larger provisions of those amending Acts, the only reason why this Act remains unrepealed is to legalize such dispositions as have taken place under it, as the Acts of 1929 are not retrospective and their larger provisions could not be safely made retrospectively applicable to the dispositions made under this Act.

(2) The Madras Act I of 1914 was passed by the local council which was held to possess no jurisdiction to alter a law applicable to the city of Madras subject to the original jurisdiction of the Madras High Court. Consequently, the Central Legislature extended the provisions of the local Act to that area by enacting The Hindu Transfers and Bequests (City of Madras) Act (VIII of 1928).

Dispositions for the benefit of persons not in existence.

2. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

Limitations and conditions.

3. The limitations and provisions referred to in section 2 shall be the following, namely:—

(*a*) in respect of dispositions by transfer *inter vivos*, those contained in sections 13, 14 and 20 of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in sections 100 and 101 of the Indian Succession Act, 1865.

Failure of prior disposition.

4. Where a disposition of property fails by reason of any of the limitations referred to in section 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.[3]

(3) Section 4 is repealed by Act XXI of 1929 in that it is a rule of interpretation covered by S. 8 of the Transfer and S. 35 of the Succession Act.

Application of this Act to the Khoja community.

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may, by notification in the *Gazette of India*, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja," as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as

(1) *Tagore* v. *Tagore*, 14 B.L.R. 60 P.C.

(2) *See* Act XVIII of 1929.

may be specified in the notification, and this Act shall thereupon have effect accordingly.

THE HINDU GAINS OF LEARNING ACT (XXX OF 1930).

[*25th July*, 1930.

An Act to remove doubt as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning.

WHEREAS it is expedient to remove doubt, and to provide an uniform rule, as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE HINDU GAINS OF LEARNING ACT, 1930.[1]

(2) It extends to the whole of British India.

(1) This Act owes its inception to Mr. R. Jayakar[1] and was passed to supersede the rule of Hindu Law as interpreted by the Privy Council in the undernoted case.[2]

The two Mitakshara texts[3] lay down that (1) whatever is gained with the nucleus of the family fund is partible,[4] and (2) what is the "gains of learning" of a member of a joint family acquired "without detriment to the father's estate" are not partible. It raised two questions as to what those words meant. The first question has been already dealt with in the Code (S. 115).

Dealing with the second question, the Privy Council held that the text excluded a general education, but was intended to refer to special education. Consequently, where a person had received such education at the family expense, but had; by his skill as a pleader, made money it was his self-acquisition,[5] but otherwise where he had received education qualifying him to enter the Indian Civil Service.[6] The question of "detriment" is again a question of the condition of the family. If it be rich, the imparting of the special education would not be to its detriment, which it will be if it is poor. With the opening of new professions of law, medicine and Civil Service, these questions began to agitate not only the acquirer but his relatives. The Act was consequently passed to insure that whatever the education and whatever its detriment to the joint family property, all that a man makes and acquires shall be his self-acquisition.

The Act does not deal with the general law of presumptions, namely, that property that a member possessed as a member of a coparcenary shall be presumed to be joint. While he is alive, his separate possession and control may suffice to rebut that presumption, but that presumption may have to be rebutted by his widow and descendants.[7]

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "acquirer" means a member of a Hindu undivided family, who acquires gains of learning;

(*b*) "gains of learning" means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before[2] or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary[3] result of such learning; and

(2) The Act is, therefore, retrospective, and applies to gains whenever made.

(3) *i.e.*, arising in the natural course or otherwise.

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(1) Assembly Debates dated 15th July, 1930, pp. 427-464.

(2) *Metha Ram* v. *Rewachand*, 45 C. 666 P.C.

(3) Mit. I-IV-1, 31.

(4) *Anand Rao* v. *Vasant Rao*, 5 C. L.J. 338 P.C.; *Lala Bahadur* v. *Kanhaya Lal*, 29 A. 244 (254, 255) P.C.

(5) *Metharam* v. *Rewachand*, 45 C. 666 (684, 685) P.C.

(6) *Gokal Chand* v. *Hukum Chand*, 2 L. 40 P.C.; *Hanso Pathak* v. *Harmardil*, 56 A. 1026.

(7) Assembly Debates pp. 448-449, (1930).

(*c*) "learning" means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.[4]

(4) The term "learning" is retained because it is to so used in the text. It includes, training of every kind, apprenticeship or the like.

Gains of learning not to be held not to be separate property of acquirer merely for certain reasons.

3. Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of—

(*a*) his learning having been, in whole or in part imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family, or with the aid of the funds of any member thereof; or

(*b*) himself or his family having, while he was acquiring his learning, be maintained or supported, wholly or in part by the join funds of his family, or by the funds of any member thereof.

4. This Act shall not be deemed in any way to affect—

(*a*) the terms or incidents of any transfer of property made or effected before the commencement of this Act;

(*b*) the validity, invalidity, effect or consequences of anything already suffered or done before the commencement of this Act;

(*c*) any right or liability created under a partition, or an agreement for a partition, of joint family property made before the commencement of this Act; or

(*d*) any remedy or proceeding in respect of such right or liability; or to render invalid or in any way affect anything done before the commencement of this Act in any proceeding pending in a Court at such commencement, and any such remedy and any such proceeding as in herein referred to may be enforced instituted or continued, as the case may be, as if this Act had not been passed.

THE HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929).

[21*st February*, 1929.

An Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate.

WHEREAS it is expedient to alter the order[1] in which certain heirs of a Hindu male dying intestate[2] are entitled to succeeded[3] to his estate; It is hereby enacted as follows:—

This Act owes its enactment to the present writer who had introduced it (after its previous rejection) in the Legislative Assembly on 22nd March, 1928.1

(1) *Alter the order.*—The addition of new heirs is an alteration in the order of succession.2 The legal effect of this and similar Acts, amending the Mitakshara, is to write those Acts into it by way of correction.

(2) *Dying intestate.*—Male who has died before the Act came into force or may die thereafter.3 Though the Act applies primarily to a male dying intestate, yet it

(1) Assembly Debates, dated 22nd March 1928, pp. 1924-1926.

(2) *Mahabir* v. *Radha*, (1933) O. 231 (235).

(3) *Rajpali* v. *Sarju Rai*, (1936) A. 507 F.B.; *Lakshmi* v. *Anantharama*, (1937) M. 619 F.B.

will equally regulate succession to the stridhan of a woman when it devolves upon her husband and his heirs. Consequently, if such heir is to be found after the Act comes into force, it will be found in the Mitakshara as amended by the Act.[1]

(3) *Certain heirs.....are entitled to succeed.*—That is to say, if an heir had to be looked for after the Act is in force, he must be found from the Mitakshara read with the Act. For example, if a male dies leaving him surviving an intermediate female heir, *e.g.*, his widow, daughter or the mother; on her death his heir has to be found and must be found under the Act. In such case, there is no question of retrospectively, since the sole question is whether the Act was in force when the succession opened, if it was, it must apply.[2]

Short title, extent and application.

1. (1) This Act may be called THE HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males[4] not held in coparcenary and not disposed of by will.[5]

(4) *"Property of males, etc."*—including property that was inherited by the husband from his wife which became his separate property.[3]

(5) *"Not disposed of by will", i.e.;* a valid will and includes property not only not so disposed of, but also that which cannot be so disposed of.[4]

Order of succession of certain heirs.

2. A son's daughter, daughter's daughter[6] sister[7] and sister's son[8] shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother.

Provided that a sister's son shall not include a son adopted after the sister's death.

(6) *"Daughter's daughter,"*—by two wives are included in the term.

(7) *"Sister"*,—includes a half sister.[5] (§§ 2274, 2275).

(8) *"Sister's son,"*—natural or adopted by her husband or by her with his authority (if necessary) after his death, but not a son adopted by the husband after his wife's death, though in the eye of law, he would become equally her son. The proviso is inserted to discourage mercenary adoptions. Following the Full Bench decision of the Allahabad High Court, a bench of the same court has held a "sister's son" to exclude a half-sister's son;[6] but this view has not obtained currency in the other courts.[7]

Savings.

3. Nothing in this Act shall—

(*a*) affect any special family or local custom having the force of law, or

(*b*) vest in a son's daughter, daughter's daughter or sister an estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

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(1) *Charjo* v. *Ainanath*, (1937) L. 196 (199, 200).

(2) *Pokhan* v. *Mt. Manoa*, 16 Pat. 215 F.B. (five Judges); *Lakshmi* v. *Anatharama*, I.L.R. (1937) M. 948 F.B.; overruling *Gavarammal* v. *Manickammal*, 57 M. 718. To the same effect *Rajpali* v. *Surju Rai*, 58 A. 1041; *Shib Das* v. *Nand Lal*, 13 L. 178; *Shakuntala* v. *Kaushalya*, 17 L. 356; *Charjo* v. *Dinanath*, (1937) L. 196.

(3) *Charjo* v. *Dinanath*, (1937) L. 196.

(4) *Pokhan* v. *Mt. Manoa*, 16 Pat. 215 F.B.

(5) *Gurunditta* v. *Mt. Diwani*, (1937) L. 11 (14); *Amrut* v. *Mt. Thagan*, I.L.R. (1938) N. 115 F.B. contra *Ramadhar* v. *Sudeshra*, 55 A. 725 F.B.: (1937) A.L.J.: 11 Luck. 148.

(6) *Sahodra* v. *Ram Babu*, (1937) A. 655 (*sed quaere*).

(7) *See* f.n. (5) *supra*.

(c) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir.

THE HINDU LAW OF INHERITANCE (REMOVAL OF DISABILITIES) ACT (XII OF 1928).

An Act to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts.

WHEREAS it is expedient to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts; It is hereby enacted as follows:—

Short title, extent and application.

1. (1) This Act may be called THE HINDU LAW OF INHERITANCE (REMOVAL OF DISABILITIES) ACT, 1928.

(2) It extends to the whole of British India, including British Baluchistan and Sonthal Parganas.

(3) It shall not apply to any person governed by the Dayabhaga School of **Hindu Law.**

This Act like Act II of 1929 was re-introduced by the present writer in the Assembly (after its previous rejection) on the 22nd March, 1928.[1]

Persons not to be excluded from inheritance or rights in the joint family property.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or idiot shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect.

The disqualification is personal. It does not affect the issue.

The retention of a congenital lunatic or idiot as a disqualification was acceded to by the author on the ground that such person without reason cannot be a member of a coparcenary entitled to joint mess, worship and residence, while he is equally unfit to perform the spirtual service that is expected of the heir.[2]

Saving and exception.

3. Nothing contained in this Act shall affect any right which has accrued or any liability which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of any religious office or service or of the management of any religious or charitable trust which he would not have had if this Act had not been passed.

THE INDIAN LIMITATION ACT (IX OF 1908).

As amended by the Indian Limitation (Amendment) Act (I of 1929).

Suits against express trustees and the representatives.

S. 10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds

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(1) *See* Assembly debates, dated 22nd March, 1928, pp. 1917, 1918.

(2) For the history and scope of this section and ensuing Articles *see* §§ 2062-2073.

thereof, or for an account of such property or proceeds, shall be barred by any length of time.

(For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.)[1]

Articles added by Act I of 1929.

Description of Suit.	Period of limitation.	Time from which period begins to run.
48-A. To recover movable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee depositary or pawnee for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff.
48-B. To set aside sale of *movable* property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff.
134 To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.
134-A. To set aside a transfer of *immovable* property comprised in a Hindu, Muhammadan or Buddhist religious or Charitable endowment made by a manager thereof for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.
134-B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowments to recover possession of *immovable* property comprised in the endowment which has been *transferred* by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the transferor.
134-C. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowments to recover possession of *movable* property comprised in the endowment which has been *sold* by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the seller.

THE PARTITION ACT (IV OF 1893).

[*9th March*, 1893.]

An Act to amend the Law relating to Partition.

WHEREAS it is expedient to amend the law relating to partition; It is hereby enacted as follows:—

(1) Added by Act I of 1929.

Title, extent, commencement and saving.

1. (1) This Act may be called THE PARTITION ACT, 1893. *

Construction of Act.—This Act provides one mode of partition, that is no partition at all, since instead of the property being divided *in specie* it is sold and might be sold to a stranger. Recourse must, therefore, be had to it, only when all other modes of partition fail, and the Act itself must be strictly construed.[1] Further it does not apply where revenue paying estates are subject to the several revenue laws dealing with their partition. Such are the Zemindaries in Bengal, Behar and the United Provinces and all Malguzari estates there and elsewhere. Where, however, the quantum of interest sought to be partitioned is a mortgage thereon, such partition might be made under this Act, if the local revenue Acts do not provide for the partition of such interest.[2] But this was a case in which both the mortgagor and the mortgagee had applied for such partition. The mortgagee is not entitled to obtain partition of his rights by instituting a suit therefore, if it will result in destroying the intrinsic value of the property sought to be partitioned.[3] On the other hand, where the plaintiff wanted partition of a shop *in specie*, which the defendant opposed on the ground that it was impracticable and would cause him injury, the court made the partition holding that it would cause him no injury in the legal sense of the term.[4]

Many cases have been decided in which the courts have used their power under S. 3, many in which they have not, but these cases were decided upon their own facts and furnish no rules for general guidance. If they did they would crystallize into set rules what the Legislature had intended to remain fluid and open to decision in each case.

(2) It extends to the whole of British India; [*]

(3) [* * * *]

(4) But nothing herein contained shall be deemed to affect any local law providing for the partition of immovable property paying revenue to Government.

Power to Court to order sale instead of division in partition suits.

2. Whenever in any suit for partition[1] in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property, and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

(1) **In any suit for partition.**—The suit may relate to a general or partial partition, but it must comprise the property sought to be sold. Three conditions are essential to justify a sale: (1) An application for a sale by one or more shareholders, representing at least a moiety of interest in the property; (2) an independent decision by the court that no partition of the property can reasonably or conveniently be made;

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* For Statement of Objects and Reasons, *see* Gazette of India, 1892, Pt. V, p. 46; for Report of the Select Committee, *see ibid.*, 1893, Pt. V; p. 51; and for Proceedings in Council, *see ibid.*, 1893, Pt. VI, pp. 38 and 49.

For Civil Rules of Practice made by the High Court, Madras, under this Act, the Code of Civil Procedure and certain other Acts for observance by the Subordinate Civil Courts of that Presidency, except the Madras Small Cause Court, *see* Fort St. George Gazette, 1905, Supplement, p. 1.

The Act has been declared in force in Upper Burma (except the Shan States) by the Burma Laws Act (XIII of 1898), Bur. Code.

(1) *Ram Prasad* v. *Mukundi*, (1929) A. 443.

(2) *Banke Lal* v. *Shanti Prasad*, 35 A. 387 (388).

(3) *Mahabir* v. *Mahadeo*, (1927) A. 686.

(4) *Govind* v. *Naraindas*, (1882) P.R. No. 29.

and (3) its sale would be more beneficial to all the shareholders. An order passed under this section is deemed to be a decree and is, therefore, appealable.[1] A property is not reasonably or conveniently partible if it is wholly impartible, *e.g.*, a family house, a party wall,[2] a tank, a well, a motor car, an elephant or the like. The property may be either movable or immovable, but recourse cannot be had under this section.

The duty of ordering partition under this section vests in the court, which has to perform a judicial act, and it cannot be swayed by the consent of the parties;[3] nor can the court ignore the several provisions of the Act, when it decides to sell, *e.g.*, fixing of a reserved price as provided in S. 6. But if in spite of that default the property fetches an adequate price, the sale would not be set aside[4] since the reservation is intended to ensure that result.

Procedure when sharer undertakes to buy.

3. (1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

Partition suit by transferee of share in dwelling-house.

4. (1) Where a share of a dwelling-house belonging to an undivided family[1] has been transferred[2] to a person who is not a member of such family and such transferee sues for partition,[3] the court shall,[4] if any member of the family being a shareholder[5] shall undertake[6] to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family, being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

(1) **Undivided Family.**—This section deals with a special case of the purchase of a share of a dwelling-house by a stranger, and three conditions are specified before recourse is had to a sale under that section. (1) The suit must relate to the partition of a dwelling-house, as distinct from a shop or business premises. It is not necessary that the whole of the house should be so used, but it would suffice if a part at least is so used. (2) Such house must belong to an undivided family, that is, two or more relations must own jointly, not that they should be in actual possession of it, though a house, wholly let out to tenants, could not be treated as a dwelling-house within the

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(1) S. 8.
(2) *Mamsa Ram* v. *Nanak Chand*, (1934) L. 893, contra *Hardand Das* v. *Sundar*, 64 I.C. (R.) 949 (a party wall and a staircase partitioned).
(3) *Mumtaz Jahan* v. *Mannulal*, (1934) L. 965.
(4) *Dost Mahomed* v. *Mhd. Shariff*, (1933) S. 40.

meaning of this section;[1] and (3) a share of it must have been transferred by a voluntary or involuntary act to a stranger who must sue for partition.[2] It is not necessary that the transferee who purchased the share should himself have sued for it, for a transferee is nonetheless a transferee, though he may not be its immediate purchaser. The transfer again may not be of the *corpus*, for it may be a house built on another's land and it may, again, be held by the family on a lease. The term "transfer" is, in this sense, not to be treated as limited to a sale. The phrase "undivided family" in S. 4 is not limited to members of a Hindu undivided family. All it means is that the dwelling-house is the joint property of the members of a family[3] Hindu, or Moslems, undivided *qua* the house in dispute.[4]

(2) The word "transferred" means transferred by a voluntary or by an involuntary act, *e.g.*, in execution of a decree.[5] As such, an auction-purchaser of a share of a house is competent to sue for partition.[6] The term "transfer" is defined in S. 5 of the Transfer of Property Act to be a voluntary transfer, but it is definitive limitation for the purpose of that Act. It does not alter its ordinary meaning and that section cannot be referred to limit the meaning of that term in this section.[7] At the same time, reference should be made to S. 44 proviso of the Transfer of Property Act, which enacts a similar rule giving the purchaser the right of partition.

(3) The right conferred by this section cannot be enforced by a qualified member, unless the transferee sues for partition. It may be that in a suit by another, the transferee may apply for the separation of his share. It would then suffice to consituate such suit as the section contemplates.[8]

(4) This section like the rest of the Act provides a solution where the parties do not agree to the amicable partition of their property. It is, therefore, always open to them to adopt another method of partition or solution of their dispute, by consenting to a sale otherwise than that provided in the Act.[9]

(5) The next question is who is entitled to exercise his right "as a member of the family being a shareholder". The question of membership of a family is not one of technical law, since women who have no share in the joint family property are still members of the family, but it gives them no right to pre-empt, unless they are presumed or are actual shareholders in the house.[10]

(6) The section does not indicate the stage when a member is to give his undertaking, which he may be permitted to do at any time before the final allotment is made. But the proper time for this application is before the preliminary decree[11] unless one of the defendants wished to continue and apply to have his name substituted in place of the stranger plaintiff who had been bought out.[12] In an ordinary partition suit, the plaintiff is only so *pro forma*, since all co-sharers possess mutual rights against one another, and such, they are all plaintiffs and defendants at the same time;[13] and consequently, if in such a case a stranger purchaser applies for partition, it will suffice to let in the right of a co-sharer member to buy him out under this section. Even that right has been treated as not too late, if it is made even in appeal;[14] but this proceeds on a lacunae in the section and the liberal construction of it in the interest of a co-sharer member, but on this point two opinions are possible and two opinions have been taken on the ground that since the section is a statutory interference with

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(1) *Subramanya* v. *Sheik Ghannu*, (1935) M. 628 (632), distinguishing *Kshirode Chandra* v. *Saroda Prosad*, 7 I. C. (C.) 436; *Vaman* v. *Vasudev*, 23 B. 73.

(2) *Subbamma* v. *Veerayya*, (1932) M. 15.

(3) *Sultan Begum* v. *Debi Prasad*, 30 A. 324 F.B.; *Kshirode* v. *Saroda Prosad*, 7 I.C. (C.) 436; *Latifunessa* v. *Abdul Rahman*, (1934) C. 202; *Fatma* v. *Gulamnabi*, (1936) B. 197; *Gangi* v. *Atmaram*, (1936) L. 291.

(4) *Sohoni* v. *Raj Kumar*, 54 A. 840; *Fatma* v. *Gulamnabi*, (1936) B. 197; *Sivaramayya* v. *Venkata*, (1930) M. 561.

(5) *Gangi* v. *Atmaram*, (1936) L. 281 (293).

(6) *Sohoni* v. *Rajkumar*, 54 A. 840.

(7) *Ib.*, pp. 843, 844.

(8) *Laxman* v. *Lahanabai*, 165 I.C. (N.) 930.

(9) *Mahamooda* v. *Nainoo*, (1937) C. 384.

(10) *Laxman* v. *Lahanabai*, 165 I.C. (N). 930: 19 N.L.J. 241 (The widow of a coparcener was permitted to buy overlooking the fact that S. 4 requires she must also be a shareholder).

(11) *Khanderao* v. *Balkrishna*, 23 Bom. L.R. 1083: 64 I.C. (B.) 917.

(12) *Ib.*

(13) *Satyabhama* v. *Jatindra Mohan*, (1929) C. 269.

(14) *Pran Krishna* v. *Surath Chandra*, 45 C. 873; *Kshirode Chunder* v. *Saroda Prosad*, 12 C.L.J. 525; *Satyabhama* v. *Jatindra Mohan*, (1929) C. 269.

the transferee's legal right, it should be strictly construed so as to limit such interference.[1]

The section is enacted in the interest of the transferors, defendants in the stranger's suit, giving them the right of pre-emption. But any such person applying to the court for valuation "must undertake to buy the share" whereupon the procedure prescribed by the section is to be followed. If, therefore, he fails in his undertaking he cannot complain, if the court forfeits his right of pre-emption[2] or compels him to make good his undertaking.[3] If he does purchase, the transferee cannot claim mesne profits as from the date of his purchase.[4]

Representation of parties under disability.

5. In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.

Reserved bidding and bidding by shareholders.

6. (1) Every sale under section 2 shall be subject to a reserved bidding[1] and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the Court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

(1) **Reserved bidding.**—It has already been seen, that the court must fix the reserve to ensure sale for an adequate price, and prevent its being cornered by a combine. Where, however, the court failed to make a reserve; but the price fetched was adequate, the sale was upheld in spite of its disobedience to a statutory condition.

Again, where, parties agree to a consent decree for partition by which certain properties are to be sold by the Commissioner at his discretion, but the court directed that he should fix a reserve, which he failed to do, the court held that the direction of the court was *ex majore cautelum* and its non-observance did not vitiate the sale.[5]

Procedure to be followed in case of sales.

7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely:—

(*a*) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, or of the Court of the Recorder of Rangoon, the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar;

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(1) *Ilias Ahmad* v. *Bulaqi Chand*, 39 A. 672 (674); *Subramanya* v. *Sheik Ghannu*, (1935) M. 628.

(2) *Subramanya* v. *Sheik Ghannu*, (1935) M. 628 (630).

(3) *Ilias Ahmad* v. *Bulaji Chand*, 39 A. 672 (674).

(4) *Subramanya* v. *Sheik Ghannu*, (1935) M. 628 (634), S. 44 proviso, 1 Law of Transfer (6th Ed.), §§ 831, 832, pp. 503, 504.

(5) *Mahmooda* v. *Nainoo*, (1937) C. 384.

(*b*) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.

Orders for sale to be deemed decrees.

8. Any order for sale made by the Court under sections 2, 3 or 4 shall be deemed to be a decree[1] within the meaning of section 2 of the Code of Civil Procedure.

(1) **Appealable orders.**—This section merely enacts that all orders passed by a court under section 2, 3 or 4 shall be treated as decrees within the meaning of S. 2 of the Civil Procedure Code, and would be appealable as such. The *forum* of appeal would be determined by the valuation of the suit in accordance with the provisions of the Court-Fees and the Suits Valuation Acts.[1]

Saving of power to order partly partition and partly sale.

9. In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act.

Application of Act to pending suits.

10. This Act shall apply to suits instituted before the commencement thereof, in which no scheme for the partition of the property has been finally approved by the Court.

THE SPECIAL MARRIAGE ACT (III OF 1872).*

[22*nd March*, 1872.

Amended on 30*th July*, 1923.

An Act to provide a form of marriage in certain cases.

Topical Introduction.—This Act was passed to meet the objection of the Brahmos to be compelled to contract their marriages under the Brahminical law before an idol or by Brahmins, in whom they did not believe. When the Act was passed, all concerned believed that a declaration by a party that he did not profess any of the religions enumerated in S. 2 would suffice to take him out of the place of Hindu law generally, including that of coparcenership and succession. But in 1903, the Privy Council declared that persons belonging to the dissenting sects, such as Sikhism or Brahmoism were still Hindus and, as such, subject to Hindu law.[2] It led to other discussions in which followers of other dissenting sects such as Brahmoism, Arya Samaj and Jainism, were likewise held to remain Hindus.

The present writer felt that, following the lead of all other civilized countries, India should possess a non-religious civil marriage law, and he introduced a Bill in the Central Legislature,[3] which aroused convulsing opposition from the Mahomedan and Parsi communities throughout India with the result that the author was left with no option but to modify it to the form in which it was enacted as Act XXX of 1923.—

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(1) Court-Fees Act (VII of 1870); Suits Valuation Act (VII of 1887).

* Short title, The Special Marriage Act, 1872. *See* the Indian Short Titles Act, 1897 (XIV of 1897), General Act; Vol. IV.

There was no Statement of Objects and Reasons; the Bill as introduced was published in the Gazette of India, 1868, p. 1403; for the Report of the Select Committee, dated 21st December, 1871, *see Ibid.*, 1871, Pt. V, p. 519; for discussions in Council, *see ibid.*, 1868; Supplement, pp. 890 and 1197; *ibid.*, 1871; Extra Supplement, pp. 16 and 42; *ibid.*, 1872. Supplement, pp. 2, 57, 193 and 261. The Amending Act XXX of 1923 was introduced by the present writer in the Legislative Assembly on 23rd March, 1921, (Assembly Debates of that date pp. 1551-1552) and dated 22nd March, 1923 pp. 3898-3927, as an independent Civil Marriage Bill. After strenuous struggle it was enacted as Act XXX of 1923.

(2) *Bhagawan Koer* v. *J. C. Bose*, 31 C. 11 P.C.

(3) Assembly Debates (1923), pp. 3436, 3893-3927.

This Act was to be treated as an amendment to the original Act, enacted in 1872, but marriages performed under it and the rights of parties so married remain distinct as will be evident from the notes of cases appended to the Act.

Preamble.

WHEREAS it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion, [and for persons who profess the Hindu, Buddhist, Sikh or Jaina religion]* and to legalize certain marriages the validity of which is doubtful; It is hereby enacted as follows:—

Local extent.

1. This Act extends to the whole of British India.

[*Commencement.*] *Rep. by the Repealing Act,* 1874 (*XVI of* 1874).

Conditions upon which marriages under Act may be celebrated.

2. Marriages may be celebrated under this Act between persons neither of whom professes the Christian or the Jewish, or the Hindu or the Muhammadan, or the Parsi or the Buddhist, or the Sikh or the Jaina religion, [or between persons each of] whom professes one or other of the following religious, that is to say, the Hindu, Buddhist, Sikh, or Jaina religion] upon the following conditions:—

(1) neither party must, at the time of the marriage, have a husband or wife living:

(2) the man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian calendar:

(3) each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage:

(4) the parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

1st Proviso.—No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

2nd Proviso.—No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

Who Can Marry.—Under unamended section 2, both parties must declare that *neither* of them professes the enumerated religions. The question is what does the word "profess" imply. It has been held that the word "profess" is distinct from the term born, or accepted as a member of the religion which he professes for the purposes of the Act. As Greaves, J., observed: "A declaration under the Act cannot be taken as an abjuration for all purposes of Hinduism, but merely as a statement for the purposes of the Act itself."[1] A person declaring that he does not, at the time of his signing the declaration required by Act III of 1872, profess any of the religions therein named cannot be convicted of making a false declaration under S. 199 of the Indian Penal Code,[2] since the profession of a religion whether in the negative form under unamended S. 2 or in its positive form under its amended provision is a matter of individual conscience and belief and no one can dessect his mind to prove its falsity. It may be that a person has openly joined a dissenting sect, like Sikhism or Brahmoism,

Preamble, S. 2.

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* Inserted by Act XXX of 1923.

(1) *Jnanendra Nath Ray,* In re, 49 C. 1069 (1072).

(2) *Walter* v. *E.* (1934) O. 155.

formed to abjure some of the accepted tenets or practices of Hinduism, but it would not suffice to remove him form the fold of Hinduism. As the Privy Council observed: "In matters of mere belief, we are disposed to think that a mere profession of Brahmoism does not necessarily make a man cease to be a Hindu unless he also abjures the social rules of Hinduism and declares himself not to be a Hindu."[1] It may be added, that Chamars who eat cow-flesh do not cease to be Hindus, and the social practices of Hinduism are so varied that no departure from them would make a man a non-Hindu. Hence it follows that a Hindu married under the unamended Act would, despite his declaration, be still subject to the Hindu law of succession.[2]

As this law was hard on women and otherwise antiquated, the amending Act was enacted to provide for the law of succession in accordance with the provisions of the Succession Act.[3] But this law of succession can only be availed of by those who marry under the terms of the amended Act which came into force on the 30th July, 1923.[4]

Amending Act of 1923.

But under the amending Act it is still necessary to declare that both parties to the marriage profess any of the four named religions, namely, Hindu, Buddhist, Sikh or Jain religion. One party to the marriage may be a Hindu, and another a Buddhist, but the two must profess one or other of the four religions. If they do not, they cannot be married under the amended Act, though they may both belong to the same religion. A Confusion is not a Buddhist, and he cannot, therefore; marry under this Act;[5] though the Buddhist law is very liberal and treats an agreement coupled with consummation as establishing a legal marriage.[6]

S. 2 (3). "Consent of his or her father or guardian".

Necessity of Consent.—Though either party may have attained the age of majority under the Indian Majority Act, 1875, still this law enacted in 1872 prescribed the age of 21 which was then the English law of majority.

Now, since a person attains the age of majority on his or her completing the age of 18 years, this clause reproduced in the form of a declaration prescribed in the second schedule of the Act requiring a person who had not completed the age of 21 years to declare that he or she had obtained the consent of his or her father or guardian, as the case may be, cannot be complied with, as it may be that the father is dead and there can be no guardian to consent. In a case decided by the Calcutta High Court, a girl aged 17 married her tutor over 21, under the provisions of the amended Act. They signed a form that contained no clause requiring consent of the father or other guardian. They were duly married, but their marriage was declared null and void in view of the provisions of S. 2 (3),[7] the court observing at the same time that the Legislature should consider the working of the Act and with that view sent a copy of their judgment to Government, who sought to add to the declaratory form the necessity of stating the age of the parties. The present writer opposed the amendment on the ground that clause (3) itself was an anachronism, as a person between 18 and 21 may have no father alive and can have no guardian to apply to for consent, whereupon the Government withdrew their bill, though it was passed unchallenged in the Council of State, and promised to consider the weighty objections raised against it.[8]

In the case under reference, the bride was 17, but if she had completed her eighteenth year, the very point here made would have confronted the learned judges, and it would have been difficult for them to hold that the marriage was a nullity.

S. 2 (4).

Consanguinity.—Since the parties remain subject to their personal law in spite of the declaration, it follows that their marriage must be in accordance with the law of consanguinity of either of them.

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(1) *Bhagwan Koer* v. *Bose*, 31 C. 11 (19) P.C., followed in *Jnanendra Nath Ray*, In re, 49 C. 1069 (1072-1074).

(2) *Bhagwan Koer* v. *Bose*, 31 C. 11 P.C.; *Jnanendra Nath*, In re, 49 C. 1069; *Vidya Gavri* v. *Haran Das*, (1928) B. 74.

(3) S. 23.

(4) *Vidyagavri* v. *Haran Das*, (1928) B. 74; *Punyabrata* v. *Monmohan*, (1934) Pat. 427; *Thukku Bai* v. *Attavar*, 58 M. 1004.

(5) *Ma Kyin Mya* v. *Mg. Sit Han*, (1937) R.L.R. 103: (1937) R. 245.

(6) *Ma Hla Me* v. *Mg. Hla Bow*, 8 R. 425: (1931) R. 29, followed in *Ma Kyin Mya* v. *Mgsit Han*, (1937) R.L.R. 103. (1937) R. 245.

(7) *Basana Sen* v. *Aghore Nath*, 56 C. 628.

(8) Assembly Debates dated 6th March, 1930, pp. 1363-1367.

But even as regards consanguinity the strict rules of Hindu law are relaxed in proviso (2) which shuts out such restrictions as arise from the difference of caste or the fiction of adoption. Under the former proviso, a man can marry his cousin whom he could not have married under Hindu law.

Appointment of Marriage Registrars.

3. The Local Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called "Registrar of Marriages under Act III of 1872," and is hereinafter referred to as "the Registrar." The portion of territory for which any such officer is appointed shall be deemed his district.

One of the parties to intended marriage to give notice to Registrar.

4. When a marriage is intended to be solemnized under this Act, one of the parties must give notice in writing to the Registrar before whom it is to be solemnized.

The Registrar to whom such notice is given must be the Registrar of a district within which one at least of the parties to the marriage has resided for fourteen days before such notice is given.

Such notice may be in the form given in the first schedule to this Act.

Notice by a party.—The party that gives notice must have resided for fourteen days in the district before such notice is given. Though a notice given by one of the parties is sufficient, it does not prevent both the parties giving separate notices. "Such notice *may be* in the form given in the first schedule to this Act"—or it may be in any other form, *e.g.*, a letter; provided it contains all the particulars of the set form.

S. 4.

Notice to be filed and copy entered in the Marriage Notice Book.

5. The Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of every such notice in a book to be for that purpose furnished to him by the Government, to be called the "Marriage Notice Book under Act III of 1872" and such book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

Objection to marriage.

6. Fourteen days after notice of an intended marriage has been given under section 4, such marriage may be solemnized, unless it has been previously objected to in the manner hereinafter mentioned.

Any person may object to any such marriage on the ground that it would contravene some one or more of the conditions prescribed in clause (1), (2), (3) or (4) of section 2.

The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.

Procedure on receipt of objection.

7. On receipt of such notice of objection the Registrar shall not proceed to solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court.

Objector may file suit.

The person objecting to the intended marriage may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that such marriage would contravene some one or more of the conditions prescribed in clause (1), (2), (3) or (4) of section 2.

Certificate of filing of suit to be lodged with Registrar.

8. The Officer before whom such suit is filed shall thereupon give the person presenting it a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within fourteen days from the receipt of notice of objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, within fourteen days of the opening of such Court, the marriage shall not be solemnized till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given.

If such certificate be not lodged in the manner and within the period prescribed in the last preceding paragraph, or if the decision of the Court be that such marriage would not contravene any one or more of the conditions prescribed in clause (1), (2), (3) or (4) of section 2, such marriage may be solemnized.

If the decision of such Court be that the marriage in question would contravene any one or more of the conditions prescribed in clause (1), (2), (3) or (4) of section 2, the marriage shall not be solemnized.

Court may fine when objection not reasonable.

9. Any Court in which any such suit as is referred to in section 7 is filed may, if it shall appear to it that the objection was not reasonable and *bona fide*, inflict a fine, not exceeding one thousand rupees, on the person objecting, and award it, or any part of it, to the parties to the intended marriage.

Declaration by parties and witnesses.

10. Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Registrar, sign a declaration in the form contained in the second schedule to this Act. If either party has not completed the age of twenty-one years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar.

Signing of Declaration.—S. 10.—See *Supra*, "*Except in the case of a widow*,"—because her previous marriage dispenses with the guardian's consent to her re-marriage, but she must have still completed her fourteenth year. But since she has to consent to this marriage, while her previous marriage might have been under Hindu law, it is apprehended that she may so consent even though she is a minor. S. 375 of the Indian Penal Code legalizes her consent at that age to sexual intercourse with the husband exempting him from the charge of rape.

Marriage how to be solemnized.

11. The marriage shall be solemnized in the presence of the Registrar and of the three witnesses who signed the declaration. It may be solemnized in any form, provided that each party says to the other, in the presence and hearing of the Registrar and witnesses, "I, [*A*], take thee, [*B*], to be my lawful wife (*or* husband)."

Place where marriage may be solemnized.

12. The marriage may be celebrated either at the office of the Registrar or at such other place, within reasonable distance of the office of the Registrar, as the parties desire: Provided that the Local Government may prescribe the conditions under which such marriages may be solemnized at places other than the Registrar's office, and the additional fees to be paid thereupon.

Certificate of marriage.

13. When the marriage has been solemnized, the Registrar shall enter a certificate thereof in a book to be kept by him for that purpose and to be called the "Marriage Certificate Book under Act III of 1872," in the form given in the third schedule to this Act, and such certificate shall be signed by the parties to the marriage and the three witnesses.

Transmission of certified copies of entries in marriage certificate book to the Registrar-General of Births, Deaths and Marriages.

13-A. The Registrar shall send to the Registrar-General of Births, Deaths and Marriages for the territories within which his district is situate, at such intervals as the [Local Government,] * from time to time directs, a true copy certified by him, in such form as the [Local Government] * from time to time prescribes, of all entries made by him in the said marriage-certificate book since the last of such intervals.

Fees.

14. The Local Government shall prescribe the fees to be paid to the Regirtrar for the duties to be discharged by him under this Act.

The Registrar may, if he think fit, demand payment of any such fee before solemnization of the marriage or performance of any other duty in respect of which it is payable.

The said Marriage-Certificate Book shall at all reasonable times be open for inspection, and shall be admissible as evidence of the truth of the statements therein contained. Certified extracts therefrom shall on application be given by the Registrar on the payment to him by the applicant of a fee to be fixed by the Local Government for each such extract.

Penalty on married person marrying again under Act.

15. Every person who, being at the time married, procures a marriage of himself to be solemnized under this Act, shall be deemed to have committed an offence under section 494 or section 495 of the Indian Penal Code as the case may be; and the marriage so solemnized is void.

Bigamy.—This section is defectively worded, since, if strictly construed, it would prevent a man marrying the same woman twice, *first* under his personal law and secondly under the statute, though such marriages are solemnized by people who wish to reconcile themselves to their community and retain their personal predilection. What the section forbids is bigamy, polygamy and polyandry, that is to say; if a person, being once married, say to one person *A* again marries during the lifetime of *A*, another person, say *B*; under this Act, his or her second marriage under the Act would be void, and the parties concerned would expose themselves to a prosecution under sections 494 and 495 of the Indian Penal Code.

S. 15.

Such cases apart, a question has often been raised as to the legal effect of a couple first undergoing the ceremony of marriage under Hindu law, and then contract-

* **Sec. 13-A.**—S. 13-A was inserted by S. 29 of the Births, Deaths and Marriages Registration Act (IV of 1886). The words "Local-Government" were substituted for "Governor-General in Council" by Act XXXVIII of 1920.

ing a marriage under the Act, or *vice versa*. Now, since Hindu law is polygamous; it permits a man say *A* to first marry *B*, and then *C*, *D* and so on *ad infinitum*. Consequently, *A's* first marriage to *B* under that law offers no bar to their marriage under the Act, but S. 2 (1) prohibits a statutory marriage where in consequence of a previous marriage the relationship of husband and wife had already been contracted. And since the Act does not define "Marriage", and the general law treats Hindu marriages as legal marriages in India, though not outside of it, whereas in many countries no marriage other than a statutory marriage receives legal recognition, it follows that the previous solemnization of a marriage in accordance with the rites of the Hindu religion offers an effective bar to the solemnization of the same marriage under this Act, and a marriage so solemnized would under the terms of this section be void.

Efficacy of two marriages.

But should the statutory marriage precede the religious marriage, then both marriages would be legal, since Hindu law does not prohibit such marriages, though the performance of that marriage would be otiose and create no right, or entail disabilities inconsistent with the previsions of the amended law; but if the earlier marriage was contracted under the unamended law, as it is still possible to do, then the law of succession would be the Hindu law, though the parties would be limited to monogamy and possess the right of divorce as provided in S. 17.

Punishment of bigamy.

16. Every person married under this Act who, during the lifetime of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage.

Indian Divorce Act to apply.

17. The Indian Divorce Act shall apply to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clause (1), (2), (3) or (4) of section 2 of this Act.

Divorce.—Turning to the reference in this section to the Indian Divorce Act, it will be seen that S. 2 of that Act had limited its provisions only to a petitioner who professed the Christian religion. The present writer was responsible for an amendment enlarging its provisions by an amending Act[1] enabling a non-Christian petitioner to obtain a divorce from his Christian wife, and though S. 2 of that Act still retains that qualification it must be deemed to be further modified by the enactment of this section.

S. 17.

Law to apply to issue of marriages under Act.

18. The issue of marriages solemnized under this Act shall, if they marry under this Act, be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity, and the provisos to section 2 of this Act shall apply to them.

Marriage of Issue.—This provision is intended to enlarge the field of choice for the issue of persons married under this Act; otherwise, if they remained subject to the Hindu law of marriage, that law might fail to provide a spouse to one who has been out of his caste, and if the Act did not apply to him, he would not have been able to marry at all.

S. 18.

Saving of marriages solemnized otherwise than under Act.

19. Nothing in this Act contained shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage; but, if the validity of

(1) Act XXX of 1927; Assembly Debates dated 19th September, 1927, pp. 4616-4617.

any such mode shall hereafter come into question before any Court, such question shall be decided as if this Act had not been passed.

Saving of other marriages.—This section merely declares that statutory provision herein made for marriages must be supposed to shake the validity of religious marriages which will continue to be judged in the light of facts and circumstances independently of the Act.

S. 19.

20. [*Registry of marriages contracted before passing of Act.*] *Rep. by the Repealing Act* (*XII of* 1876).

Penalty for signing declarations or certificates containing false statements.

21. Every person making, signing or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in section 199 of the Indian Penal Code.

As to the clause regarding the parties' religion, see *supra*.

S. 21.

Effect of certain marriages on co-parcenary.

22. The marriage under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religion shall be deemed to effect his severance from such family.

Rights of succession in certain cases of marriage under Act.

23. A person professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act shall have the same rights and be subject to the same disabilities in regard to any right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850, applies:

Provided that nothing in this section shall confer on any person any right to any religious office or service, or to the management of any religious or charitable trust.

Rights retained and lost.—This section creates a statutory severance of a person married under this Act from the joint family of which he might have been till then a member. The orthodox members of the Select Committee had proposed this clause as a deterrent against persons resorting to such marriages. But the present writer accepted it as a happy release from a continued union in which embarrassing situation might be created by the orthodox members of his family, contesting his right in his property by survivorship or inheritance, in which case the misfortunes of the widows married under the amended Act and their children would be aggravated because of the persons marrying under the amended Act, having to declare that they professed the Hindu religion, and since the *lex loci* is construed by the Privy Council in a limited sense as noted under that Act, a Hindu marrying under the Act does not stand to gain by continuing to remain a member of the coparcenary. But so far as his own rights are concerned, he remains entitled to all those rights of inheritance to his other relations, near and remote as if he had never married under the Act.

Ss. 22-23.

The proviso to S. 23 provides that "nothing therein shall *confer* any right to any religious office." This clause was added at the insistence of a Madras Advocate who failed to see that the Act of 1850 *confers* no right: all it does is to preserve them from forfeiture.

Succession to the property of parties married under Act.

24. Succession to the property of any person professing the Hindu, Buddhist, Sikh or Jaina religion, who marries under this Act, and to the property of the issue of such marriage, shall be regulated by the provisions of the Indian Succession Act, 1865.

Succession.—This section was inserted to confer the supreme blessing of giving to a person, married under the Act, the modern equitable law of succession as enacted in the Succession Act, though by so enacting, the Legislature has brought into existence an amusing legal paradoy, since those who marry by declaring that they are non-Hindus still remain subject to the Hindu law of joint family and succession, but those who marry professing to be Hindus go out of it to the English law of Succession. But all the same their wives and descendants would feel happy that their property is not usurped by a distant *gotraj* or even a more distant *bandhu*.

S. 24.

Person marrying under Act not to have right of adoption.

25. No person professing the Hindu, Buddhist, Sikh or Jaina religion who marries under this Act shall have any right of adoption.

Adoption by father of person marrying under Act.

26. When a person professing the Hindu Buddhist, Sikh or Jaina religion marries under this Act, his father shall, if he has no other son living, have the right to adopt another person as a son under the law to which he is subject.]*

No Adoption:—Section 25 was inserted as another deterrent. But adoption is an archaic institution given up by all civilized countries and none of those who had married under the unamended Act are known to have lapsed into making an adoption. Section 26 was another shot from the orthodox benches who had joined forces to maim the Bill that they could not kill.

Ss. 25, 26.

FIRST SCHEDULE.

(*See section* 4.)

NOTICE OF MARRIAGE.

To , a Registrar of Marriages under Act III of 1872 for the District.

I hereby give you notice that a marriage under Act III of 1872 is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say):—

Names.	Condition.	Rank or profession.	Age.	Dwelling-place.	Length of residence.
A. B.	Unmarried Widower.	Landowner.	Of full age.	....	23 days.
C. D.	Spinster.	....	Minor.	....	....

Witness my hand, this day of 187 .

(*Signed*) *A. B.*

SECOND SCHEDULE.

(*See section* 10.)

DECLARATION TO BE MADE BY THE BRIDEGROOM.

I, *A B*, hereby declare as follows:—

1. I am at the present time unmarried:

* Ss. 22 to 26 are added by Act XXX of 1923.

2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion [or (as the case may be) I profess the Hindu, or the Buddhist, or the Sikh, or the Jaina religion:]*

3. I have completed my age of eighteen years:

4. I am not related to *C D* [*the bride*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *C D* is subject, and subject to the provisos of clause (4) of section 2 of Act III of 1872, render a marriage between us illegal:

[*And when the bridegroom has not completed his age of twenty-one years;*

5. The consent of my father [*or* guardian, *as the case may be*] has been given to a marriage between myself and *C D*, and has not been revoked:]

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(*Signed*) *A B* [*the bridegroom*].

DECLARATION TO BE MADE BY THE BRIDE.

I, *C D*, hereby declare as follows:—

1. I am at the present time unmarried:

2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion [or (as the case may be) I profess the Hindu, or the Buddhist, or the Sikh, or the Jaina religion:]*

3. I have completed my age of fourteen years:

4. I am not related to *A B* [*the bridegroom*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *A B* is subject, and subject to the provisos of clause (4) of section 2 of Act III of 1872, render a marriage between us illegal:

[*And when the bride has not completed her age of twenty-one years, unless she is a widow:*

5. The consent of *M N*, my father [*or* guardian, *as the case may be*] has been given to a marriage between myself and *A B* and has not been revoked:]

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(*Signed*) *C D* [*the bride*].

Signed in our presence by the above-named *A B* and *C D*:

G H.
I J. } [*three witnesses*].
K L.

[*And when the bridegroom or bride has not completed the age of twenty-one years, except in the case of a widow*]:

Signed in my presence and with my consent by the above-named *A B* and *C D*:

M N, the father [*or* guardian]
of the above-mentioned *A B* (*or C D, as the case may be*].

(*Countersigned*) *E. F.*
Registrar of Marriages under Act III of 1872 *for the District of*

Dated the *day of* 18 .

THIRD SCHEDULE.

(*See section* 13.)

REGISTRAR'S CERTIFICATE.

I, *E F*, certify that, on the of 18 appeared before me *A B* and *C D*, each of whom in my presence and in the presence of three credible witnesses whose names are signed hereunder, made the declarations required by

*The words "or (as the case may be) ....religion" in both the declarations were inserted by Act XXX of 1923, S. 5.

Act III of 1872, and that a marriage under the said Act was solemnized between them in my presence.

(*Signed*) *E.F.*,
Registrar of Marriages under Act III of 1872 *for the District of*

(*Signed*) *A. B.*,
C. D.

G H.
I J.
K L. } [*three witnesses*].

Dated the *day of* 18 .

FOURTH SCHEDULE.

[*Rep. by the Repealing Act* (*XII of* 1876).]

THE INDIAN SUCCESSION (AMENDMENT) ACT (XVII OF 1929).

[1*st October*, 1929.

An Act further to amend the Indian Succession Act, 1925, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Succession Act, 1925 for the purposes hereinafter appearing: It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN SUCCESSION (AMENDMENT) ACT, 1929.

Amendment of S. 2, Act XXXIX of 1925.

2. After clause (*b*) of S. 2 of the Indian Succession Act, 1925 (hereinafter referred to as the said Act), the following clause shall be inserted, namely:—

"(*bb*) 'District Judge' means the Judge of a principal Civil Court of original jurisdiction".

Amendment of S. 57, Act XXXIX of 1925.

3. (1) Sub-section (1) of section 57 of the said Act shall be re-numbered as section 57, and after clause (*b*) and before the proviso, the word 'and' and the following clause shall be added, namely:

"(*c*) To all wills and codicils made by any Hindu Buddhist, Shikh or Jain, on or after the 1st day of January, 1927, to which those provisions are not applied by clauses (*a*) and (*b*)".

(2) Sub-section (2) of section 57 of the said Act shall be omitted.

Amendment of S. 213, Act XXXIX of 1925.

4. In sub-section (2) of section 213 of the said Act, for the word "class" the word "classes" and for the words and figures "sub-section (1) of section 57" the words, letters and figures "clauses (*a*) and (*b*) of section 57" shall be substituted.

Repeals.

5. The enactments specified in the schedule are hereby repealed.

THE SCHEDULE.

ENACTMENTS REPEALED.

(*See section* 5).

Year.	No.	Short title.
1926	XXXVII	The Indian Succession (Amendment) Act, 1926.
1928	XXI	The Indian Succession Second (Amendment) Act, 1928.

THE HINDU WIDOWS' REMARRIAGE ACT (XV OF 1856).

An Act to remove all legal obstacles to the marriage of Hindu widows.

WHEREAS it is known that, by the law as administered in the possession and under the Government of the East India Company, Hindu widows with certain exceptions[1] are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property; and

Preamble.

WHEREAS many Hindus believe that the imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom in accordance with the dictates of their own conscience; and

WHEREAS it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare; it is enacted as follows:—

(1) The Act recognizes that widows were entitled to re-marry, but their re-marriage was exceptional and not generally permissible. The language of the preamble shows that the Act was limited to such persons as feel within the rule and not its exception.[1]

Marriage of Hindu widows legalized.

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the women having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

Rights of widow in deceased husband's property to cease on her re-marriage.

2. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry only a limited

(1) *Cf.* "it is just to relieve all such Hindus".

interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

This clause speaks of "any widow" which, if read with the preamble, must mean "any such widow" as the preamble speaks of. Consequently, the clause does not affect the re-marriage of a person amongst whom re-marriage was customary and the forfeiture of whose estate inherited from the husband would then be regulated by custom.[1] But if "any woman" in S. 2, which is the enacting section, cannot be limited by any statement in the preamble then, the clause relating to forfeiture would apply equally to all widows who re-marry even after their conversion to an alien faith, *e.g.*, Islam, including those whose re-marriage was sanctioned by custom,[2] without entailing forfeiture. The argument that the widow inherits as the surviving half of the husband, and therefore, forfeits when she re-marries overlooks the fact that where her re-marriage is customarily permissible, custom prefers the reality to a metaphor, and must be left to decide the question of forfeiture. A widow does not forfeit her estate on her subsequent unchastity. Can re-marriage of the surviving half be treated as any thing worse than unchastity under Hindu Law? The majority of the High Courts hold the enacting section as uncontrolled by the preamble, but it is the normal rule of construction and the preamble is used to extend or limit the operative words in a statute.[3]

Rights of widow in deceased husband's property to cease on her re-marriage.

3. On the remarriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children the father or paternal grandfather or the mother or paternal grandmother of the deceased husband, or any male relative of the deceased husband may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said court, if it shall think fit, to appoint such guardian who when appointed shall be entitled to have the care and custody of the said children or of any of them during their minority in the place of their mother; and in making such appointment the court shall be guided, so far as may be by the laws and rules in force touching the guardianship of children who have neither father nor mother: Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Nothing in this Act to render any childless widow capable of inheriting.

4. Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property if, before the passing of this Act,

(1) *Bhola Umar* v. *Kausilla*, 55 A. 24 F.B., cases of the other High Courts distinguished. *See* pp. 35, 36, after Full Bench decision 58 A. 1054; *Tapoo* v. *E*, (1937) S. 42; *Narain* v. *Mohan Singh*, (1937) A. 343; *Bhola Umar* v. *Kausilla*, 58 A. 1034.

(2) *Matungini* v. *Ram Rutton*, 19 C. 289 F.B. (Majority, case of marriage after conversion); *Raghunath* v. *Laxmibai*, 59 B. 417 (421) (re-marriage on conversion to Islam. But in cases of conversion the woman is protected by the *Lex Loci* Act (XXI of 1850); *Vitta* v. *Chatakonda*, 41 M. 1078 F.B. (no unanimity on any point); *Parji* v. *Mangla*, (1930) L. 1023; *Suraj Jote* v. *Attar Kumari*. 1 Pat. 706.

(3) *Targnand* v. *Board of Trade*. 11 A.C. 286; *Powell* v. *Kempton Park Race Course Co.*, (1899) A.C. 143, (185). *See* cases cited in 1 Law of Transfer (6th Ed.), 16, 17; *London and County Council* v. *Bermondsey Bioscope Co.*, 80 L.J.K.B. 144.

she would have been incapable of inheriting the same by reason of her being a childless widow.

Saving of right of widow marrying, except as provided in sections 2 to 4.

5. Except as in the three preceding sections is provided a widow shall not, by reason of her re-marriage, forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

Ceremonies constituting valid marriage to have same effect on widow's marriage.

6. Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect if spoken, performed or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.

Consent to re-marriage of minor widow.

7. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father or her paternal grandfather, or if she has no such grandfather, or her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative.

Punishment for abetting marriage made contrary to this section.

All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year or to fine or to both.

And all marriages made contrary to the provisions of this section may be declared void by a Court of law: Provided that, in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as aforesaid shall be presumed until contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Consent to re-marriage of major widow.

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient to constitute her re-marriage lawful and valid.

THE HINDU WOMEN'S RIGHT TO PROPERTY ACT (XVIII OF 1937).

[14*th April*, 1937.

An Act to amend the Hindu Law governing Hindu Women's right to property.

WHEREAS it is expedient to amend the Hindu Law as to give better rights to women in respect of property; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

This Act owes it inception to Dr. G. V. Deshmukh who introduced it in the Assembly on 26th September, 1938. It is at the present moment (31—3—1938), subject to an Amending Bill sponsered by Government.

Application.

2. Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate leaving a widow.[1]

(1) Though the Act is intended to amend the Hindu Law governing Hindu women's right to property, that right depends upon the single contingency of a man predeceasing his wife. (*See* S. 2). If, therefore, he died leaving him surviving no widow, all his decendants and heirs specified in S. 3 are left unprovided for except to the limited extent provided in Hindu Law.

If, however, any such contingency favours the heirs, they get equal shares regardless of sex, the daughters sharing equally with the son.

The Act omits to consider the case of a widow who, upon her remarriage forfeits her heritage under S. 2 of the Widows' Remarriage Act.

Devolution of Property.

3. (1) When a Hindu governed by the Dayabhaga school of Hindu Law dies intestate, his property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, that separate property shall, subject to the provisions of sub-section (3), devolve upon his widow along with[2] his lineal descendants,[3] if any, in like manner as it devolves upon his son:

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner[4] as a son's son if there is surviving a son or son's son of such predeceased son:[5]

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.[5]

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhag school or by customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3),[6] have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate[6] provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession descends to a single heir or to any property to which the Indian Succession Act, 1925, applies.

(2) *"along with"* suggests a joint tenancy and not tenancy-in-common that appears to be intended.

(3) *"Lineal descendants"* upto any decree (?) Under Hindu Law such male descendants take only upto the third degree. The words also include all descendants, male and female, but omits to include or exclude those adopted into or out of the family. But though S. 2 repeals "any rule of Hindu law or custom to the contrary" it is apprehended that adopted persons would presumably come in or go out in accordance with the tenor of the general law.

(4) *"In like manner"*—it is not the manner but the extent of the devolution that is intended. It was probably intended to mean "to the same extent as it devolves upon a son." As under the General Clauses Act the singular includes the plural, it follows that if the owner left two more wives, they will all count as so many sons and the same rule would determine the share of the daughter-in-law and the granddaughter-in-law.

It is further not clear whether the descendants will take *per stirpes* or *per capita*. It would set a premium upon fecundity if they took *per capita*, and the Act does not suggest the contrary.

(5) These two provisos add that the daughter-in-law would take the share in case she is the widow of the owner's predeceased son, but the extent of her share would depend upon whether the predeceased son had left any son or a son's son. She would take the share of her husband, if the latter predeceased his father and left no son at the time of the father's death when the succession opened, but her share will be reduced to that of a son's son if the predeceased son died leaving him surviving a son or a son's son.

The same provision is extended to the widow of the predeceased grandson.

(6) "*Subject to the provisions of sub-section* (3)" which is limited to the widow.

Under S. 3 (3), the widow's estate is limited, but what about the estate taken by the other female heirs?

If strictly construed, this provision would be hard on the women subject to the Bombay school who take an absolute estate as *gotraja sapindas*.

Savings.

4. Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

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